

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

REGIONAL BENCH-COURT NO. 3

CUSTOMS Appeal No. 10770 of 2023 - DB

(Arising out of OIA-AHM-CUSTOM-000-APP-264-266-23-24 dated 25/10/2023 passed by Customs Central Excise & Service Tax (Appeals), Ahmedabad)

AMGLO RESOURCES PVT LTD

301,ELPHINSTONE HOUSE,
17, MURZBAN ROAD, FORT,
MUMBAI, MAHARASHTRA-400 001

.....Appellant

VERSUS

C.C. AHMEDABAD

OFFICE OF THE PR. COMMISSIONER OF CUSTOMS,
1ST FLOOR, CUSTOMS HOUSE,
OPPOSITE OLD HIGH COURT NAVRANGPURA,
AHMEDABAD-380009

.....Respondent

WITH

CUSTOMS Appeal No. 10771 of 2023 - DB

(Arising out of OIA-AHM-CUSTOM-000-APP-264-266-23-24 dated 25/10/2023 Customs Central Excise & Service Tax (Appeals), Ahmedabad)

SATISH AMLANI

DIRECTOR OF M/s. AMGLO RESOURCES PVT LTD
301,ELPHINSTONE HOUSE,
17, MURZBAN ROAD, FORT,
MUMBAI,MAHARASHTRA -400 001

.....Appellant

VERSUS

C.C. AHMEDABAD

OFFICE OF THE PR. COMMISSIONER OF CUSTOMS,
1ST FLOOR, CUSTOMS HOUSE,
OPPOSITE OLD HIGH COURT NAVRANGPURA,
AHMEDABAD-380009

.....Respondent

AND

CUSTOMS Appeal No. 10772 of 2023 - DB

(Arising out of OIA-AHM-CUSTOM-000-APP-264-266-23-24 dated 25/10/2023 Customs Central Excise & Service Tax (Appeals), Ahmedabad)

VISHAL AMLANI

DIRECTOR OF M/s. AMGLO RESOURCES PVT LTD
301,ELPHINSTONE HOUSE,
17, MURZBAN ROAD, FORT,
MUMBAI, MAHARASHTRA -400 001.

.....Appellant

VERSUS

C.C. AHMEDABAD

OFFICE OF THE PR. COMMISSIONER OF CUSTOMS,
1ST FLOOR, CUSTOMS HOUSE,
OPPOSITE OLD HIGH COURT NAVRANGPURA,
AHMEDABAD-380009

.....Respondent

APPEARANCE:

Shri Jitu Motwani, Advocate for the Appellant

Shri S S Vikal Assistant Commissioner (AR) for the Respondent

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

Final Order No. 10449-10451/2024

DATE OF HEARING: 13.12.2023

DATE OF DECISION :21.02.2024

RAMESH NAIR

Present Appeal filed by M/s Amglo Resources Private Limited, the main Appellant (referred to as Appellant), challenges Order-in-Appeal dated 25.10.2023 by which penalties under Section 112(a) and 114AA of the Act respectively have been imposed against the Appellant along with Redemption fine. Two other appeals have been filed by Mr. Vishal Amlani and Satish Amlani, the directors of the Company (referred to as the Director and/or Directors) against the same Order-in-Appeal dated 25.10.2023 imposing separate penalties on each of the directors under Sections 112(a) and 114(AA) of the Act.

1.1 The main issue in the present case relates to country of origin of goods. The case of the department is that the Appellant herein had mis-declared the country of origin (herein after referred to as COO) of goods as Zambia instead of Iran. It is relevant to note that the present proceedings have no duty implication as the Appellant admittedly never intended to avail any duty benefit basis the country of origin certificates (herein after referred to as COO certificates) and have paid duty at proper value determined on the basis of LME price prevalent on the date of assessment.

1.2 The brief facts of the case are that the Appellant during the Normal course of business had raised Purchase Order on NBJ International FZ-LLC, Dubai, UAE (herein after referred to as the supplier) for supply of Copper Cathode on CFR, Nhava Sheva. Accordingly, it was the duty of the supplier

to supply the goods to the Buyer (Appellant) at the destination port viz., Nhava Sheva.

1.3 Four Bills of Entry were filed by the Appellant on the basis of documents provided by the supplier which included COO Certificates showing goods to be of Zambian Origin. The COO certificate contains the stamp of Zambian revenue authorities. The details of Bills of Entry filed along with respective COO Certificate is as under:

Sr. No	Bill of Entry No. and date	SADC Certificate No.	Issuing authority	Issuing date
1.	7078275 dated 14.01.2022	ZM N 2744	Zambia Revenue Authority, Customs and Excise	08.11.2021
2.	7078197 dated 14.01.2022	ZM N 2742		
3.	7078308 dated 14.01.2022	ZM N 2743		
4.	7078318 dated 14.01.2022	ZM N 2745		

1.4 It is a matter of records that while filing the Bills of Entry, the Appellant always intended to clear the imported goods on payment of duties of customs at the applicable rate, without claiming any FTA benefits basis the COO Certificates. The said fact has not been disputed by the department in the show cause notice. Also, the value of goods was declared basis LME and there is no issue of valuation in the present case.

1.5 Concurrently, since the product imported by the Appellant was covered under DGFT notification No. 61/2015-20 dated 31.03.2021, the Appellant registered the import of goods under Non-Ferrous Metal Import Monitoring System and appropriate certificate was issued by the DGFT in this regard. We have been informed that the registration/certification is valid till date and has not been disturbed by the DGFT.

1.6 Investigation was initiated by the department in relation to alleged mis-declaration of COO of goods by the Appellant. In terms of the examination order, the goods imported vide Bill of Entry No. 7078197 dated 14.01.2022 were examined wherein it was suspected that the Appellant had submitted false/fabricated COO Certificate and had wrongly mentioned Zambia as country of origin in Bill of Entry. Examination of the goods was undertaken under Panchnama dated 28.01.2022 and it was observed that the said goods appear to be of Iranian Origin and not Zambia.

1.7 Summons were issued and statements of following persons were recorded under Section 108 of the Act:

- (a) Shri Vishal Amlani, Director of the Appellant, statement dated 29.01.2022.
- (b) Shri Satish Amlani, Director of the Appellant, statement dated 14.12.2022.
- (c) Mr. Dhiraj Kumar, Authorised representative of SGS India, statement dated 30.03.2022 and
- (d) Mr. Amol Pongde, authorised representative of M/s. Radiant Maritime India Pvt. Ltd, statement dated 19.04.2022.

1.8 Subsequently, goods were seized and a Provisional order was passed by the department which was challenged before this Tribunal. This Tribunal vide order dated 27.06.2022 permitted clearance of goods, on Appellant furnishing a bank guarantee of Rs. 1,00,00,000/-.

1.9 Pursuant to the aforesaid order, the Customs Department released the goods provisionally. Thereafter, a Show Cause Notice (referred to as SCN) dated 04.01.2023 was issued calling upon the Appellant and its directors to show cause as to why –

- a) 1497.83 MTs of Copper Cathode conforming to LME Grade A having assessable value Rs. 110,41,45,320 imported under Bills of Entry No. 7078318, 7078308, 7078197 and 7078275 all dated 14.01.2022 should not be confiscated under Section 111(d) and 111(m) of Customs Act, 1962;
- b) Penalty should not be imposed in terms of Section 112(a) of Customs Act, 1962;
- c) Penalty should not be imposed in terms of Section 114AA of Customs Act, 1962

1.10 The SCN was issued on the following allegations:

- (i) The Appellants have mis-declared country of origin of goods as Zambia in Bills of Entry;
- (ii) The Appellants have wilfully mis-declared country of origin of goods as Zambia instead of Iran in registration application filed in Non-Ferrous Metals Import Monitoring System (NFMIMS) required to be filed by the importer as per DGFT Notification No. 61/2015-20 dated 31.03.2021 wherein NFMIMS registration was mandatory for import of copper, which is a violation of FTDR Act, 1992 and FTR Rules read with Section 11 of Customs Act, 1962 (Act);
- (iii) The registration under NFMIMS by the Appellant was obtained on forged COO certificate. Hence, condition of compulsory registration is not complied with rendering goods liable for confiscation under Section 111(d) of the Act;
- (iv) The Appellants, in collusion with the foreign supplier and shipping agent, created a whole bunch of manipulated/forged documents, including COO Certificate to show that the impugned goods originated from Zambia;

1.11 The aforesaid SCN culminated into Order-in-Original dated 12.06.2023, wherein the adjudicating authority:

- a) imposed fine of Rs 11 Crore under Section 125 (1) of the Act in lieu of confiscation on the Appellant;
- b) imposed penalty of Rs 10 crore under Section 112 (a) (i) of the Act on the Appellant; and
- c) imposed penalty of Rs 25 crore under Section 114 AA of the Act on the Appellant;
- d) imposed penalty of Rs. 10 crore each on the two directors of the Appellant viz; Mr. Vishal Amlani and Mr. Satish Amlani.

1.12 The Order-in-Original was passed by placing reliance on the statements of a) Mr. Vishal Amlani; b) Mr. Satish Amlani; c) Mr. Dhiraj Jane and d) Mr Amol Pongde, to hold that the goods had originated from Iran and not Zambia. Furthermore, the Adjudicating Authority, has held that since there is a sanction on financial institutes by the US relating to import of goods from Iran, the Appellant had declared the country of origin as Iran, as no financial institute could have provided the funds in US Dollars or have entered in providing financial support to the Appellant. Hence, the intention of providing wrong country of origin was to circumvent the aforesaid US sanction.

1.13 Aggrieved by the Order-in-Original, the Appellant and Directors filed respective appeals before the Commissioner of Customs (Appeals), Ahmedabad (referred to as Commissioner (Appeals). Vide its Order-in-Appeal No. AHD-CUSTOM-000-APP-264 to 266-23-24 dated 25.10.2023 (referred to as the Impugned Order), the Commissioner (Appeals) rejected

the contentions and submissions made by the Appellant as well the Directors and concurred with the findings of the Adjudicating Authority made in the Order-in-Original.

1.14 The present Appeals have been filed against the impugned order.

2. We have heard and considered the oral arguments made during the hearing and written submissions filed post hearing. During the hearing the Shri Jitendra Motwani, learned counsel for the Appellant has filed a synopsis of arguments challenging the impugned order. The Synopsis of arguments are reproduced below for sake of clarity:

- The entire case of the Department which has been confirmed by the Commissioner (Appeals) is that the Appellant has mis-declared the COO of the imported goods as Zambia instead of Iran and registration obtained under NFMIMS basis the said document is incorrect and therefore, the goods are liable for confiscation. To confirm the allegation of goods being imported from Iran instead of Zambia, the Commissioner (Appeals) has erroneously held that the COO certificates furnished by the Appellants were fake/forged and the same were knowingly used by the Appellants.
- The Commissioner (Appeals) has wrongly relied upon the statements of Mr. Dhiraj Kumar Jane (referred to Mr. Jane), the authorized representative of SGS India Pvt. Ltd., Mr. Amol Pongde, (referred to as Mr. Pongde) the authorized representative of the shipping agency viz., Radiant Maritime India Pvt. Ltd., Mr. Vishal Amlani and Mr. Satish Amlani inasmuch as

the said statement do not prove in any manner that the origin of the goods was Iran and not Zambia. The statement of Mr. Jane and Mr. Pongde record that certain document in the form of bill of lading, inspection report, letters seeking switching of bill of lading were submitted to the investigating authorities. The said documents have not been made a part of relied upon documents and not supplied with the SCN and therefore the statements which refer to these documents cannot be relied upon as well.

- Mr. Pongde in his statement states that letters of Copernium and NBJ International appear to have the same signature is totally baseless as neither he was a forensic or handwriting expert nor are the said letters made a part of the RUDs.
- the Commissioner (Appeals) has failed to appreciate that (a) the entire investigation is incomplete, motivated and baseless; (b) the department has not produced any document which conclusively proves that goods are of Iranian Origin; (b) the department ought to have reached out to the Zambian Authorities to verify the authenticity of the COO certificates and the same has not been done; (c) merely because the inspection of goods was purportedly done at Iran and/or the route of travel cannot determine the origin of goods; (d) none of the statements have said that goods are from Iran or Appellant was involved in any alleged mis-declaration; (e) statements of Mr. Jane and Mr. Pongde cannot be relied upon to determine the origin of the goods, as both were from India and did not have any expertise or knowledge to determine the origin of goods; (f) three parties viz., National

Iranian Copper Industries Co, Coppernium International and M/s Sanaye Va Maaden Mes Kerman Zamin, whose name were disclosed by Mr. Jane, involved in inspection of goods in Iran, were not questioned;

- mere inspection of goods in Iran does not in any manner conclude that the goods have originated in Iran.
- Mr. Jane, the authorized representative of M/s SGS India Pvt. Ltd., could not have commented on the manufacturer of goods, as the said company is solely dealing with inspection of goods and in any event he was not directly working for the inspecting agency viz., SGS Iran;
- That the department has not even made an attempt to reach out to the Zambian Authority to check on the authenticity of COO certificates. The COO certificates being properly stamped and signed cannot be overlooked and or brushed aside by the customs department without any evidence of same being not authentic and unless the same is cancelled or the same is proclaimed as fake by the issuing authority; the department cannot go beyond the said COOs as held by Hon'ble Supreme Court in the case of Zuari Industries Vs Commissioner of Customs 2007 (210) E.L.T. 648 (S.C.);
- The letter dated 26.05.2022 issued by the DRI to Commissioner of Customs, Nhava Sheva does not pertain to COO certificates pertaining to bills of entry assessed under impugned order. In any event while the said letter mentions about some overseas enquires with Zambia Revenue Authority, the same does not

produce any communication issued by the Zambian Authority questioning the correctness of the COOs. The letter does not disclose the nature of enquiries as well. The said letter, therefore being cryptic cannot be relied upon in an event. A perusal of the said letter clarifies that the same was issued to Nhava Sheva Commissionerate for a different consignment. The show cause notice issued by the Nhava Sheva Commissionerate (copy furnished and shown during the Personal hearing) for the said consignment does not even refer to the letter of DRI therefore establishing that the said letter cannot be taken as a proof much less conclusive proof providing that the COO certificates were not genuine.

- No investigation has been done with National Iranian Copper Industries Co, Coppernium International, M/s Sanaye Va Maaden Mes Kerman Zamin and SGS Iran as inspection was carried out in Iran to find out the origin of goods; the same was extremely vital.
- Shifting of the burden on the Appellant to prove that the goods may have been transshipped from Zambia to Iran and thereafter to Dubai and then to India is beyond the settled principles of law. The Appellant herein has submitted proper COO certificates bearing the stamp of the issuing authority in Zambia and it is the Department who is doubting the authenticity of the same. Hence, it is submitted that the onus is on the department to prove its case with evidence which has not been done in the present case. It is settled law that the burden to prove a fact is on the person who asserts the same. Reliance is placed on the following decisions: *Pr Commissioner of Income Tax v/s Daksha Jain 2018*

*(11) TMI 1182; Gokuldas Exports v/s Jain Exports Pvt Ltd 2003
(157) ELT 243 (SC) and Phoenix Mills v/s Union of India 2004
(168) ELT 310. Reliance placed on Section 46(4) and 4(A) of the Customs Act is totally baseless as the Appellant had provided truthful declaration which as per the department is not true. The onus was therefore on the Revenue to prove the same. Similarly, reliance placed on decisions mentioned in para 6.10.1 and 6.10.2 is totally baseless and shows the prejudiced mindset of the Commissioner (Appeals) as the facts in the said decisions were totally opposite. In the present case no evidence whatsoever has been produced to prove that goods originated in Iran whereas in cases cited the department had produced evidence to prove their claim. To the contrary in the present case the department has not even attempted to examine important factors like reaching out to Zambian Authorities and Parties from Iran;*

- There is no dispute that the Appellant has made payment to their foreign supplier in Dubai and not to any party in Iran. Furthermore, there was no contract between Appellant and any party in Iran including National Iranian Industries Co. or Coppernium International FZE. The Appellant had entered into a contract with the supplier NBJ International, Dubai and it is not even the case of the Department in SCN or in any of the orders passed by authorities below, that Appellant was dealing with either National Iranian Industries Co or Coppernium International FZE or was aware of their existence. Hence, the finding that the Appellants knowingly submitted forged COO certificates is without any basis and based on presumption and assumption.

- It is submitted that none of the activities viz., switching of BL, inspection of goods was done at the behest or within the knowledge of the Appellant. The said activities form the basis of the proposed demand. The Appellant undisputedly had a contract with the foreign supplier in Dubai who had supplied the goods as per the PO. Accordingly, it is submitted that the said purported documents which relate to third parties cannot be the basis of confirming demand against the Appellants. None of the persons whose statement has been relied upon has named the Appellant or any of its director.
- the issue is no longer res integra and has been settled by the decision of Hon'ble CESTAT in the case of Jupiter Dychem Pvt Ltd v/s Commissioner of Customs 2023 (5) TMI 670, wherein the CESTAT, and Agarwal Industrial Corporation Ltd. Vs. Commr. of Cus. Manglore reported as 2020 (373) ELT 280 (Tri-Bang) in a similar kind of case i.e. mis-declaration of country of origin of goods alleged to be from Iran, has set aside the Impugned order.
- The order of the Commissioner (Appeals) to the extent it holds that incomplete COO certificates were filed by the Appellant, and they did not bother to verify the correctness of the COO certificates is beyond the scope of show cause notice. Further the finding that the Appellant had resorted to undervaluation is also beyond the scope of show cause notice. The said findings go on to show the prejudiced and biased mind of the authority to somehow better the case of the department by placing reliance on issues which were not even alleged in the show cause. The said Act is

contrary to various decisions of Hon'ble Supreme Court which are made a part of compilation of judgements.

- The Commissioner (appeals) has also given factually incorrect findings by noting that the Appellant has not controverted the statement of Mr. Jane or Mr. Pongde. The said fact is contrary to the records as it has always been the case of the Appellant that their statements cannot be relied upon. Further the observation that finding of Original authority on applicability of letter issued by DRI dated 26.05.2022 is also baseless and incorrect. In any event, assuming without admitting the same, the Commissioner (Appeals) being a fact-finding authority could have dealt with these issues.
- Without prejudice to the above, even if the case of the Department is accepted for the sake of argument, even then the goods are not liable for confiscation and penalties cannot be imposed on the Appellants for multiple reasons. The Appellant had not claimed any duty benefit based on COO certificates and hence there was no loss to the Revenue. The Appellant made declarations in the Bills of Entry based on COO certificates which was issued and stamped by competent authority in Zambia, which notably, has not been cancelled till date. The NFMIMS registration is required to regulate the import of copper and it is not country specific. Hence, providing wrong COO certificates does not have any bearing on the said registration, especially when the competent authority i.e. DGFT had not cancelled the said registration till date. Further there is no prohibition for import of goods from Iran as has been accepted by the commissioner

(Appeals) himself and as held by Bombay High court in Global Ace Shipping Lines Inc [Writ Petition (L) No. 5118 of 2020]

- That the Appellant declared the country of origin based on documents supplied by the foreign supplier. It is settled law that charge of mis-declaration cannot be sustained against the importer when Bills of Entry were filed based on documents received from foreign suppliers.
- No documentary proof whatsoever has been produced by the Department to establish that the Appellants had any prior knowledge that the COO certificates are purportedly not genuine.
- *That* that the Appellant had paid duty as per full rate applicable and without availing any benefit of country of origin. It is settled law that where there is no change in duty payable, the wrong mentioning of country of origin would not amount to misdeclaration.
- That the goods were not mis-declared for the reasons stated above and hence the question of confiscation of the same under Section 111 (m) and (d) of the Act does not arise. Consequently, the imposition of penalties and redemption fine is not sustainable.
- The Commissioner (Appeals) erred in imposing penalty under Section 114 AA of the Act. It is submitted that penalty under Section 114AA of the Act can be only imposed if a person knowingly or intentionally makes any false declaration, statement or document. The Commissioner (Appeals) erred in holding that the Appellants knowingly obtained NFMIMS registration on the basis of forged COO certificates resulting in mis-declaration and

hence imposed penalty under Section 114 AA of the Act. As stated above, the COO certificates were not forged and the NFMIMS registration was correctly obtained by the Appellant which is still valid till date. Hence, the imposition of penalty under Section 114 AA of the Act is misplaced.

- Without prejudice to above, penalty under Section 114AA of the Act can be imposed only on a natural person and it cannot be imposed on any artificial person or company.
- That penalty cannot be imposed on the Appellant under 112 (a) of the Act inasmuch the company or its directors had no role in issuance of the COO certificates and no evidence has been produced by the department to prove the same;
- In so far as the penalties imposed on the directors are concerned it is submitted that the Directors had no role to play in the issuance of COO certificates provided by the foreign supplier. Hence, the imposition of penalties, based on alleged wrongful COO certificates provided by the foreign supplier, on the directors is bad in law.
- In any event, Mr. Satish Amlani in particular was not even looking after import related activities and as such no penalty can be imposed upon him. As far as Mr. Vishal Amlani is concerned, there is no evidence of his wilful knowledge and or involvement in the alleged mis-declaration and as such no penalty can be imposed upon him as well.

2.1 Two compilations, viz., one of various provisions and judgements (marked as "Compilation Volume 1") and another consisting of statements of

a) Mr. Vishal Amlani; b) Satish Amlani; c) Mr. Dhiraj Kumar Jane d) Mr. Amol Pongde, letter issued by DRI dated 03.11.2022 and legible copy of SCN (marked as "Compilation Volume 2") was furnished.

3. Shir S S Vikal, the departmental authorised representative reiterated the findings of the impugned Order-in-Appeal.

4. The entire issue in this appeal relates to alleged mis-declaration of Country of Origin of copper cathodes imported by the Appellant. As recorded above there is no duty implication in the matter inasmuch as the Appellant has never intended to avail any duty benefit basis the COO certificates in dispute. The relevant para of the show cause is reproduced below for sake of clarity:

"6.1 As per discussion made in the foregoing paras and documentary evidences on records, it is noticed that M/s. Amglo Resources Private Limited filed four Bill of Entry bearing No. 7078318, 7078308, 7078197 and 7078275 all dated 14.01.2022 under Section 46 of the Customs Act, 1962 for import of 1497.83 MTs of 'Copper Cathode Conforming to LME Grade 'A' having assessable value Rs. 110,41,45,320/- through ICD Tumb. The importer had declared Basic Customs Duty @ 5%, Social Welfare Cess @ 10% and IGST @ 18% in the Bills of Entry filed by them. The importer had declared Zambia on import documents as Country of Origin of the said goods. The importer had submitted Country of Origin certificates no. ZM N 2742, ZM N 2743, ZM N 2744 and ZM N 2745 all dated 08.11.2021 issued by Zambia Revenue Authority. "

The aforesaid clarifies that Appellant had declared value which has not been disputed by the Revenue in the SCN. Further we note that there is no proposal for confirmation of any differential duty in the SCN thereby supporting the case of the Appellant that valuation of goods for the purpose of payment of duty has never been in dispute.

4.1 The department has imposed heavy penalties on the Appellant and its directors along with redemption fine on the ground that the Appellant had

furnished fake/forged/un authentic COO certificates, and the said act of mis-declaration has rendered the goods liable for confiscation. The SCN has alleged that the Appellant had created whole bunch of manipulated/forged documents including the country of origin certificate in connivance with the exporter/foreign parties to show that the impugned goods originated from Zambia instead of Iran and the said charge has been confirmed in the Impugned order. The Appellant had declared the goods to be of Zambian origin whereas the department had alleged that the same were of Iran origin. The impugned Order has accepted the case made out by the department in the show cause notice by holding the goods to be of Iran origin.

4.2 Before considering detailed submissions on various issues, it is important to note that the said matter at provisional clearance stage was agitated before this Tribunal. The Appellant had challenged the terms permitting provisional release of goods. This Tribunal vide order dated 27.06.2022 had permitted provisional release of goods on Appellant furnishing bank guarantee of Rs. 1 crore. Certain observations/findings of the said order are reproduced below:

“29. In the present case undisputedly, nothing has been placed on record showing any undervaluation of goods. While the department has submitted before the Commissioner (Appeals) that the issue of valuation is under investigation, however what cannot be ignored is that the goods imported are copper cathodes and the value of the same is determined basis the LME price. Also the provisional release order dated 06.04.2022 and the seizure memo dated 02.02.2022 is totally silent on the aspect of undervaluation. The seizure memo in fact gives the complete history of the matter but does not contain any allegation about the undervaluation of goods. Given the above it is submitted that the condition to furnish BG of 15% of value is extremely onerous, more so when the Appellant has shown his will to deposit entire amount of duty on value declared by it.”

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35. Apart from the same, the appellant herein has always been willing to pay the entire duty amount of around Rs. 25 crores at the time of clearance of the goods, which was not the case in Hazel Mercantile case (supra) as in the case of Hazel no duty was payable on export goods. Also, it is an undisputed fact that the department has alleged

mis-declaration on the part of the appellant based on Country of Origin certificate which in normal cases is issued by the appropriate authority of the exporting country and the importer in India has no role in the issuance of the same. The investigation on this behalf is ongoing and yet to be concluded.

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39. Further it is a settled law that an importer unless proven otherwise beyond doubt cannot be said to have any role in the issuance of a COO as the same is issued by the competent authority of the originating country. However, at this point in time, it is also important to note that the investigation is ongoing and country of origin of the goods will be determined only after the investigation is concluded. At this point of time, it cannot be said with certainty that the goods were imported from Iran. Be that as it may, the issue before this Tribunal is limited to the provisional release of goods and the same be decided keeping in mind the fact that the Appellant never intended to avail any benefit basis the COO and were and are willing to pay the duty on the goods imported vide the 4 bills of entry.”

4.3 The aforesaid order was accepted by the department and the Appellant was permitted to provisionally clear the goods. Post the said order investigations were initiated by the department which led to issuance of SCN dated 04.01.2023 which got culminated into Order-in-Original 12.06.2023. The said Order has been upheld by the impugned order. Accordingly, it will be important to see the evidence relied upon by the department on the basis of which it has been confirmed that the goods are of Iran origin and have been mis-declared. Admittedly, 4 Bills of Entry were filed on 14.01.2022 describing the imported goods as copper cathodes, the value for the purpose assessment was based on price declared on London Metal Exchange. One of the documents filed alongwith the 4 Bills of Entry were 4 separate COO certificates issued by Zambia Revenue Authority all dated 08.11.2021. Undisputedly, the Appellant did not claim any Customs duty benefit as recorded above.

4.4 When the goods arrived at ICD, Tumb during examination, it was noticed that the copper cathodes were packed in various bundles wherein sticker showing QC-passing date of December 2021 was found. Since the COO certificates were issued on 08.11.2021 and the packing sticker was of

December 2021 the same led the department to suspect that the Appellant had submitted fake/forged COO certificates by mentioning the COO as Zambia. Further tracking of the containers mentioned in the Bills of Entry indicated that the same arrived at Jabel Ali Port (UAE) by Vessel Virgo on 04.01.2022 and transhipped by Vessel X-Press Euphrates on 06.01.2022 for journey to Jawaharlal Nehru Port Trust.

4.5 Investigation led to the department summoning Mr. Jane, authorised representative of M/s. SGS Inspection & Survey and Inspection, India. His statement was recorded on 30.03.2022 during which he deposed that the seals that were cut from the containers were of SGS group of companies and the seal numbers were matching with the inspection certificate issued by SGS Iran. He further deposed that Bill of Lading No. ATSBNDTUM2112412 of Asian Tiger Shipping LLC was submitted wherein the consignor was mentioned as National Iranian Copper Industries Company and consignee was mentioned as M/s. Coppernium International FZE UAE and the inspection of the goods were carried out by SGS Iran on directions of M/s. Sanaye Va Maaden Mes Kerman Zamin at Bunder Abbas Port, Iran. Basis the same, the department in para 5.1 has alleged that the since the goods were inspected in Iran between 22.12.2021 to 27.12.2021 and further the fact that the Inspection Report dated 08.01.2022 records that "prior to loading, all cargo stock were covered by tarpaulin" clearly show that the goods originated from Iran instead of Zambia. On the basis of this deposition, it appears that the department has alleged that the Appellant had created whole bunch of manipulated/forged documents including the country of origin certificate in connivance with the exporter/foreign parties to show that the impugned goods originated from Zambia instead of Iran. On going through the statement, we note that while inspection report of SGS Iran was submitted by Mr. Jane, the same has not been made a part of Relied upon

documents (herein after referred to as RUDs). The SCN also does not reproduce the contents of the said report.

4.6 Further statement of Mr. Pongde, authorized representative of M/s. Radiant Maritime India Pvt. Ltd was recorded on 19.04.22. As per Mr. Pongde, Radiant Maritime was an agent of Asian Tiger Shipping FZE who were the shipping line for voyage of good pertaining to Bill of Lading No ATSBNDTUM2112412 between National Iranian Copper Industries Company and M/s. Coppernium International FZE UAE. Mr. Pongde in his statement deposed that on arrival of goods at Jabel Ali Port, UAE, vide letter dated 03.01.2022 they received a request for switching the Bill of Lading from M/s Coppernium International FZE in the name of M/s. NBJ International FZE UAE (the supplier of goods in the present case). Thereafter, on request of M/s. NBJ International, the Bill of Lading were again switched where the name of the consignee was mentioned as M/s. Amglo Resources (the Appellant herein). Here again while the statement shows that letters seeking switching of Bill of lading by M/s Coppernium International FZE and M/s. NBJ International FZE UAE, were submitted by the deponent, the same have neither been made a part of the RUDs nor are they reproduced in the SCN.

4.7 Apart from the above reliance has been placed by the authorities below on Statement of Mr. Vishal Amlani, one of the directors of the Appellant wherein in reply to questions No. 13, he has stated that the supplier may have submitted wrong COO certificates.

4.8 While no document has been placed on record on whether any communication was made with the Zambian Authorities to check the authenticity of COO certificates, reliance has been placed on letter dated 26.05.2022 issued by DRI. On perusing the said letter we note that the

same has been addressed to Commissioner of Customs (NS V), Nhava Sheva, Maharashtra with respect to COO No. No. ZM/N/2741 dated 03.11.2022. The said letter has been issued in response to office letter of Nhava Sheva Commissionerate dated 19.04.022 and the same reads as under:

"2. In this regard overseas enquiries as sought were conducted and it is learnt from the Zambia Revenue Authorities that the Country of Origin Certificate bearing Ref. No. ZM/N/2741 is not authentic.

4.9 Basis the above evidence the Commissioner (Appeals) vide impugned order has confiscated the goods and imposed redemption fine on the Appellant. Penalties have been imposed on the Appellant and the two directors under both section 112(a) and 114(AA) of the Act.

4.10 It is the case of the Appellant that the evidence relied upon by the department does not remotely show that the goods had originated from Iran. Having submitted proper COO certificates stamped by Zambia Revenue Authorities, the same could not be declared as forged/fake on basis of presumptions and assumptions. No efforts were taken by the department to reach out to the Zambian authorities to check the authenticity of the COO certificates. Similarly, the letter issued by DRI to Nhava Sheva Commissionerate cannot further the case of the department as the letter does not disclose the nature of overseas enquires nor does it disclose the manner or mode by which it was learnt from the Zambia Revenue Authority that the Country of Origin was not authentic. It is submitted that the entire case has been made on presumption and the allegations that the Appellant had created whole bunch of manipulated/forged documents including the country of origin certificate in connivance with the exporter/foreign parties to show that the impugned goods originated from Zambia instead of Iran is

bald and totally baseless. No investigation has been carried out with the so called foreign parties with whom Appellant had no contact with. It has been therefore submitted before us that the Department has failed to discharge its burden of proving that the COO certificates were fake/forged or not authentic as has been confirmed by the impugned order.

4.11 The show cause notice has been issued by the department doubting the correctness of the COO certificates submitted by the Appellant. It is the case of the department that the same though stamped by the issuing authority is not authentic. The Appellant has placed reliance on the settled law that the burden to prove a claim is on the person who asserts the same. Hon'ble Supreme Court in *Gokuldas Exports v/s Jain Exports Pvt Ltd 2003 (157) ELT 243 (SC)* and Hon'ble Bombay High Court in the case of *Phoenix Mills v/s Union of India 2004 (168) ELT 310*.

4.12 Before dealing with the above submissions, it is important to look into the allegation made in the show cause notice. The outcome of the investigation is recorded in the show cause notice from Para 6.1 to 7.2. Para 6.6.2 is reproduced herein.

"6.6.2. Investigation revealed that entire web of fraudulent activities and fabrication of documents was done by the importer in connivance with the foreign supplier/exporter to suppress the fact of goods being of Iranian origin. Further, the importer connived with the different entities abroad like the exporter, Shipping Line/Agent to create whole bunch of manipulated/forged documents including the country of origin certificate to show that the impugned goods originated from Zambia against the true country of origin i.e. Iran."

4.13 It is clear from the aforesaid that the department has alleged that:

e) fabrication of documents was done by the importer in connivance with the foreign supplier/exporter to suppress the fact of goods being of Iranian origin.

f) the importer connived with the different entities abroad like the exporter, Shipping Line/Agent to create whole bunch of manipulated/forged documents including the country of origin certificate to show that the impugned goods originated from Zambia against the true country of origin i.e. Iran.

4.14 Whether there is any evidence to back and support the above allegations made in the show cause notice will have to be looked into by us.

a) Supreme Court in the case of Gokuldas Exports (supra) has held that *"A party which asserts a fact has to establish it. In this case it was the plaintiff who asserted that second revalidation was permissible. It was for the plaintiff to establish it."*

b) Similarly, Hon'ble Bombay High Court in the case of Phoenix Mills v/s Union of India 2004 (168) ELT 310 has held that :

"16. Having considered the rival submissions at length, the controversy lies in a very narrow compass which can be adjudicated upon the text of the show cause notices itself. The show cause notice dated 2nd November, 1992 incorporated at Exh. 'E' issued by respondent No. 3 specifically, states, "for the purposes of printing of fabric the petitioners require "printing paste", and the assessee bring duty paid colour from market and mix it up with other material such as chemicals and kerosene. The mixing giving rise to the substance known as "printing paste" is classifiable under Chapter sub-heading 3204.29 of the Tariff Act".

The second show cause notice dated 4th February, 1993 also incorporates same averments. When the show cause notices were issued the Order No. 2/93, dated 21st April, 1993 issued by the Board was not in the field. Therefore, the "printing paste" prepared from formulated, standardised and prepared dyes by simple mixing with other materials bringing into existence a product known as "printing paste" was treated as 'manufacture' by the respondents for all the time till the clarification issued by the Board could see the light of the day. The clarification issued by the Board that the printing paste prepared from formulated, standardised and prepared dyes by simple mixing with other materials shall not amount to "manufacture", as such, not classifiable under

Chapter sub-heading 3204.29 of the Tariff Act has taken out the wind of the show cause notices issued by the Revenue to the petitioners. As a matter of fact, the burden to prove that the printing paste used by the petitioners was not manufactured from the formulated, standardised or prepared dyes by simple mixing with other material was on the Revenue, especially, when the show cause notices issued were pregnant with the admission on the part of the Revenue as indicated in the opening part of this para. The Revenue having chosen to issue show cause notices, burden of proof was on the Revenue. Mr. Rana is not right in contending that the burden of proof was on the petitioners. The burden always lies on the person who asserts that the particular goods are excisable. It lies at first on the party who would be unsuccessful if no evidence at all was given on either side. There is essential distinction between burden of proof and onus of proof. The burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Onus means the duty of adducing evidence. Assuming that onus, has shifted on the petitioner, then, the evidence produced by the petitioners has substantially established the link between the material supplied and used by the petitioners.

4.15 Given the above settled proposition of law it is clear that since the allegation of COO certificates being forged/fake and further Appellant and its directors having connived in the same is made by the department the burden to prove the above is solely on them and cannot be shifted on the Appellant unless cogent evidence is produced in support of the said claim. It is the case of the department that the goods imported by the Appellant did not originate in Zambia as declared but were from Iran. The Appellant on the other hand had submitted COO certificates which are stamped by Zambia Revenue Authority, Tanzania Customs, Lusaka Customs Port, Customs Service Division and Tanzania Revenue Authority. Nothing stopped the department from reaching out to the issuing authority viz., Zambia revenue authority through official channel to check the veracity of the COO certificates and understand if the same were issued by them or not. No communication to this effect has been produced before us. It cannot be even conclusively said that an attempt was made in this regard. We are of the view that communication with the Zambian Authorities was the first

logical step that the department ought to have taken if they intended to support the allegation that the COO certificates were forged/fake or not authentic. Although the Department is disputing the correctness of COO certificates, they have not even attempted to reach out to the Zambian Authority to ascertain the veracity of the certificates. Hence, in absence of the aforesaid verification by the Department, we are of the view that the Commissioner (Appeals) has erred in reaching to the conclusion that evidence produced by the department prove that Appellant had mis-declared the origin of goods, especially when there is no proof to the effect that the said COO certificates have been declared as un-authentic by the Zambian Authority or have been cancelled.

4.16 The Commissioner (Appeals) has placed reliance on the finding of the Original Adjudicating authority who had in turn has placed reliance on the internal communication dated 26.05.2022 of DRI to Nhava Sheva Custom authorities to support the allegation of COO certificates being not authentic. We are of the view that the Commissioner (Appeals) instead of reproducing paragraphs of Order-in-Original was expected to consider the submissions of the Appellant. The Appellant has questioned the reliance placed by the department for various reasons. The said communication uses the language *"overseas enquiries as sought were conducted and it is learnt from the Zambia Revenue Authority that the Country of Origin bearing reference No. ZM/N/2741 is not authentic"*. In our view the Appellant is correct in contending that the said letter does not further the case of the department in any manner inasmuch as by looking at the language of the said communication it cannot be said with certainty as to whether any enquiry through official channel took place between Indian authorities and Zambian Authorities as the communication neither discloses the nature of overseas enquiry nor does it provide details on the mode of communication by which

it was learnt that the COO certificate was not authentic. If there was any written communication from Zambian Authorities the letter issuing authority, would have provided the same as a supporting to letter dated 26.05.2022. We are of the view that the letter issuing officer was duty bound to provide proper details/documents on the basis of which COO certificate issued by an independent authority of contracting state has been labelled as not authentic. Mere statement or casually written documents without corroborative and supporting documents cannot be the basis to label a document issued by an independent foreign authority non authentic. Further we find merits in the arguments of the Appellant that the said communication in any event relates to COO No. ZM/N/2741 dated 03.11.2022 whereas the COO certificates involved in the present case were No.ZM/N/2742, No. ZM/N/2743, No. ZM/N/2744 and No. ZM/N/2745 all dated 8.11.2022. The reasoning adopted in the impugned order in Para 8.3 to the effect that since all 80 containers originated from the same source of country on a single Bill of lading which were subsequently split into 4 bills of lading would be enough to show that if one COO certificate is found fake the others would also be fake is totally incorrect. The reason provided by the Commissioner (Appeals) to reject the submissions of the Appellant is that the findings of the Adjudicating authority has not been rebutted by the Appellant. The said finding itself is faulty and contrary to the records of the case as the Appellant in grounds of Appeal had disputed the findings of the Adjudicating authority basis the said letter. Be that as it may, we are of the view that the Appellant is right to contend that the finding provided by the Adjudicating authority in Para 12.12 to 12.14.2 of the Adjudication order as reproduced in the impugned order at Para 8.2 itself is beyond the show cause notice as the show cause notice in Para 7.2 had simply mentioned about the said communication without relying upon the same to crystallise any allegation. The Commissioner (Appeals) in our view should have

considered the said submissions of the Appellant with an independent mind which has not been done. In any event apart from the COO certificates impugned in the present case having different numbers, than the COO certificate mentioned in the letter dated 26.06.2022, we note that even the dates of the said certificates are different. In view thereof we are of the view that reliance placed on the said letter for this reason also cannot be accepted. The finding of the adjudicating authority that all 80 containers were under one bill of lading will have no bearing to the validity of the 4 COO certificates impugned in the present case as the said Bill of Lading mentioned by the Commissioner (Appeals) was admittedly issued for journey of goods from Iran to UAE and not for movement of goods from Zambia. The department has not produced any evidence that there was no movement of goods from Zambia to Iran. Another argument of the Appellant is that the COO certificate No. ZM/N/2741 dated 03.11.2022 mentioned in the letter was the subject matter of good imported in Nhava Sheva port and the customs authorities concerned with the said imports itself has not relied upon the said communication thereby showing that there was no correspondence with Zambian authorities in relation authenticity of the COO certificates. Keeping the peculiar facts of the present case in mind, the said submission of the Appellant, cannot be overlooked or brushed aside as undisputedly the letter has been addressed to Nhava Sheva Commissionerate and on perusal of the show cause notice issued by SIIB (Imports) Nhava Sheva, submitted during the hearing, we note that the said communication though addressed to them has not been relied upon in the show cause notice issued by Nhava Sheva Commissionerate. In any event as mentioned above we find merits in the submission of the Appellant that the said letter does not provide any details on nature of enquiry conducted or supporting documents received from Zambian Authorities on the basis of which the DRI has purportedly learnt and formed an opinion the COO

certificate mentioned in the letter was not authentic. For the aforesaid reasons we are of the view that the said letter cannot be the basis to hold that the COO certificates impugned in the present case were not authentic.

4.17 Coming back the allegations made in para 6.6.2 of the show cause notice, the department has alleged that the importer connived with the different entities abroad like the exporter, Shipping Line/Agent to create whole bunch of manipulated/forged documents including the country of origin certificate to show that the impugned goods originated from Zambia against the true country of origin i.e. Iran. Comparing the aforesaid allegation with the contents of the show cause notice, we are constrained to note that no investigation whatsoever has been carried out by the department against any of the parties mentioned above to remotely suggest what has been alleged by the department. Mr. Jane in his statement had deposed that the consignor in the first Bill of lading was National Iranian Copper Industries Co whereas the consignee was Coppernium International. The inspection of goods was carried out by SGS Iran on directions of M/s Sanaye Va Maaden Mes Kerman Zamin. Apart from not reaching out to Zambian authorities no attempt has been made by the department to even investigate any of the parties mentioned above to find out whether the goods had originated in Iran or not. Not reaching out to Zambian authorities to verify the authenticity of the COO certificates and further not investigating any of the parties above clearly shows that the investigation was not done in a proper manner and the allegations made in para 6.6.2 to the effect that Appellant connived with the exporter and foreign parties is clearly based on presumption and assumptions.

4.18 We are of the view that the finding of manipulation/forgery of the Bill of Lading against the Appellant is without any basis as the same is unsupported by any evidence whatsoever. We note that even the statement of Mr. Jane and Mr. Pongde relied upon by the department in the show cause notice does not name the Appellant or its directors and infact they have stated that they did not know the Appellant or the directors.

4.19 It appears to us that the Commissioner (Appeals) has sought to discard the COO certificates of the goods as Zambian origin on the basis of Bill of Lading No. ATSBNDTUM2112412 dated 01.01.2022 wherein undisputedly the Shipper is "National Iranian Industries Co." and Consignee is "Coppernium International FZE" and Shipping Line is "Asian Tiger Shipping LLC". In this regard we note that the disputed import has been made by the Appellant based on the Bill of Lading No. ATSJEATUM21124125, ATSJEATUM21124123, ATSJEATUM21124122 and ATSJEATUM21124124 wherein the shipper is clearly mentioned as NBJ International FZE-LLC and consignee as Amglo Resources Pvt. Ltd (the Appellant herein). The Bill of Lading relied upon by the Department is between two different parties with whom no link of Appellant has been established. Further can country of origin of goods be rejected merely due existence of another Bill of Lading especially when the same is between other parties is another issue that has not been addressed by the Commissioner (Appeals) or the Adjudicating authority. The Department to prove the same ought to have investigated the said parties or established a link between them and the Appellant. On the contrary we note that there is no evidence to even remotely suggest that the Appellant knew either "National Iranian Industries Co." or "Coppernium International FZE" "Asian Tiger Shipping LLC". From the show cause notice and the statements of witnesses, it is clear that the department has not

even alleged that the Appellant knew about the said purported trade or was a party to it. No documentary evidence has been produced to suggest otherwise. In view of the aforesaid, we are of the view that the finding of the Commisisoner (Appeals) in relation to manipulation of bill of lading and or connivance of the Appellant for the same deserves to be set aside being unsupported by any evidence.

4.20 The Appellant in fact has been contending right from the adjudication stage that it had no contract with any Iranian company who got the goods inspected and the said parties were not known to them in any manner. The authorities below have completely overlooked this aspect. The department while making allegations as grave as one made in para 6.6.2 was expected to establish a clear link to allege connivance on the part of the Appellant.

4.21 Even otherwise the department has relied upon statements of following persons to hold that goods have originated from Iran and not from Zambia:

- (a) Mr Dhiraj Kumar Jane, the authorized representative of SGS India Pvt Ltd;
- (b) Amol Pongde, the authorized representative of the shipping agency viz., Radiant Maritime India Pvt Ltd;
- (c) Mr. Vishal Amlani and Mr. Satish Amlani.

On the face of it unless the persons mentioned above have concrete documents to show that goods were manufactured in Iran, we do not see how the said people working in India had the knowledge to depose anything about the country of origin of the imported goods. It is surprising to note that the department chose to investigate and rely upon persons working in Indian companies than to investigate the entities whose names were

provided by both Mr. Jane and Mr. Pongde, viz., National Iranian Copper Industries Co, Coppernium International, M/s Sanaye Va Maaden Mes Kerman Zamin and SGS Iran.

4.22 Having said the above, on perusing the statement of Mr Jane we note that as per him inspection report has been issued by SGS Iran who had inspected the containers as per request of M/s Sanaye Va Maaden Mes Kerman Zamin, Iran. Further on being asked regarding M/s Sanaye Va Maaden Mes Kerman Zamin, the entity on the instructions of whom the inspection was carried out, Mr. Jane deposed that he did not know about the said entity. Mr. Jane in his statement goes on to state that inspection of goods was in respect of goods supplied by M/s. National Iranian Copper Industries Co, who was the shipper/manufacturer of the goods. We are unable see as to which part of the statement even remotely supports the allegation of mis-declaration made by the department in the SCN. To us, on reading the entire statement of Mr. Jane he has concluded that the goods have been manufactured by National Iranian Co. basis the fact that the same have been inspected in Iran by its counterpart. Nothing has been produced in the form of any documentary evidence to support the said statement. Infact we are at loss of words to understand how a person working in India can opine on origination of goods in a third country basis an inspection report. The Commissioner (Appeals) in our view ought to have appreciated that mere inspection of goods in Iran does not in any manner mean that the goods have originated in Iran. If the said argument of department is accepted, it will be open for the importers to seek origination of goods on the basis of getting the same inspect in a country of their choice. This will be totally contrary to the provisions of FTAs and Rules of origin between India and various countries. The Inspection of goods, in our view is a contractual issue and the same can be done as per contractual

arrangement between parties. In the present case the inspection was done with respect to the first leg of transaction between Iran and UAE, to which neither the supplier was a party nor the Appellant. Most importantly the inspection report that is purported to have been submitted by Mr. Jane during the recording of his statement has not been made a part of RUDs. We are unable to understand the reason for which the said document has not been placed on record, especially when the case of the department hinges on the same. The said error is not condonable as it is a settled law that department cannot go beyond the scope of SCN and documents relied upon therein. It is not forthcoming from the SCN or statement of Mr. Jane as to what was the basis to hold that M/s National Iranian Copper Industries Co. was manufacturer of the goods as we have no doubt in our minds that inspection of goods cannot be equated to manufacture of goods. It is hard to believe that when Mr. Jane did not even know about the entity who had ordered inspection of goods, how did he gather knowledge that M/s National Iranian Copper Industries Co. was the shipper/manufacturer. Neither does Mr. Jane work for SGS Iran nor there is a mention in his statement or the SCN that SGS Iran report had details of the manufacturer. Unfortunately, the said report has not been made a part of the SCN as RUD or reproduced therein. In view of the above on going through the statement of Mr. Jane in entirety, we are of the considered view that there is nothing in the statement that can even remotely suggest that the goods have been manufactured and/or originated in Iran. In an event as has been held above, the simplest thing department could have done was to reach out to the Parties in Iran on the behest of whom the goods were inspected.

4.23 With regards to statement of Mr. Pongde, he has deposed that as per Bill of Lading No. ATSBNDTUM2112412 dated 01.01.2022 the shipper was M/s National Iranian Copper Industries Co and consignee was Coppernium

International FZE, UAE and subsequently the said Bill of Lading was switched where the consignor was named as M/s NBJ International FZE, UAE and consignee was named as M/s. Amglo Resources Private Limited, the Appellant herein. Given the above as has been held by us above, nothing stopped the department from reaching out to M/s National Iranian Copper Industries Co. to find out about the origination of the goods. The above details of switching of bills of lading cannot in any manner be taken to be as proof to show that goods were originated in Iran inasmuch as there is no dispute that the Appellant has made payment to their foreign supplier in Dubai and not to any party in Iran. Furthermore, we agree with the submission of the Appellant that there was no contract between Appellant and any party in Iran including National Iranian Industries Co. or Coppernium International FZE. The Appellant had entered into a contract with NBJ International, Dubai and it is not even the case of the Department in SCN or in orders passed by authorities below that Appellant was dealing with either National Iranian Industries Co or Coppernium International FZE or was aware of their existence.

4.24 We further note that the department has placed reliance on statement of Mr. Pongde wherein he has stated that that letters of Coppernium International and NBJ International (the supplier in the present case) appear to have the same signature. Like the statement of Mr. Jane here also we note that the said letters seeking switching of BL filed by Coppernium International and NBJ International (the supplier in the present case) which purportedly have the same signatures are not a part of RUDs of SCN. Accordingly, there is no way for us to test if the statement of Mr. Pongde on signatures being same be taken as true. Further we agree with the submission of the Appellant that Mr. Pongde was not a forensic or

handwriting expert, and the said letter was not sent for signature testing by the department. Accordingly, we hold that statement of Mr. Pongde does not in any manner further the case of the department that goods were of Iran Origin.

4.25 Having held that above we are constrained to note that the finding of the Commissioner (Appeals) that the Appellant has not challenged the statements of the above two person is erroneous. Apart from the fact that nothing incriminating qua the Appellant and its Directors has been stated in the statement, the Appellant have challenged the statements of the both the witnesses on the ground that same is contrary to the documentary evidence i.e. stamped COOs. The said challenge was made before the Commissioner (Appeals) as well.

4.26 In relation to statement of Mr Vishal Amlani the relevant extract of the statement is reproduced:

"I again reiterate that these SADC COO certificates may be wrong. It has been prepared for documentation purpose only. The goods may be of Iran originated and correct Country of Origin of these goods may be Iran."

From the above, it is clear that Mr. Vishal Amlani did not give any definitive statement on the COO certificates. The use of words 'may be' will only show that even at that stage there was no conclusive evidence to show or prove that the goods are not of Zambian origin. The onus without a doubt was on the department to convert the use of term "*these goods may be from Iran*" into "*are from Iran*" by producing supporting evidence which they have failed to do. We further find merits in the arguments that undisputedly since the Appellant had no relationship with any of entities in Iran, it was impossible for them to know the origination of goods more so when they had no role in issuance of the COO certificates.

4.27 As far as statement of Mr. Satish Amlani is concerned, nothing has been mentioned in his statement that can remotely prove the case of the department. Infact, he has clearly mentioned that neither did he handle import related work, nor were the Appellant aware of any of the Iran entities.

4.28 Given the above none of the statements relied upon by the Revenue can be taken as positive evidence to show that goods had originated in Iran and Not Zambia. Infact we are constrained to conclude that the investigation carried out by the department was far from desirable. As noted above instead of reaching out to the Zambian authorities or the Iran entities they chose to place reliance on statements of person who worked in India and had no direct connection with inspection of goods or shipping of goods from Iran to UAE. If that was not enough the department has chosen not to make the documents submitted by the witness as RUDs so as to enable the Appellant to counter the same. The Commissioner (Appeals) instead of applying his independent mind to the submissions of the Appellant has chosen to reproduce and agree with the findings of the Adjudicating authority which is not permissible in law. Case laws of this Tribunal which were otherwise binding on the department have not been considered. Accordingly, we hold that the findings of the Commissioner (Appeals) that the COO Certificates were bogus or fake and that the goods have originated from Iran and not Zambia, is incorrect and has been given by non - appreciation or mis interpretation of statements and /or document/submissions of the Appellant.

4.29 One of the arguments of the Appellant is that the entire basis on which the SCN has been issued viz: quality control stickers of December 2021 being incorrect and/or inconclusive to prove origination of goods has not been dealt with by the authorities below. It is the case of the Appellant that merely because the COO certificates were issued on 08.11.2021 and the packing sticker were of December 2021 cannot be the reason for department to allege that the Appellant had submitted fake/forged COO certificates by mentioning the COO as Zambia. It has been argued that the goods may have been shipped from Zambia to Iran and from there to Jabel Ali and then to India cannot be ruled out and the supplier of goods can as per his choice get the quality of goods checked as per his choice. Reliance has been placed on the statement of Mr. Satish Amlani to demonstrate that either of the Iran parties mentioned were not known to the Appellant and the reasons for getting quality testing done in Iran can be found out through the said Iran entities only. Further reliance has been placed on the statement of other two witnesses who have accepted that they did not know the Appellant. The adjudicating authority has dismissed the transshipment argument by shifting the burden to prove the same on the Appellant. The Commissioner (Appeals) has held that the Appellant has not produced any evidence in support of their submission of transshipment. We are not in agreement with the observations of the Commissioner (Appeals) in Para 6.10 of the impugned order. We fail to understand as to how can the Appellant be directed to prove the above when the department itself has failed to prove that the goods had originated in Iran. Unless the same is proved, the department cannot have any case against the Appellant. To look into other allegations, the department has to first cross the hurdle of proving mis-declaration of COO Certificates qua origin, which they have failed to do as has been held by us in above paragraphs. As per settled law, the initial burden was on the department to prove/support the allegations made by it with cogent

evidence which has not been done. Given the same the onus of proving transshipment of goods cannot be shifted on the Appellant as the department has not been able to show that the COO certificates were not authentic. Similarly, reliance placed on the decision passed in the case of *Kanungo & Co 1983 (13) ELT 1486 (SC)* and *Shreeji Aluminum Pvt Ltd 2012 (282) ELT 234*, to hold that the burden of proof is on the Appellant is totally misplaced. In the present case, the Department has not produced any evidence to prove that the goods originated from Iran and not Zambia and hence the burden of proof cannot be shifted to Appellant as has been held by us above. If the stand of the department is accepted the same will lead to an assessee being made to prove allegations made by department on assumptions and presumptions. The same is contrary to the general principles of law and cannot be accepted.

4.30 We also note the reliance placed by the Commissioner (Appeals) on Section 46 (4A) of the Act to hold that the burden to prove that the goods originated from Zambia is on the Appellant and they failed to discharge the said burden. The said Section is reproduced below for sake of clarity:

SECTION 46. Entry of goods on importation. -

*[(4A) The importer who presents a bill of entry shall ensure the following, namely:—
(a) the accuracy and completeness of the information given therein;
(b) the authenticity and validity of any document supporting it; and
(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.]*

4.31 We don't see how the above Section can be relied upon to shift the burden of proof on the Appellant assessee. The Appellant has submitted certain documents which bear appropriate stamps of the issuing authority. Admittedly the Appellant had no role in issuance of the documents. Since the department had disputed the authenticity of a document issued by a contracting state, the onus was on it to reach out to the Zambian authorities

through official route provided under the FTA Regulations. Even otherwise the department could have pursued with the concerned/appropriate ministry to reach out to Zambian authorities and not rely upon letter issued by DRI which is cryptic and does not provide any basis as has been held by us above. What also impresses us is the fact that the Appellant had never intended to avail any benefit from the COOs and the same is clear from the show cause notice which does not propose recovery of any duty. Given the same we agree with the contention of the Appellant that there was no reason for them to be a part of the alleged or purported action to mis-declare the origin of goods. We note that the Commissioner (Appeals) on this count also has tried to go beyond the show cause notice by holding that the Appellant was guilty of under valuation, however the same in our view is an attempt to create prejudice against the Appellant who in our view was always willing to pay duty on merit rate as per LME prices. The same has been recorded by us in our earlier order dated 27.06.2022 and the same has been accepted by the department. Even otherwise as has been recorded by us above there is no allegation in the show cause notice alleging undervaluation of goods as the same would have consequentially led to demand of additional duty, which is not the case here. Similarly, the finding of the Commissioner (Appeals) that since the Appellant has used COO certificates having multiple discrepancies the same shows that they have failed to verify the authenticity of the certificates is incorrect being beyond the show cause notice. On perusal of the show cause notice we note that there is no allegation to the said effect. The same goes on to show that the Commissioner (Appeals) to uphold the Order-in-Original has travelled beyond the show cause notice on multiple counts which cannot be permitted as being contrary to law settled by Supreme Court in Commissioner v. Toyo Engineering India Ltd. — 2006 (201) E.L.T. 513 (S.C.) and Commissioner v. Ballarpur Industries Ltd. — 2007 (215) E.L.T. 489 (S.C.). In any event the

explanation provided by the Appellant through Mr. Satish Malani that since the Appellant never intended to avail any benefit basis the said COO certificates, they did not check the contents appears to be plausible to us.

4.32 In view of the finding recorded by us above we are of the considered view that the Commissioner (Appeals) has erred in holding that basis the evidence relied upon in the show cause notice, the department has proved that the country of origin of goods was mis-declared and the same had originated in Iran instead of Zambia. The finding of the Commissioner (Appeals) on manipulation of import documents or connivance on the part of the Appellant, being unsubstantiated also is erroneous. On the contrary as held by us above, the department has failed to produce a single document or evidence to remotely support their case of mis-declaration of country of origin. As recorded by us above, the investigating authority instead of reaching out to Zambian authorities and Iranian entities have chosen to rely upon statements of witnesses who were not competent to depose on origin of goods. If that was not enough the department while issuing the show cause notice have not made documents submitted by the said witnesses a part of the show cause notice through RUDs. It is a settled law that documents not made part of relied upon documents cannot be relied upon. Given the above we have no hesitation in holding that the case of the department that goods have originated from Iran instead of Zambia must fail on all counts and we hold accordingly.

4.33 Having held the above, we will not deal with other alternative submissions made by the Appellant during personal hearing.

4.34 We note that the Appellant has submitted that the issue is no longer res-integra and is covered in their favour. Before looking into the said contention, we would like to note that there is no contest to the submission of the Appellant that there are no restrictions under the foreign trade policy for import of goods from Iran. To support the above contention, the Appellant has relied upon decision of Hon'ble Bombay High court in **Global Ace Shipping Lines Inc [Writ Petition (L) No. 5118 of 2020]**, However the said issue has not been disputed by the Commissioner (Appeals) who at para 9.1 of the order has held as under:

"on perusal of the show cause notice and impugned order, it is observed that the goods have not been held liable for confiscation for any violation pertaining to the imports from Iran. But the charges are on the ground that"

In view of the above clear findings, it is clear that the department has not contested the imports from Iran. In any event looking at the provisions of foreign trade policy more particularly Para 2.18 along with the decision of Bombay High court in Global Ace (Supra), the contention of the Appellant that there was no restriction in importing goods from Iran has to be accepted. Having held the above the findings of the authorities below that the goods were mis-declared due to sanctions from US appears to be farfetched and cannot be accepted as the same has nothing to do with contravention under Customs Act.

4.35 We further note that the reliance placed by the Appellant on the decision of **Jupiter Dychem Pvt Ltd** (supra), is correct. Before providing our reasons for the same we find it fit to reproduce the important paragraphs below:

"4. Four appeals against two adjudication orders of Commissioner of Customs (Import-II), New Custom House, Mumbai, on identical issue of addition of freight for computation of assessable value and confiscation for misdeclaration of country of origin, are disposed of by these common proceedings. The adjudicating authority proceeded on the finding that the cargo, covered by import general manifest no.

224501/23.01.2020 of MT Braveworth filed for discharge at Mumbai and purportedly taken on board at Sohar in Oman during the voyage out of Fujairah in UAE from 9th January 2020, was, in fact, loaded during clandestine call at Dayyer in Iran between 15th January 2020 and 18th January 2020, and cargo, covered by Import General Manifest No. 2244928/22.01.2020 of MT Chem Trader filed for discharge at Mumbai and purportedly taken on board at Jebel Ali on 16th January 2020 was, in fact, loaded during clandestine call at Bamder Imam Khomeini in Iran between 12th January 2020 and 14th January 2020.

.....

8. The first issue that comes up relates to the place of origin. There is no contention on the part of customs authorities that appellants had insisted upon sourcing from Iran or that they had any commercial engagements with suppliers in Iran that was sought to be obfuscated by a paper trail through Dubai/Sharjah. On the contrary, the entire proceedings have been carried through on the presumption that there is no engagement other than with the contracted suppliers. **The sole evidence of goods not being of Taiwanese/Omani origin, as contained in the bills of lading, are the records of passage by MT Braveworth from Fujairah to Sohar en route to India having been interrupted by allegedly calling at Dayyer in Iran and of MT Chem Trader having called at Bander Imam Khamenei in Iran before arrival at Jebel Ali for the next voyage to Mumbai. There is no evidence on record, elicited through official channels, of the facts relating to the movement of the vessels. The impugned orders have placed emphasis on the statements recorded from the master of the respective vessels but, in the absence of official confirmation from authorities at Oman/UAE about the port clearance submitted for entry at Sohar/Jebel Ali where, acknowledgedly, the two vessels departed for arrival in Kandla/Mumbai, it cannot be concluded that such evidence can be relied upon to visit detriment upon importers who had no commercial engagement with the vessels or her masters."**

4.36 In the present case also as held by us above, the Customs Department has solely relied upon the aforesaid statements to allege that the goods are from Iran and not Zambia, without any corroborative evidence. As mentioned above, there is no official confirmation that the goods are not from Zambia but from Iran. No document to the said effect has been placed on record. Infact we may add that no document showing any form of communication with the Zambian authorities have been made a part of SCN. The Department could have taken up the issue with Zambian Authorities or investigated National Iranian Industries Co. and Coppernium International

FZE to find out about the origin of the goods. However, they failed to do. The Appellant or its Directors had no relationship with either of the Iranian Party viz., National Iranian Industries Co. and Copernium International FZE. The SCN although has a bald allegation in this regard, however not a shred of evidence has been produced to show any relationship business or personal between the Appellant or its Directors and the Iranian entities. The statement of Witnesses also do not make any incriminating disclosure against Appellant or its directors. From the facts on record, it is clear that the most suitable option viz., to reach out or investigate the matter through official channel has not been explored by the department. Instead, the department has tried to corroborate their case by relying upon evidence in the form of statement of witnesses who had no competence to depose on origination of goods. The said action is contrary to the settled law that charge of mis-declaration cannot be confirmed solely on the basis of statements. In the present case we have in any event held that the said statements do not prove anything against the Appellant. Further placing reliance on the inspection/quality check date to dispute the correctness of country of origin of goods and taking the place of inspection of goods as place of origination of goods itself is faulty as mere inspection of goods in Iran cannot establish that the goods have originated from Iran. We find force in argument of the Appellant that the possibility of goods having originated in Zambia and then being transhipped through Iran before reaching Dubai cannot be ruled out. The inspection of goods in Iran cannot establish that the goods originated from Iran in absence of any confirmation from the Iranian entities that the goods originated from Iran. Even the statements are not conclusive for reasons stated above. Hence, we are of the view that the decision in the case of Jupiter Dyechem (supra) will apply to the present case on all fours.

4.37 Similarly we note that CESTAT in the case of **Agarwal Industrial Corporation Ltd. vs. Commr. of Cus. Mangalore** reported in **2020 (373) ELT 280 (Tri- Bang)** has decided a similar case in favour of the party. The demands in the said case were dropped with the following observation: -

“After considering the submissions of the both the parties and perusal of the material on record, I find that in the present case there is no dispute that the impugned goods i.e., bitumen is not prohibited goods either under the Customs Act or Foreign Trade Policy or any other law in force at the time of importation of goods and the Customs in the show cause notice has admitted this fact. It is also a fact that there is no prohibition of impugned goods from Iran either under the Customs Act or Foreign Trade Policy. Further, I find that the only allegation against the appellant in the present case is that in the bill of entry filed by them, they have wrongly mentioned the ‘country of origin’ as “UAE” whereas in fact the ‘country of origin’ is from Iran. After perusal of various statements made by the various persons during the course of investigation including that of the appellant, I find that nobody has spoken against the appellant that the appellant is in any way involved in the manipulation of changing the ‘country of origin’ documents. The appellant has filed the bill of entry and showed the ‘country of origin’ as “UAE” on the basis of documents supplied to him by the supplier based at UAE. Further no document has been produced by Revenue on record to show the involvement of appellant in any way in the said misdeclaration.”

4.38 The facts of the present case are almost identical in nature. Neither there is any restriction of import of Copper Cathode from Iran nor has the department established any link between the Appellant and the purported Iranian Companies. Infact the facts of the present case are better as the department has not been able to show that the goods are of Iran Origin. As mentioned above, none of the statements have said anything incriminating against the Appellant and more importantly the Appellant never had any intention to avail any benefit basis the COO certificates. Accordingly, the ratio of aforesaid decision which appears to have been accepted by the revenue will apply to the present case as well. On the above ground as well

the impugned order passed by the Commissioner (appeals) deserves to be quashed and set aside and we have no hesitation in doing so.

4.39 Having held the above, we note that the authorities below have imposed heavy redemption fine and penalties on the Appellant and directors both under Section 112(a) and 114AA of the Act. The Appellants have argued that the documents filed by them were supplied by the supplier and they had no role in issuance of the COO certificates. It is further submitted that no benefit was ever availed on the basis of the said certificates and also no evidence has been placed on record to show their involvement in any manner. Accordingly, as a without prejudice argument the Appellant have prayed that redemption fine and penalty cannot be imposed. In any event the quantum of redemption fine and penalty has been challenged too.

4.40 The Commissioner (Appeals) in the present case has held the goods are liable for confiscation under section 111(d) and 111(m) of the Act. As per the Commissioner (Appeals) the act of Appellant obtaining 'compulsory registration' under Non-Ferrous Metal Import Monitoring System (NFMIMS) on the basis of false documents viz., COO certificates have rendered the goods liable for confiscation. Apart from the above the goods have been held liable to confiscation under Section 111(m) of the Act on the ground that the Appellant did not care to verify the genuineness of the COO certificates and chose to file statutory documents basis non authentic and incomplete documents. On the said count redemption fine has been imposed on the Appellant.

4.41 As has been held above, the department has unable to prove that the goods are not from Zambia but Iran and therefore on this count alone the redemption fine imposed on the Appellant requires to be set aside. In any

event, even otherwise, keeping in mind the peculiar facts of the case, we are of the view that provisions of Section 111(d) and 111(m) have been wrongly invoked.

4.42 Foreign Trade Policy, 2015-20 ("FTP") is notified by the Central Government under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992. Chapter 2 of the FTP provides for general provisions with respect to import and exports of goods and *inter alia* lists down the country, product, organization, etc., and the specific prohibitions for the purposes of foreign trade. Para 2.18 deals with imports and exports from Iran and reads as under:

"2.18 Direct or Indirect Export/Import to/from Iran

(a) Direct or indirect export to Iran or import from Iran of any item, material, equipment, goods and technology mentioned in the following documents would be permitted subject to the provisions contained in Annex-B to the United Nations Security Council Resolution 2231 (2015):

(i) Items listed in INFCIRC/254/Rev.9/Part 1 and INFCIRC /254/Rev.7 /Part 2 (IAEA Documents) as updated by the IAEA from time to time.

(ii) Items listed in S/2006/263 (UN Security Council document) as updated by the Security Council from time to time.

(b) All the UN Security Council Resolutions/Documents and IAEA Documents referred to above are available on the UN Security Council website (www.un.org/Docs/sc) and IAEA website (www.iaea.org)."

It is clear from the above that import of only those goods is restricted from Iran which feature in the aforementioned documents. These documents deal with nuclear material, equipment, and technologies. It is not the case of the department that Cooper Cathode is used in any of such material, equipment or technology. Further we note that no notification has been issued by the Central Government under Section 11 of the Act restricting imports from Iran. Accordingly copper cathodes imported by the Appellant are not prohibited goods and are freely importable. Further DGFT vide Notification No. 61/2015-20 dated 31.03.2021 have notified certain goods which are

required to be registered under NFMIMS. Since goods imported by the Appellant are falling under the said Notification, the Appellant has duly obtained registration as required. On perusing the said Notification of DGFT, we note that the same is product specific and not country specific inasmuch as registration is required to be obtained basis the product that is imported irrespective of country of origination or country of import. Accordingly, submission of the Appellant that even if it is assumed that the goods were imported by them from Iran, the same will not have any bearing on the registration obtained under NFMISM needs to be accepted. The said registration in any event has not been disturbed by the DGFT till date and the same supports the argument of the Appellant as being the issuing authority the decision on whether the registration was proper or not will lie with DGFT and not customs. In any event, even as per the department, the goods were required to be compulsorily registered under NFMIMS which has been done. The DGFT has not taken any action on alleged violation of any provision of FTD&R Act or the Rules made thereunder. Keeping in mind the above and since Country of Origin is not a criteria to seek registration under NFMISM the goods cannot be said to have been imported in contravention of section 111(d) of the Customs Act. Further the finding of the Commissioner (Appeals) that registration under NFMISM is not valid is totally contrary to law settled by the Hon'ble Supreme Court in **Titan Medical Systems Pvt. Limited v. Collector of Customs [2003 (151) ELT 254 (SC)]** wherein the Hon'ble Supreme Court has held that if the license granted to the assessee is not questioned by the licensing authority, the customs authorities cannot refuse exemption on the allegation of misrepresentation. The ratio of aforesaid case law will apply to the present case inasmuch as the DGFT authorities have not cancelled the aforesaid registration till date. On both counts the goods therefore cannot be said to have been imported in contravention of section 111(d) of the Customs Act. For this reason also the

finding of the adjudicating authority on the Appellant mis-declaring the goods due to sanctions from US government requires to be set aside being not relevant.

4.43 The Act of Appellant not verifying the genuineness of the COO certificates and filing statutory documents basis non authentic and incomplete documents has led the Commissioner (Appeals) to hold that goods are liable for confiscation under 111(m) of the Act.

4.44 In view of our findings that the department has not been able to show that the goods have been mis-declared and the same have originated from Iran instead of Zambia, the charge of confiscation of goods under Section 111(m) of the Act will automatically fall. Even otherwise we note that the findings of Commissioner (Appeals) to support his view that goods are liable for confiscation under 111(m) are beyond the scope of show cause notice. The show cause in Para 9.2 proposes confiscation under 111(m) on the ground that *"the importer by deliberately mis-declaring the country of Origin of the goods imported in the import documents like Bills of Entry, COO, Invoice, etc have rendered the goods liable for confiscation"*, whereas in the impugned order the charge of 111(m) stands confirmed on the ground that the Appellant failed to verify the authenticity of the COO certificates and said act coupled with the act of submitting incomplete documents have rendered the goods liable for confiscation under 111(m). The said finding being beyond the show cause notice deserves to be quashed and set aside on this ground as well. Even otherwise the charge in show cause cannot sustain as the department has not been able to show any document or produce any evidence on the basis of which it can be held that the Appellant was aware about the COO certificates was fake or had deliberately used the same.

4.45 We are in agreement with the submission of the Appellant that declaration made by them while filing import documents was basis the documents submitted by the supplier. There is no evidence to the contrary. Infact the statements of witnesses relied upon in the SCN does not state anything against the Appellant or the directors.

4.46 The Appellant had purchased the goods from Dubai based supplier who has confirmed that the goods are of Zambian Origin and to this extent has provided stamped COO certificates to the Appellant. There was neither any contract with any party in Iran nor was any payment made to them. Undisputedly the Appellant had entered into a contract with Dubai based company and payments were also made to it through proper banking channels. On the other hand, the department has not produced any evidence to prove that the goods are not of Zambian origin. Even if it is assumed that the goods were routed through Iran and UAE, that by itself does not conclude that the goods are of Iranian Origin as has been held by co-ordinate bench of this Tribunal in Jupiter Dychem (Supra). In our view country of origin cannot be determined basis the movement of goods or the country where the same were inspected. As has been discussed in detail above, nothing stopped the department from reaching out to National Iranian Industries Co. to ascertain if the goods originated from Iran. The charge in para 6.6.2 and para 9 of the SCN as confirmed by the impugned order requires to be quashed on the ground that same is based on assumptions and presumptions without any corroboration. Reliance placed on Section 46 4A by the Commissioner (Appeals) to disregard binding decisions of this Tribunal on the issue of non-imposition of redemption fine and penalty when declaration is made basis documents supplied by supplier is without any basis and in our view violates the principles of judicial discipline.

4.47 Accordingly, we have no hesitation in holding that goods are not liable for confiscation as there is no contravention of Sections 111(d) and (m) of the act for detailed reasons mentioned above. Penalty imposed under Section 112(a) and 114AA on the Appellant and directors will have to be dropped.

4.48 Even otherwise we are of the view that given the findings above no penalty can be imposed under Section 112(a) and 114AA on the Appellant and its directors. Both the Sections are reproduced herein for sake of convenience:

Section 112 (a):

112 Penalty for improper importation of goods, etc.

“Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act”

Section 114AA

Penalty for use of false and incorrect material.—If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.]

It is clear from the above that penalty under 112(a) of the Act is imposable on persons who in relation to any goods, does or omits to do any act which act, or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act. Similarly, penalty under Section 114AA of the Act is imposable on person who knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect.

4.49 We have noted above that the department has failed to discharge the burden cast upon it to conclusively prove that the goods had originated in Iran as against Zambia. Accordingly, the question of imposing any penalty be it under 112(a) of 114AA will not arise. Apart from the above, we have found that no evidence has been produced by the Department to remotely show that there was wilful involvement of the Appellant in the issuance of COO certificates. The submission of the Appellant that the COO certificates have not been cancelled by the Zambian Authorities cannot be overlooked or brushed aside just because the department has formed a view that the same were not authentic. We have already observed that the said view is without any basis and unsupported by any evidence. Department has not made any effort to check the correctness of the COO certificates and if any attempt is made the documents proving the same have not been annexed to the SCN or placed on record. Furthermore, the Department choosing to not investigate the Iran entities viz., National Iranian Industries Co. and Coppernium International FZE goes on to show the incomplete nature of investigation. Therefore as held by us above the authenticity of the documents cannot be doubted due to lack of evidence. In view of the above penalty under Section 112(a) and 114AA of the Act cannot be imposed on both the Appellant and its directors and the same deserves to be set aside.

4.50 Assuming that the COO certificates are incorrect and goods have actually originated from Iran, it is still not in dispute that the Department has failed to produce any document to show the involvement of the Appellant. Even the statement relied upon of the Indian employee working with Indian counter part of the shipping lining and employee working with Indian counterpart of Iran inspection agency does not name the Appellant. It is not the case of the Department in the SCN that the Appellant had any

contact with the Iran parties or had colluded with the same. Apart from the same it is a matter of fact that the payments in the present case have been made by the Appellant to their foreign supplier (based in Dubai) and the Appellant neither had connection with the Iranian companies or any payment was made to them by the Appellant.

4.51 We are aware that in relation to Section 112 (a) of the Act it has been held in various ruling that *mens rea* is not a requirement for imposition of penalty, however the same cannot be a standard principle in all matters. In cases where there is absolutely no involvement of assessee and where there is no evidence produced to show their role in the alleged fraud/mis-declaration, then imposition of penalty in our view will amount to injustice as far as the assessee is concerned. Penalty generally is imposed as a penal consequence of a person enjoying benefits of a thing which it is not entitled to or the said benefits are obtained by him due to fraud or mis representation. Hon'ble Supreme Court in ***Akbar Badruddin Jiwani vs Collector of Customs reported as 1990 (47) ELT 161 (S.C.)***. has held that *mens rea* is to be established even in case for imposition of penalty under section 112 (a) of the Act. Similarly in ***Commissioner v/s Trinetra Impex Pvt. Ltd. reported as 2020 (372) E.L.T. 332 (Del.)***, the Hon'ble Delhi High Court held that while *mens rea* for imposition of penalty under Section 112 (a) of the Act is not a condition precedent, however, said ingredient is necessary for imposition of penalty under the said section.

4.52 In **Extrusions Vs. Collector of Customs** reported as **1994 (70) ELT 52** the Hon'ble Kolkata High court has held as under:

"30. In P. Ripakkumar and Company v. Union of India, reported in 1991 (54) E.L.T. 67, a Division Bench of the Bombay High Court set aside the confiscation on the finding that the importer had acted bonafide. It was held at page 71 of the report as follows :-

“8. On the specific statement made by both the counsels, we propose to examine the question as to whether on the facts and circumstances of the case, the order of confiscation passed by the Customs authorities and the order of imposition of redemption fine in lieu thereof should be sustained. In these circumstances, Shri Mehta submitted that the action of the petitioners was bonafide and consequently the order of confiscation and redemption fine in lieu thereof should be set aside In these circumstances, in our judgment, the import made by the petitioner cannot be faulted on the ground of malafide and the order of confiscation is required to be set aside. As the petitioners have already cleared the goods on payment of redemption fine, it is necessary to direct the respondents to refund the said amount to the petitioners.”

31. The principles which can be culled out from the aforesaid decisions are that facts and circumstances relevant to the bona fide conduct of an importer in importing the goods and the extenuating circumstances leading to the import have to be taken into consideration for determining

as to whether the goods should be confiscated and any redemption fine imposed. Even if the import be in contravention of any prohibition, the importer should not be visited with confiscation if his conduct in making the import is bonafide. Even if confiscation is made in such a case, the redemption fine can only be a token one. Merely because action against goods is action in rem it does not mean that a person who had committed no offence in respect of them or with reference to them could be made to suffer by way of payment of fine or otherwise. Imposition of fine, in effect amounts to awarding a punishment to the person held liable to pay the same and a person can be held liable to punishment only if he is found to be responsible for some act of omission or commission with reference to the law and the goods in question. In our view, to impose or inflict punishment on a person who is not guilty is against all canons of natural justice and fair play. Even otherwise, merely because the goods are liable to confiscation it is not always necessary to impose a fine in lieu of confiscation, in the same way, as merely because a penalty is imposable under a provision, it is not necessary that it must always be imposed. The facts and circumstances of the case as a whole have to be borne in mind and it has to be ensured that absurd situations unintended by law do not result. There are innumerable cases in which goods are released on caution or warning when some technical violation or breach of provision is noticed and imposition of fine or penalty is not warranted.

Both in cases of fine and penalty, it is the non-observance of law by the person concerned which is required to be established in the first instance. In our view, the principles laid down by the Supreme Court in Hindustan Steel Ltd. (Supra) have to be kept in mind and duly applied, mutatis mutandis, in cases of confiscation of goods and imposition of redemption fine as well. In the instant case, however, the Tribunal fell in

error in holding that the question of intention is irrelevant in deciding upon the confiscation and quantum of redemption fine. The instant case is a fit one where confiscation should not have been made having regard to the bonafide conduct of the applicant.”

In view of the above settled position and considering our findings that no evidence has been produced by the department showing any role of Appellant and its directors in the alleged mis-declaration Penalties as confirmed by the impugned order are required to be set aside.

4.53 In relation to penalty imposed under Section 114AA, It is submitted that the key words in the aforesaid Section is 'knowingly' and 'intentionally' and therefore unless *mens-rea* is established beyond doubt Penalty under the said section cannot be imposed.

4.54 We have provided detailed findings in relation to failure on the part of the department to either prove that goods had originated in Iran or prove role of the Appellant or its Directors in the alleged Mis-declaration. Penalty under Section 114AA also in our view cannot be imposed in the facts of the present case.

4.55 Apart from the above, individual penalties have been imposed on the directors i.e. Mr. Satish Amlani and Mr. Vishal Amlani under sections i.e. Section 112 (a) and Section 114 AA of the Act, as invoked for the company. We have gone through the statement of both the directors and note that nothing incriminating is found therein. None of the other witnesses have stated anything against the directors. No document has been produced that shows any involvement of either of them in the alleged mis-declaration which in any event department has not been able to prove. Mr. Satish Amlani was not even looking into import related transaction. Given the

above we are loss to understand as to how department has imposed penalties under Section 112(a) and 114AA on two directors.

5. In view of the above findings, we set aside the impugned order and allow the Appeals with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 21.02.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha