CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 23589 of 2014

[Arising out of Order in Original No. 26/2014 dated 22/08/2014 passed by Commissioner of CUSTOMS , MANGALORE]

GSEC Limited
2nd Floor, Gujarat Chambers Building
Ashram Road Ahmadabad
AHMADABAD
MAHARASTRA
380000

Appellant(s)

VERSUS

C.C.E. & S.T.-Mangalore
7TH FLOOR...TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE,
KARNATAKA
575003

Respondent(s)

AND

Customs Appeal No. 23591 of 2014

[Arising out of Order in Original No. 26/2014 dated 22/08/2014 passed by Commissioner of CUSTOMS , MANGALORE]

Shri Anand Mathur, Vice President
GSEC Limited
2nd Floor, Gujarat Chambers Building
Ashram Road Ahmadabad
AHMADABAD
MAHARASTRA
380000

Appellant(s)

VERSUS

C.C.E. & S.T.-Mangalore
7TH FLOOR...TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE,
KARNATAKA
575003

Respondent(s)

WITH

Customs Appeal No. 23620 of 2014

[Arising out of Order in Original No. 26/2014 dated 22/08/2014 passed by Commissioner of CUSTOMS , MANGALORE]

Shri Nikharv Hasmukhlal Shah Appellant(s)

VERSUS

C.C.E. & S.T.-Mangalore
7TH FLOOR...TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE,
KARNATAKA
575003

Respondent(s)

Appearance:

Smt. NISHA BINEESH ADVOCATE
D-141, FIRST FLOOR
ANAND NIKETAN
NEW DELHI
21

For the Appellants

Shri P. Gopakumar, Jt. Commissioner(AR) For the Respondent

CORAM:
HON'BLE MR. ANIL CHOUDHARY, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20332-20334 / 2020

Date of Hearing: 20/02/2020
Date of Decision: 13/03/2020

Per : P. ANJANI KUMAR

Brief facts of the case are that the Appellants, M/s GSEC Ltd, have imported 14 consignment of Bitumen, during November 2010 – March 2012, at 3 different ports *i.e.* Karwar port (10 consignments), Mundra port (3 consignments) and Kandla Port (1 consignment), from two suppliers viz. Prime Tankers, U.A.E and Gulf Petrochem, UAE; the appellants made enquiries; procured quotations from various manufacturers; benchmarked the same against the price of Bitumen grade 60/70 sold by M/s. Indian Oil

Corporation (IOC), a manufacturer; evaluated the same to ascertain the price feasibility, vendors'/manufactures' past track record in adhering to supply schedule, quality control etc. and placed orders. Officers of DRI, Ahmedabad visited and searched the office premises of the Appellants on 09.01.2012and seized certain files and copied certain data in two DVDs. DRI issued 3 separate Show Cause Notices, in respect of imports at different ports. It was alleged that the appellants misdeclared country of origin; GSEC (appellant) & Gulf Petrochem were related parties; appellants misdeclared value, to evade payment of Customs Duty and that Shri Anand Mathur, Shri Nikharv Hashmukh Shah, Shri S K Gowri Shankar and Shri Sachin Saxena abetted with GSEC Ltd. to undervalue the said goods. The Commissioner, vide Order No.26/2014dated 30.07.2014/22.08.2014, confirmed the demand of customs duty of Rs 2, 17, 95,982 along with interest; imposed a penalty of Rs 44, 28,101+Rs. 25, 00,000on the appellants; imposed a penalty of Rs 12 Lakhs on Shri Anand Mathur and Rs 14 Lakhs on Shri Nikharav Shah. Hence these Appeals No C/23589, 23591 and 23620/2014.

2. Ms. Nisha Bineesh, Advocate, appearing on behalf of the appellants, submits that the appellants, vide letter dated 21.06.2013, requested DRI to provide copies of DVDs mentioned at Sr. Nos. 15 and 16 of Panchnama, as they apprehended that copies were made in the absence of Panch witnesses and Shri Rakesh Shah (Chairman & M.D.) DRI, vide letter dated 19.07.2013, informed that veracity of e-mails could be verified from the Computer system available with GSEC, from respective e-mail ID's. She submits that all the allegations were false and do not hold any merit; search was not legal and proper as DRI officers were not accompanied by any witness; no witnesses were present during first six hours of the search; witnesses were just called at fag end and shown seized files and DVD on which purported e-mails were copied; cross examination of Panch witnesses (Shri Nimesh Shan & Shri Hashmukh Hungu) was not allowed; DVD was neither opened in presence of the witnesses nor were shown to the witnesses; statements of Shri Gowri Shankar, Shri Sachin Saxena and Shri Nikharv Shah were contrary to the facts; no statement of Shri Rakesh Shah, Chairman & MD who was present during the search was recorded; bitumen was purchased at a discounted rate prevailing in the market as per Iranian

Mercantile Exchange; transactions were at arm's length; there was no related party transaction between GSEC and foreign supplier i.e. Gulf Petrochem; prices of imported goods are benchmarked against price of Bitumen grade 60/70 sold by M/s Indian Oil Corporation (IOC); from the cross examination of Shri Nikharv Shah it became clear that M/s Gulf Petrochem supplied goods to many parties at the same time, at the same rate at which the said goods were sold to GSEC Ltd though the goods were imported from Iran and misdeclared (as to country of origin), there was no extra benefit accrued by them if the goods as imported from UAE and not Iran.

3. Learned counsel submits that the Procedures, contained in section 105 of the Customs Act 1962 read with Section 100 of Cr. PC relating to conduct of search and drawing of Panchnama have not been followed and hence, the same is illegal; since cross-examination of Panch witnesses were not allowed, the contents of the Panchnama cannot be relied upon as it violated the principles of natural justice; appellant requested for the inspection of DVDs and for the copy of the same but has been denied; denial of cross examination of the Panch witnesses and copy of the DVD constitutes violation of the principles of natural justice. She relied on the following rulings as to requisites to be followed in drawing panchnama.

(i). Kuber Tobacco Products Ltd Vs Commissioner of C. Ex. Delhi, (2013 (290) ELT 545 (Tri-Del)
(ii). *M.P. Jain vs. CC,* 1988 (37) ELT 577 (Tribunal)
(iii). *Laxmi Prasad Vs CE*, 2009 (248) ELT 489 (Tri - Kolkata)
(iv). *Plastic DuniyaVs CCE*, 2005 (190) ELT 381 (Tri- Del)
(v). *GunwantraiHarivallabha Jani, Ranvir Bidi Works Vs CCE*, 1987 (29) ELT 151 (Tri)

4. Learned counsel further submits that authenticity of emails copied into DVD is in doubt due to non-presence of Panch witnesses, denial of opportunity to cross-examine the witnesses (Panch), and the fact that statement of Shri Rakesh Shah was not recoded; it is a settled law that an electronic record shall not be admitted in evidence unless the requirements under Section 65B of Indian Evidence Act, 1872(also contained in Section 138C of the Customs Act, 1962) are satisfied; without accompaniment of certificate in terms of Section 65B/138C, the same cannot be admitted in evidence; thus, the entire case based on the purported e-mails fails; this view was expressed by Hon'ble Supreme Court in the case of *Anvar P.V.Vs P.K Basheer,* 2017 (352) ELT 416 (SC) and by CESTAT in the case of *S.N. AgrotechVs Commissioner of Customs, New Delhi* 2018 (361) ELT 761 (Tri–Del); the above decisions are mandatorily required to be followed in terms of the principles of judicial discipline as laid down by the Hon'ble Supreme Court in *UOI VsKamlakshi Finance Corporation*, 1991 (55) ELT 433 (SC); Panch witnesses and Shri Rakesh Shah had no knowledge about the contents of the DVD as the same was never opened in their presence; investigating authority ought to have sent the DVDs to a Forensic Laboratory for verification of genuineness of e-mails and the digital signature in the e-mails; Shri Nikhrav Shah during cross-examination stated that he did not accept the contents of e-mail; E-mails as retrieved, cannot be taken as evidence in terms of Section 138C of the Customs Act, on the following grounds.

- statement of Shri Shaishav Shah was not recorded even though the emails were copied from the system belonging to him;
- provisions of Section 138C for considering computer print outs as documents and as evidence, were not followed;
- Investigating Authority did not furnish any documents to prove authenticity of DVDs and emails; even the e-mails retrieved were not copied in DVDs in presence of Panch witnesses; e-mails are contradictory and/or contain no admitted documents or records;
- contents of e-mails not proved in as much as the same do not pertain to GSEC Ltd; all incriminating e-mails are incoming only with no e-mails sent in response to the incoming mails

in absence of complying with procedures laid down under customs act for copying e-mails and retrieving the same from DVDs, e-mails referred in SCN cannot be relied upon. She relied upon.

(i). Kohinoor Foods Ltd Vs DGFT 2012 (275) ELT 320 (Del)
(ii). Air Trade International Vs CC 2010 (251) ELT 471 (T)
(iii). Videocon International Ltd Vs CC 2010 (250) ELT 553 (T)

5. Learned counsel submits that Shri Nikharv Shah in his cross-examination clearly stated that 'Country of Origin' was declared as per the import documents, which is U.A.E, and he further deposed that there is no extra benefit accrued if the country of origin is declared as U.A.E or Iran. In a catena of decisions, it is held that charge of misdeclaration cannot be sustained against the importer when Bills of Entry were filed based on documents received from foreign suppliers. She relies on the following cases.

(i). *Surya Roshni Ltd Vs CC* 2002 (147) ELT 84

(ii). *Shri Ganesh International Vs CCE* 2004 (174) ELT 171

(iii). *Porcelain Crafts & components Exim (P) Ltd Vs CC,* 2001 (138) ELT 471

(iv). *CC Vs Essar Projects Ltd* 2004 (165) EST 537

(v). *Ganapati International vs. CC,* 2001 (130) ELT 370

(vi). *Makali Metals Pvt. Ltd. vs. CC,* 2001 (138) ELT 607

Where there is no change in duty payable, the wrong mentioning of country of origin would not amount to misdeclaration as affirmed in the following cases.

(i). BEL India Trade Pvt Ltd Vs CC New Delhi 2007 (216) ELT 441 (Tri–Del).
(ii). Saboo George Vs CC Kandla 2008 (230) ELT 535 (Tri. - Del.)
(iii). *CC (EP) Mumbai-I Vs Paras Industries* 2010 (257) ELT 481 (Bom)

6. Learned counsel submits that appellant GSEC do not fall under any of the clauses as defined under Rule 2(2) to satisfy the definition of "Related person" in respect of transactions with Gulf Petrochem and Prime Tankers; Commissioner, on the one hand (Paras 67.2, 67.4, 67.5, 67.6 and 67.7), held that in the absence of any documents to show that either capital or profit and loss was shared, it is not possible to rely upon on the statements to hold that GSEC and Gulf Petrochem were related person, and on the other hand, relied on e-mails dated 14.05.2011 of Shri Anand Mathur, e-mail dated 09.04.2011 of Shri Rasheed Shaik of J.K. International & email dated 24.10.2011 of Shri Yunus Khan of Gulf Petrochem, in arriving at the conclusion that the transactions between GSEC and Gulf Petrochem is a related party transactions; since the finding itself is self-contradictory, the impugned order cannot be sustained particularly when the authenticity of e-mails is doubted; in respect of e-mail dated 24.10.2011 of Shri Yunus Khan of Gulf Petrochem, there is no evidence on record to show that there was undervaluation of goods except for the e-mails referred; GSEC never shared any expenses with Gulf Petrochem nor raised any debit note/credit note on them; in respect of mail dated 09.04.2014, by Shri Rasheed Shaikh of JF

International regarding bitumen price, it is submitted that JF International had sent the offer of price of the bitumen; price quoted was not negotiated by GSEC; There is a discount prevailing in the range of 15% to 20% on price declared in Iran Market Exchange (IME) to regular importers; GSEC never purchased materials from J. F. International; on the contrary, GSEC sold materials to J. F. International. Similarly, there are contradictory findings regarding relationship with M/s Prime Tankers (Paras 70.2. 70.7); in spite of the above findings the Lower Authority proceeded further with the allegation of related party transaction as alleged in the Show Cause Notice, which is contrary to the finding and is illegal.

7. Learned counsel further submits that in the absence of any evidence of any higher price in the contemporaneous import of bitumen or absence of violation of any condition under Rule 3(1) of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988, the lower authority ought to have accepted price declared by the Appellant; when all the conditions of Rule 3(1) are satisfied, the value is to be accepted, being the transaction value. She relies upon the following rulings.

(i). Eicher Tractors Limited - 2000 (122) ELT 321 (SC) .
(ii). *Jai Bharat Steel Industry* - 2005 (192) ELT 792 (SC)
(iii). *Bureau Veritas* - 2005 (181) ELT 3 (SC)
(iv). *Bansal Industries* - 2002 (147) ELT 967 (SC)
(v). *Aryan Chemicals* - Order dated 19.02.2013 by Commissioner (Appeals), Ahmedabad

8. Counsel submits that simple replacement of transaction value with the highest price of comparable goods is not permitted by Section 14 of the Customs Act 1962 or the said Rules; in the instant case, there is no specific evidence on record which brings out that transaction value between GSEC and foreign suppliers has been influenced by non-commercial consideration, and that invoice price does not reflect or reveal the real transaction value; Tribunal, in the case of *Oswal Fats & Oil Vs CC* 2007 (220) ELT 795 (T), held that fixed price for goods would not remain same for the imported goods when the price fluctuates in reality, and the price in a particular transaction can be rejected only when there is information or evidence that transaction was not a commercial transaction; value in the present case must be determined under Rule 3(1) because the conditions of Rule 3(1) are satisfied and none of the conditions/circumstances mentioned in Rule 3(3) are applicable; prices declared, for contemporaneous imports including the latest clearances occurred after the present investigation, are comparable to the prices declared by appellants; value declared by appellants is comparable with prices declared by other importers of the same/identical materials; appellants did not receive any abnormal discounts/special discounts and/or reduction in price from the ordinary competitive price; the parties are not related to each other and none of the conditions of Rule 3(3) of the said Rules are applicable; Price is the sole consideration and there is no payment over and above the invoice price; appellants obtained insurance based on the actual price and thus insured the goods at the price at which the same were imported; thus, finding of undervaluation cannot be sustained; there are no incriminating statements of Directors and/or chits/private records and/or records of any payments made in cash and/or recovery of any unaccounted cash amounts etc; charge of undervaluation ought not to have been confirmed based on e-mails and statements of Co-Appellants in absence of any documentary evidences; it is a well settled legal proposition that where documentary evidences are available, the same being primary form of evidence shall be preferred over oral testimony, as held by the Hon'ble Tribunal in the case of *Philip Fernandes Vs C.C.,* 2002 (146) ELT 180 (T); Hon'ble Supreme Court held, in the case of *CC Vs Initiating Explosives (I) Ltd* 2008 (224) ELT 343.that the burden to prove undervaluation lies squarely on the Revenue; the department has not put forward any substantial evidence to prove under valuation.

9. Learned counsel also submits that there was no undervaluation of the goods to the extent of US$ 120 PMT as held in the impugned order; price shown at US$ 625 PMT was an offer price; Shri Anand Mathur vide e-mail dated 09.05.2011 informed Gulf Petrochem that GSEC did not agree with the price at US$ 625 PMT as it was commercially not viable. Transactions with Gulf Petrochem at US$ 625 were never done; as per prevailing practice in the international market, importers were offered discount approximately @ 15% to 20% based on the orders placed with the suppliers; Shri Rutul Shah in his statement dated 13.02.2012 stated that as per Proforma Invoice No.153, actual price was US$ 625 PMT & the price declared to Customs was US$ 505; he did not admit that there was any undervaluation of goods and any differential amount was paid to the suppliers; Shri Nikhrav Shah in his statement dated 16.02.2012 shown unawareness about difference of US$ 120 and how the payment was made to Gulf Petrochem.

10. Learned counsel also submits that in respect of Bill of Entry No. 100 dated 24.10.2011 and emails pertaining to Bill of Entry No.100, appellants, in their reply submitted that emails copied into DVDs cannot be relied upon as evidence; finding was made, based on e-mail dated 26.10.2011 exchanged between Shri Gowri Shanker and Shri Sachin Saxena; the said e-mail cannot be relied upon; appellants provided official e-mail ID to all employees and strictly instructed not to deal with any of the suppliers or buyers with their personal e-mail Id; respective persons were only shown the emails but were not asked to comment upon; in the present case, Shri Gowri Shanker marked the purported e-mail to Sachin Saxena on his personal e-mail Id; appellants have no liability on Email exchanged in personal capacity; E-mail dated 26.10.2011 exchanged between Shri Gowri Shanker and Shri Sachin Saxena is not related to GSEC Ltd; Sachin Saxena was handling domestic market and never given charge of financial transactions; appellants came to know about this e-mail for the first time when it was shown to Shri Rutul Shah during recording his statement on 13.02.2012 and therefore, he had shown his ignorance about the said e-mail; said e-mail was not shown to Shri Anand Mathur, Vice President of appellants nor any of the persons of appellants except Shri Rutul Shah; even though Shri Gowri Shanker was party to the e-mail dated 26.10.2011, this e-mail was not shown to him. Shri Sachin Saxena left the appellants and joined hands with the group of M/s Gosma Trading Co.

11. Learned counsel moreover submits that on the whole, the impugned Order is self-contradictory; on the one hand, the Commissioner accepted the value declared in respect of Bills of Entry Nos. 12 dated 03.02.2012, 28 dated 24.02.2012, 47 and 48 dated 27.03.2012 since no evidence like E-mail or other documents were unearthed whereas he discarded the value of declared goods in respect of other 10 Bills of Entry based on purported emails copied into DVDs; value declared in all Bills of Entry was more or less same; if the declared value has been accepted in respect of Nos 12 dated 03.02.2012, 28 dated 24.02.2012, 47 and 48 dated 27.03.2012, then the Commissioner ought to have accepted the declared value in respect of other Bills of Entry.

12. Learned counsel also submits that there is no reference in any statements or documents as to any excess payments made to any of the foreign suppliers, amount, mode, persons etc ; in absence of evidence of any additional consideration flowing from appellants to foreign supplier, the transaction value ought not to have been rejected as held in Impex Steel & Bearing Co Vs CC, Delhi-IV 2014 (302) ELT 464 (Tri-Del) and CCE Vadodara Vs Indian Dye Stuff Industries 2008 (224) ELT 255 (Tri -Ahmd). The Counsel submits that commissioner erred in rejecting the price list obtained from Info-drive India Pvt Ltd, on the ground that they are not reliable source of determination of value of the said goods; in the case of *Ramchandra Art Silk Yarn Vs Union of India* 2002 (139) ELT 540 (Guj.) it was held that prices indicated in journals of repute are relevant and to be considered when transaction value provided is in doubt or not determinable; price at which appellants sold the imported goods in the domestic market is comparable with the price at which IOC sold; in the complete absence of any evidence or material on the above facts, it cannot be held that undervaluation of goods took place and thus re-determination of value of the said goods is not needed; in case of *C.C. vs. Initiating Explosives (I) Ltd*., 2008 (224) ELT 343, the Supreme Court held that the burden to prove undervaluation lies squarely on the Revenue and the same was not discharged; therefore, there is no case made out for redetermination of declared value; Tribunal in case of *Truwoods Pvt Ltd Vs Commissioner of Cus, Vishakhapatnam*, 2006 (204) ELT 288 held that where there is evidence of contemporaneous imports, the transaction value cannot be determined on any other basis; as there is complete absence of evidence of contemporaneous imports at higher prices and, therefore, the transaction value needs to be accepted.

13. Shri Gopa Kumar, Joint Commissioner, Authorised Representative, appearing for the department, reiterates the findings of OIO and submits that the Order-in-Original discussed threadbare all the aspects and arrived at logical conclusions. With specific reference to the points raised by counsel for the appellants, he submitted written submission.

14. On the legality of the Panchnama, he submits that due procedures have been followed; the investigating officers along with the panchas visited the premises and Shri Rakesh Shah, the CMD of the appellants; introduced themselves to him and showed the search warrant; Shri Rakesh Shah put his signature on the warrant; he led the officers to the chamber of Shri Shaishav Shah; e-mails were retrieved in presence of Shri Rakesh Shah; afterwards Shri Shah led the officers to the chamber of Shri Anand Mathur; all the operations during the search was carried out in the presence of Shri Rakesh Shah; he also put his signatures on the first and the last pages of the file folders and on the two DVDs in which the emails were copied; panchas were also present during all these operations and duly appended their signatures; DVDs were put in a sealed cover and sealed in the presence of the panchas; hence the allegations with regard to the Panchnama are not well founded and were raised after a gap of more than one and half years, while replying to show cause; this clearly shows that this is a mere afterthought.

15. On the veracity of emails, learned AR submits that the allegation is an afterthought; DVDs containing the emails were properly copied in the presence of Shri Rakesh Shah and the panch witnesses who appended signatures appended on it; e-mails contain the domain id @gsecl.co.in which clearly point out the authenticity of the same; the appellants allegation that only e-mails received by the employees are seen and that there are no e-mails sent by them were retrieved is not correct; as discussed in para 63.1(e) of the O-i-O, e-mail sent by Shri Anand Mathur from e-mail id anand.mathur@gsecl.co.in to M/s. Prime Tankers requesting for proforma invoice of 2400 MT immediately at 2.07 pm on 19/09/2011 has been replied by M/s. Prime Tankers on 19/09/2011 at 16.19 hrs and the said invoice for 2400 MTs has been forwarded; similarly, e-mail sent by M/s. GSEC had the name of sender with designation, address of M/s. GSEC with phone nos and website address, which are very clear; in some mails , the digital signature also is noticed; therefore, allegation of tampering made as last resort is meaningless; the authenticity of the mails was accepted in statements; there is no violation of the conditions of Section 138C of the Customs Act, 1962, as the computer from which the e-mails were retrieved was in regular use and in was in control of appellants; data download from the official computer was certified by Sri. Rakesh Shah, Chairman and MD; courts have admitted electronic evidence under the provisions of Sec 65B of the evidence Act and same is acceptable under Sec 138C of the Customs Act, 1962; Hon'ble Delhi High Court upheld the same in (i). M/s. ICICI Bank Ltd Vs Vinod (ii) Kundan Singh Vs the State (2015) and (iii) M. P. Goenka Vs Commissioner of Customs.

16. Replying to the allegation of non-adherence to the principles of Natural Justice, learned AR submits that the SCN was issued in time and ample opportunities were given to the appellants to explain their position; appellants persons appended signatures to the evidences relied upon; requests for cross examination of Shri Nikharv Shah, Shri Sachin Saxena, Shri Gowri Shankar, Shri Nimesh Shah and Shri Hasmukh N. Hangu (Panch witnesses) were sought; the same was denied on logical and legal grounds as discussed in para 53.1 of the O-i-O; during personal hearing the cross examination of Sri Nikharv Shah was allowed; advocate Shri Jithendra Motwani stated that they did not want to cross examine Sri Gowri Shankar and Shri Sachin Saxena who have given very evidentiary statements.

17. Dealing with the allegation of misdeclaration of country of origin, learned AR submits that there is evidence beyond doubt that the goods were originated in Iran, though mis-declared to be from UAE; Shri Anad Mathur, stated on 20/01/2012 that the goods were sourced from Iran; email dated 19/09/2011 sent from M/s. Prime Tankers to Sri. Anand Mathur, Sri. J.S.Brar of M/s. Prime Tankers, it is mentioned that *'we would request you to kindly ensure the name of Iran is not mentioned anywhere in the L/C will be inoperative since no bank will accept such L/C because of embargo';* the appellants contention that misdeclaration of Country of Origin did not have an impact on revenue, is out of place. He submits that *Non-Tariff Barriers (NTBs)*also assume greater significance in an era of growing international trade; NTBs are a matter of great concern for the WCO and WTO; restrictions are imposed for ensuring greater objectives like health, social security, financial security, nuclear threats, national security, conservation of bio diversity etc; subsequent to the issue of the circular No. 31(RBI/2010-11/235) dt. 27.12.2010, the eligible current account transactions with Iran were to be settled in any permitted currency outside the Asian Clearing Union(ACU); as a result, Indian banks needed to open LC with the designated focal point bank in India to deal with the focal point European Bank, which will get a certificate from competent European Authority and release Euros; the act of misdeclaration of Country of Origin is a serious offence.

18. Coming to the issue of undervaluation, learned AR submits that there is strong evidence in the act of undervaluation; e-mail communications underlying the undervaluation are clearly retrieved and were corroborated by the statements of the top officials of the company like Shri Anand Mathur; statements were never retracted; statements recorded by Customs Officers are admissible as evidence as held in K. I. Pavunny Vs Assistant Collector, 1997 (SC); appellants did not produce any proof that the statements of Anand Mathur, Nikharv Shah, Scahin Saxen and Gowri Shankar were taken out in duress; the same were not withdrawn/retracted. Shri Gowri Shankar, MD, M/s. Gosma Trading Co, on seeing email dated 15.09.2011, accepted that the value declared to customs by appellants was less by about 110 USD per MT; on seeing email dated 09.09.2011, he accepted that the price of M/s. Prime Tankers was less by about USD 110 per MT and they have not informed Customs about the discount (Para 4.2 of the O-i-O). Shri Rutul K. Shah, Deputy Manager (Accounts), of the appellant, on seeing e-mail dated 10.06.2011, admitted that an amount of Rs. 2 Crore was shown as payable to M/s. Gulf Petrochem indicated that extra money was being repatriated to the supplier M/s Gulf Petrochem (Para 4.3 of the O-i-O). Sri Anand Mathur, admitted in his statement dated 30.04.2012, that the e-mails shown as evidence were exchanged among him/other officials of his company, Shri Nikahrv Shah of M/s AEP and Shri Gowri Shankar of M/s. Gosma Trading with various officials of M/s. Gulf Petrochem / M/s. Prime Tankers. AR submits that there are strong evidences in the undervaluation adopted by the appellants; appellant's contentions that e-mails are not evidentiary, as there is no evidence of flow back of money, are in vain; appellants and the related parties have taken extra care not to leave any tangible evidence – viz. physical copies of parallel invoices etc; cases of solid misdeclaration cannot be proved with mathematical accuracy; preponderance of probability weighs heavily in favour of unearthing such cases as held in Shah Bloorr Mal versus State of Andhra Pradesh 1983 (13) ELT 1631 (SC).

19. Learned AR submits that the department has collected all the possible corroborative evidences and constructed a strong case of undervaluation and has resorted to scientific method in arriving at the correct value in arriving the demand of duty (as detailed in Paras 13.4 to 13.6 of the O-i-O; Rules 3 to 9 of the Customs Valuation Rules 2007 are sequentially discussed and the value arrived at under Rule 9 of the VR, 2007 read with section 14 of the Customs Act, 1962. Hence, there is no lacuna in this aspect and the case laws cited by the appellant have no relevance. He submits that role played by different persons in undervaluation is summarised in para 75 of the O-i-O. He submits that as the core issue of proven undervaluation is proved, the appeals may be rejected.

20. Heard both sides, gone through written submissions and perused the records of the case. Brief issues that required consideration by us in the instant case are as to whether

(i) Panchnama proceedings are vitiated and the e-mails relied upon lose evidentiary value

(ii) Appellants and their overseas suppliers are related, and if so, if there is any undervaluation on this account.

(iii) Redetermination of assessable value was correct

(iv) Country of origin has been misdeclared and if so, the same has any bearing on the case

(iv) Appellants and their officers have been rendered to pay penalty.

21. Coming to the first issue, we find that the learned counsel for the appellants have vehemently argued that the procedures to the conduct of search and drawing of Panchnama have not been followed in this case and hence the same is illegal. She submits that while the officers entered the premises early at about 11.00 Hrs. and the Panchas were called at about 17.30 Hrs. and have signed the Panchnama, the DVDs and the documents; the officers did not open the DVD to show the contents copied therein in the presence of Panch witnesses and Shri Rakesh Shah. Contrary to this, the learned AR submits that it is clear from the Panchnama that the Panch witnesses were present during the entire proceedings of Panchnama on 9/01/2012. It is not forthcoming from the Panchnama that the panchas were not present during the entire proceedings. Regarding the e-mails, the Panchnama states that "they (officers) also find a desktop computer installed in the chamber (of Shri Shaishav Shah) and recovered certain documents there from and placed them in made up file; they also find a desktop computer installed in the chamber and switch on the same and verify data stored therein and find certain e-mails useful for their investigation and they copied these emails useful for investigation and they copied the mails in a DVD and marked the same as DVD1". Similar wordings are there to indicate the copying of emails from DVD2. In this connection, we find that Delhi Bench of the Tribunal has gone into the issue of drawl of Panchnama and seizure of documents in the case of Kuber Tobacco Products Ltd. Vs. CCE, New Delhi [2013(290) ELT 545 (Tri. Del.)]. The Tribunal has pointed out various lacunae in the Panchnama referred therein observing that the Panchnama does not describe the premises or the location in the premises with reference to the neighboring surroundings; does not describe interior of the premises; does not disclose as to who had found the documents in question and where exactly those documents were located in the said premises. Bench relying on the Apex Court's decision in Kanu Amba Vishnu Vs. State of Maharashtra 1971(1) SCC 533 states that it is well settled law that the Panchnama is always a description of the premises or of the situation as noticed by the panchas in the course of recording of Panchnama. Further, the Bench observed as follows:-

> **21.** A Panchnama is a record of the things visually perceived or actually experience by the panchas in the course of investigation. If it is a search Panchnama, obviously, it should record everything that takes place in the course of search. Mere recording that the search officers offered for search of their person is not sufficient. In relation

> to the seizure of documents, it was necessary not only to record that the documents were recovered from the premises but was also necessary to record a brief description of the exact place where the documents were located in the premises and from where they were seized by the seizing officer. It was necessary to record as to what steps the seizing officer had taken so as to refrain himself and persons accompanying him from causing any damage to the documents as also to avoid any interpolation or inference in any manner with such documents and contents thereof. It was also necessary to record as to what steps were taken to safeguard the documents and to avoid possibility of any stranger's interference with the seized materials. In other words, when any document is seized, it is necessary to enclose the same in a cover and to seal such cover so that no other person gets opportunity to interfere with such document. All these things can of course be recorded briefly, but precisely. This aspect gains more importance once there is objection regarding veracity of the Panchnama and the contents of the documents stated to have been seized in the course of such Panchnama.
>
> **35.** If however, defiance of law and procedure leaves scope for tempering with the material seized, then certainly such material cannot be of any relevancy. In the case in hand, on account of various legal and procedural infirmities in the Panchnama proceedings noted above, it is apparent that the entire proceedings have lost their credibility and serious doubt arises even about the credibility of the materials stated to have been collected in the course of such proceedings.

22. Keeping the above findings in the background and going through the Panchnama in the instant case, we find that the Panchnama in question also suffers from the various discrepancies discussed in the case referred above. Coming to the precise issue of taking out the emails from respective computers, the Panchnama does not record the vital questions relating to the start of computers and copying of the emails. We find that learned counsel has raised certain vital questions as to where was the computer; what type of a computer it was; what was the password for opening of the computer; how did the officers get the password; if they got from others, who was the other person; what was the email id; what was the password of the email id etc. We find that Panchnama does not answer these questions. We also find that statement of the responsible person i.e. Shri Rakesh Shah, Chairman and MD, was not recorded, who was available in the premises during the course of Panchnama. Under the circumstances, the contents therein of the Panchnama certainly become suspect if not liable to be thrown out at the first instance. It can be argued that the current proceedings are in respect of a case of tax evasion and not in respect of a criminal prosecution and therefore non-adherence to the established principles do not vitiate the evidentiary nature of the documents. We are afraid that such an argument would be tenable only if the evidence relied upon such a Panchnama is corroborated by independent documentary evidence. A Panchnama requires to present a vivid description of the events that occur during that particular duration. In other words, it should be a verbal representation of the vision of the activity that takes place during the course of the proceedings. Absence of the same casts doubts about the authenticity of documents recovered during the course of such Panchnama. Therefore, we find that the drawl of Panchnama and particularly the copying of emails from the computer were faulty in the instant case. Therefore, the appellants are within their rights to seek the cross-examination of the Panch witnesses and the same was denied. We find that this is a clear case of violation of principles of Natural Justice. The argument taken by the learned commissioner in OIO and reiterated by AR that the claim was made belatedly and therefore be dismissed as an afterthought, is not correct. The appellants are within their rights to point out the discrepancies.

23. Coming to the authenticity of the emails, we find that as discussed above, learned counsel submitted that the electronic evidence was not properly done as per Section 65B of Indian Evidence Act, 1872 and Section 138C of Customs Act, 1962. Learned counsel submits that a certificate, as required under the legal provisions, was not produced. Crucial questions such as the description of the computer, email id, the source of password etc. have not been answered in the Panchnama. Moreover, we find that learned Commissioner himself has observed in para 64.1 that "it is not forthcoming from the records that the print outs of the emails were taken from the said two DVDs in the presence of either Shri Shaishav Shah and ShriAnand Mathur (to whom the systems from where the emails were copied, belonged) or Shri Rakesh Shah (under whose signature the emails were copied on to the DVDs). The records also do not contain the statements of either Shri Shaishav Shah or Shri Rakesh Shah". It is very surprising that the statement of Shri Shaishav Shah, from whose computer data was retrieved in his absence, was not recoded. Statement of Shri Rakesh Shah, Chairman and MD of the appellant, who was available throughout the search, was also not recorded. Learned counsel relies on the judgment of Hon'ble Supreme Court in the case of Anwar P.V. Vs. P.K. Basheer (supra). We find that apex court observes as follows: -

> ***14.*** *Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied :*
>
> *(a) There must be a certificate which identifies the electronic record containing the statement;*
>
> *(b) The certificate must describe the manner in which the electronic record was produced;*
>
> *(c) The certificate must furnish the particulars of the device involved in the production of that record;*
>
> *(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and*
>
> *(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.*
>
> ***15.*** *It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*
>
> ***16.*** *Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.*
>
> ***17.*** *The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.*

24. We also find that Tribunal in the case of SN Agrotech supra relying on the above judgment observed as follows:-

> **11.** Upon perusal of the judgment of the Hon'ble Supreme Court in the case of *Anvar P.V.* (supra), we note that the Apex Court has categorically laid down the law that unless the requirement of Section 65B of the Evidence Act is satisfied, such evidence cannot be admitted in any proceeding. We note that the Section 138C of the Customs Act is *pari materia* to Section 65B of the Evidence Act. Consequently, the evidence in the form of computer printouts, etc., recovered during the course of investigation can be admitted as in the present proceedings only subject to the satisfaction of the sub-section (2) of Section 138C. This refers to the certificate from a responsible person in relation to the operation of the relevant laptop/computer. After perusing the record of the case, we note that in respect of the electronic

> documents in the form of computer printouts from the seized laptops and other electronic devices have not been accompanied by a certificate as required by Section 138C(2) as above. In the absence of such certificate, in view of the unambiguous language in the judgment of the Hon'ble Supreme Court (supra), the said electronic documents cannot be relied upon by the Revenue for confirmation of differential duty on the appellant. In the present case, the main evidence on which, Revenue has sought to establish the case of undervaluation and misdeclaration of the imported goods is in the form of the computer printouts taken out from the laptops and other electronic devices seized from the residential premises of Shri Nikhil Asrani, Director in respect of which the requirement of Section 138C (2) has not been satisfied. On this ground, the impugned order suffers from uncurable error and hence, is liable to be set aside.

In view of the above, we find that the electronic evidence discussed relied upon in the show-cause notice were not obtained as per the procedure laid down under Section 65B of Indian Evidence Act, 1872 or Section 138C of Customs Act, 1962, as rightly submitted by the counsel for the appellants. However, this being a case of tax evasion, it would be beneficial to examine the evidence contained in the emails and to see if the Department has established the case of undervaluation by reliable evidence.

25. Coming to the allegation that the appellants and their overseas suppliers are related and therefore the transaction value declared requires to be rejected, we find that the learned Commissioner has dealt the issue at length and came to the conclusion that the appellants and the overseas suppliers are not related. However, learned Commissioner sets out a case on the basis of the contents in the emails. We find that learned Commissioner has observed as follows:

> *(i) (Para 67.2) Ongoing through the affidavit produced before Govt. of Haryana & the e-mails exchanged in that regard, I observe that on 29/10/2010 Anand Mathur sends an e-mail to Manan Goel asking him to send the attached affidavit urgently. It is clearly implying that there was no agreement of any sort by virtue of which GSEC were appointed as dealer/distributor/agent. Neither such an agreement is available on records. The affidavit contains the details of tender enquiry………. The hurried exchange of e-mails and getting the affidavit signed a few days before the tender, suggest that GSEC were not the authorized agents/dealer/distributor of Gulf Petrochem, particularly when no other agreement is available on records. Further, no correspondence is available on records to show that the authorized agents/dealer/distributor agreement was regularized later also.*

Moreover, the number of imports was very less and same were commenced from November 2010 and stopped during May 2011. Affidavit, hence, has to be construed for the limited purpose of the tender but cannot be considered as a general agreement. Under the circumstances, merely based on the statements of two persons, who are in fact co-noticees in the matter, it cannot be said that GSEC were the authorized dealers/agents/distributors.

(ii). (Para 67.4) It is undisputed that the LLP Agreement was not signed and registered; None of the imports were made in the name of JV (GSEC Aspam LLP); Records do not reveal anything to indicate the details of profit or loss earned by the transactions i.e., purchase and sale of bitumen and what amount was actually shared; Unsigned documents cannot be relied upon. In view of the above, again the reliance is now on the statements of two persons, who are in fact co-noticees in the subject case. In absence of any documents to show that either the capital was shared or profit and loss was shared, it is not possible to rely only on the statements to hold that the said two firms are related.

(iii) (Para 67.5) Mere recommendation of particular person/company for appointment as vessel operator/shipping company does not make Gulf Petrochem & GSEC related persons. Similarly sending of daily sales reports or intimating difference in the quantity will also not make them related, as these are normal business practices. Customs Act or the CVR, 2007 do not consider such acts as amounting to related persons.

(iv) (Para 67.6) Shri Anand Mathur has requested to revise the proforma invoice as the cargo was shifted to Karwar. There is no request for reduction in the CIF value; No other invoice is forthcoming indicating that the final price was again reduced to USD 482.As there is increase in the price for which bill of entry is also filed and duty is paid on such higher value, it cannot be said that GSEC have influenced the price.

(v) (Para 67.7) on examining the e-mail dated 08.05.2011, it was observed that Proforma invoice No. 153 dated 08.05.2011 is issued by Gulf Petrochem. However, no bill of entry is found for a quantity of 1500 MTs in respect of the imports from Gulf Petrochem. Similarly, no commercial invoice contains the reference of the above said Proforma invoice. In fact imports from Gulf Petrochem have stopped after 14.5.2011. Thus, the same cannot be co-related to any of the imports. In respect of e-mail dated 24.10.2011 of Shri Yunus Khan of Gulf Petrochem, there is no evidence on record to show that there was undervaluation of goods except for the e-mails referred.

> *GSEC never shared any expenses with Gulf Petrochem nor raised any debit note/credit note on them. In respect of mail dated 09.04.2014 by Shri Rasheed Shaikh of JF International regarding bitumen price, it is submitted that JF International had sent the offer of price of the bitumen. Price quoted was not negotiated by GSEC. There is a discount prevailing in the range of 15% to 20% on price declared in Iran Market Exchange (IME) to importers who import regularly in bulk. GSEC Lt. never purchased materials from J. F. International. On the contrary, GSEC sold materials to J. F. International which can be seen from the statement annexed with the reply.*
>
> *(vii) (Para 70) from the records that unlike the case of Gulf Petrochem, Prime tankers & GSEC are not alleged to be related parties.*

26. We find that the learned commissioner has come to a categorical conclusion the appellants and their overseas suppliers are not related. However, he has proceeded to re-determine the value after rejecting the declared value. Learned Commissioner has taken some value available in the emails to be the transaction value. Learned counsel for the appellants submits that Commissioner has given contradictory findings in respect of their relationship with overseas buyers but proceeded to finalise the value, on the basis of prices mentioned in emails which were not connected to the appellants. She submits that since the finding is self-contradictory, the impugned order cannot be sustained particularly when GSEC doubted the authenticity of e-mails, based on which Commissioner came to conclusion that GSEC and suppliers were related party.

27. Regarding the redetermination of the assessable value, learned counsel submitted that in the absence of any evidence of any higher price in contemporaneous imports, and in the absence of violation of any condition of Rule 3(1) of CVR, 1988, it was not correct to reject the declared value. We find that learned Commissioner has arrived at the conclusion that there was under valuation to the extent of USD 120 PMT. Learned Counsel submits that price shown at 625 USD PMT was an offer price; Shri Anand Mathur informed Gulf Petrochem, vide mail dated 9.5.11, that they did not agree to the price and the same was not commercially viable. She submits that as per prevailing practice 15-20% discount was given and they got 20% discount.

Though Shri Rutul Shah in his statement dated 13.2.2012 stated that 625 USD was Proforma price and value declared to customs was USD 505; however he did not accept that there is undervaluation; Shri Nikharv Shah in his statement dated 16.2.2012 said he was unaware of difference of USD 120 in the transaction.

28. We find that learned Commissioner has proceeded on the figures found in emails without ascertaining if the same were finalised. We find that learned Commissioner accepted the declared price in respect of Bills of Entry and revised the same in some Bills of Entry. We find that the same is redetermined arguably on the basis of the price quoted in the emails. We find that the impugned order bases the value as found in the email dt.15.09.2011 between Shri Gowri Shankar, MD, M/s. Gosma Trading Co and Shri Anand Mathur; e-mail dated 10.06.2011 between Shri Nikhrav Shah of M/s AEP and ShriAnand Mathur of M/s. GSEC regarding the general account as on date and other emails. Interesting points that emerge is that learned Commissioner also finds certain incongruities in the mails and observes as follows:

> *(i) (Para 70.4) No evidence like e-mail or commercial invoices are forthcoming indicating that the CNF price is either USD 598 or USD 612 or USD 680. This clearly implies that unless there is reasonable doubt in a particular consignment, declared value cannot be rejected.*
>
> *(ii) (Para 70.5) Once the transaction value itself is not liable to be rejected, then the question of redetermination based on the statements does not arise. It is settled law that merely basing on the statement and in absence of any material evidence like NIDB data to show the prices the transaction value cannot be rejected.*
>
> *(iii) (Para 70.6) Investigation has not brought out any evidence indicating payment of differential amount to the supplier and there is no investigation about the sale prices at which identical goods were sold in the domestic market during the disputed period. In the absence of evidence like e-mails, commercial invoices etc., the value of imported goods could have been compared with contemporaneous imports. The documents do not reveal anything indicating that such an exercise has been done.*
>
> *(iv) (Para 70.7) It is well settled law that suspicion, howsoever grave, cannot take place of cogent evidence to establish a case of under valuation. Once the burden case on department to prove undervaluation, has not been discharged, then re-determination of value is devoid of merit…, in the subject 3 consignments neither any piece of evidence indicating under valuation nor there is any information about comparable imports. Hence, following the judicial discipline I have to extend the benefit of doubt to the importer.*

29. Further, we find that value of imported goods must be determined after rejecting, if any, of the conditions mentioned in Rule 3 of the Customs Valuation Rules, 1988/2007. We find that the impugned order does not discuss the conditions violated if any therein. However, we find that learned Commissioner has not given any reasons to indicate as to how the declared prices were rejected under the provisions of Customs Valuation Rules. We find that Apex Court in the case of Eicher Tractor Ltd. supra have laid down that

> ***7.*** *The rules which have been framed are the Customs, Valuation (Determination of Price of Imported Goods) Rules, 1988. The rules came into force on 16th August, 1988. Under Rule 3(i) "the value of imported goods shall be the transaction value". "Transaction value"' has been defined in Rule 2(f) as meaning the value determined in accordance with Rule 4. Rule 4(1) in turn states :*
>
> *"The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules."*
>
> ***8.*** *Reading Rule 3(i) and Rule 4(1) together, it is clear that a mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods under assessment as the transaction value. But the mandate is not invariable and is subject to certain exceptions specified in Rule 4(2) namely :*
>
> *(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -*
>
> *(i) are imposed or required by law or by the public authorities in India;*
>
> *or*
>
> *(ii) limit the geographical area in which the goods may be resold; or*
>
> *(iii) do not substantially affect the value of the goods;*
>
> *(b) the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;*
>
> *(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and*
>
> *(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3)."*
>
> ***9.*** *These exceptions are in expansion and explicatory of the special circumstances in Section 14(1) quoted earlier. It follows that unless the price actually paid for the particular transaction falls within the exceptions, the Customs authorities are bound to assess the duty on the transaction value.*
>
> ***10.*** *The respondent's submission is that the phrase "the transaction value" read in conjunction with the word "payable" in Rule 4(1) allows determination of the ordinary international value of the goods to be ascertained on the basis of data other than the price actually paid for the goods. This, according to the respondent, would be in keeping with the overriding effect of Section 14(1). We cannot agree.*
>
> ***11.*** *It is true that the Rules are framed under Section 14(1A) and are subject to the conditions in Section 14(1). Rule 4 is in fact directly relatable to Section 14(1). Both Section 14(1) and Rule 4 provide that the price paid by an importer to the vendor in the*

ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularised in Rule 4(2).

12. *Rule 4(1) speaks of the transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). "Payable" in the context of the language of Rule 4(1) must, therefore, be read as referring to "the particular transaction" and payability in respect of the transaction envisages a situation where payment of price may be deferred.*

13. *That Rule 4 is limited to the transaction in question is also supported by the provisions of the other Rules each of which provide for alternate modes of valuation and allow evidence of value of goods other than those under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 "using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India." If the phrase 'the transaction value' used in Rule 4 were not limited to the particular transaction then the other Rules which refer to other transactions and data would become redundant.*

14. *It is only when the transaction value under Rule 4 is rejected, then under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules. Conversely if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules.*

30. Learned counsel submits that in spite of the above findings the Lower Authority proceeded further with the allegation of related party transaction as alleged in the Show Cause Notice which contrary is to the finding and is illegal. We find on going through the emails that in none of the emails, there is any confirmation given by the appellants regarding the acceptance of the price. The purported emails are between some persons of the supplier parties and some persons of the appellants. Even assuming that the said emails are from the appellants themselves, there is no formal or informal acceptance on the part of the appellants that the said price is acceptable to them. Moreover, we find that the e-mails show the balance of payments are exchanged not with the appellants. Therefore, the evidentiary value of the same is not beyond doubt. Other than the emails, we do not find any documentary or other evidence to indicate that the said price of 610/625 USD PMT has been accepted by the appellants. We find that at best the price of 610/625 USD PMT can be a price quoted. Unless it is established that the price has actually been agreed upon by the contracting parties, the same cannot be held to be the price paid or payable and thus to be transaction value. Moreover, the appellants claim that they were given a discount of 15-20% as per prevailing practice, was neither examined nor countered. We find that Tribunal in the case of Cipla Ltd 2013(297) ELT 281 (Tri. Mum) held that quotation value cannot be held to be assessable value. Moreover, there is no provision under CVR, 1988/2007 to consider the quotation price/quoted price to be assessable value.

31. We find that there is no evidence placed to show that there has been a flow-back of money from the importer to the overseas suppliers. Under these circumstances, we find that the prices declared by the appellants need to be considered as assessable value. We find that in the absence of evidence to effect that there is no flow-back, declared prices cannot be rejected in view of the judgment of the Tribunal in Impex Steel and Bearing Co 2014(302) ELT 464 (Tri- Del) and Shri Maruthi Nandan Impex 2014(302) ELT 406 (Tri- Mum).The chairman/MD, of the appellant, was not questioned either about the discrepancies or on the averments of other persons. It is surprising that the investigations were concluded without questioning the Top man or without giving the reasons as to why such person is only a dummy and someone else was managing the affairs. We find that the department has missed out on an opportunity to fortify its own case.

32. We find that the appellants have submitted the prevailing international prices on the basis of certain commercial documents. The same were not considered in the impugned order. Moreover, no reasons, if any, for rejecting the same have also been recorded. Moreover, the appellants submit that the insurance policy obtained by them for the cargo was on the price declared by the appellants and not on the price alleged by the Department. We find that Revenue has relied upon the insurance policies obtained by the appellants to establish that the country of origin was Iran and not UAE as claimed by the appellants in the Bills of Entry. In such circumstances, we find that the Department cannot take a different stand vis-à-vis the insurance claims to suit their allegation. Other than the findings on the basis of emails, revenue has not put forth any acceptable evidence. Learned AR tried to argue on the issue of preponderance of probability as is applicable to taxation matters. However, we find that preponderance of probability ends when a fact is established, that is to say, that in view of the circumstantial evidence and evidence available on record, any common man of prudent understanding would come to conclusion that such an act as alleged has occurred. It may suggest that there is undervaluation. However, the same is not useful at arriving at the exact quantum of duty evaded, which is not in the realm of surmises and conjectures but needs to be based on hard figures that are reliable. The same is not established as per our discussion above. We find that that Panchnama is not self-speaking; proper procedure to record electronic evidence was not followed; conclusions have been drawn on figures which were neither accepted nor confirmed; no proof that the redetermined value was the price paid or payable, was provided and no evidence of flow back has been made available. Therefore, we find that the department's allegations of undervaluation are not sustainable. Once such allegations are not sustained, duty demand and consequential penalties imposed on M/s GSEC and other appellants are liable to be set aside.

33. Another issue involved in the case is that there was misdeclaration of country of origin and the circular of RBI has been violated vis a vis imports from Iran. The department relies upon the emails; insurance policy showing movement from Bandar Abbas (Iran) to respective ports in India and acceptance by the personnel involved. We find that the learned counsel fairly concedes that the origin of the goods was misdeclared as the import documents indicated the COO to be UAE. She however, submits that they had nothing to gain in terms of duty payable by misdeclaring COO as there is no differential duty. On going through the records we find that at least in two instances, as observed in the OIO, COO was declared to be Iran. However, the OIO is silent on action, taken by the department in respect of those consignments, other than provisional assessment. The OIO is silent if any action, such as seizure or informing RBI etc, taken in respect of such consignments. The OIO doesn't link the misdeclaration to the redetermination of value also. Therefore, the department, though established the misdeclaration, did not proceed further to discuss the consequences and penal action, thereby supporting the counsel's contention that it has no bearing on the case. We find that the department was well within its right to seize the goods for such misdeclaration and impose penalties under Section 112 of Customs Act, 1962, notwithstanding the fact that the appellants had nothing to gain financially by such an action as there was no differential duty involved. We find that *mens rea* is not an essential prerequisite for action under Section 111(m) and Section 112(a) of the Customs Act, 1962. However, as the SCN and OIO are silent on these issues, we refrain from discussing it further.

34. In view of the above, the appeals in question are allowed with consequential relief, if any, as per law.

(Order pronounced in open court
on 13/03/2020)

(ANIL CHOUDHARY)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER