

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH – COURT NO.III

**Customs Appeal No.54929 of 2023 with
Customs Misc. Application No.50334 of 2023**

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

M/s. Bright Metal India Pvt. Ltd.

F-671, Road No.9F2, VKI Area,
Jaipur, Rajasthan.

Appellant

Versus

**Commissioner of Customs, Central Excise
& CGST,**

NCRB, Statue Circle, Jaipur,
Rajasthan-302 005.

Respondent

With

Customs Appeal No.54930 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Sanjay Porwal, Director

of M/s. Bright Metal India Pvt.Ltd.
C-5, Krishna Marg, Shyam Nagar,
Ajmer Road, Jaipur,
Rajasthan.

Appellant

Versus

**Commissioner of Customs, Excise and
CGST,**

NCRB, Statue Circle, Jaipur,
Rajasthan-302 005.

Respondent

With

Customs Appeal No.55115 of 2023

With Customs Stay Application No.50448 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive)

NCRB, Statue Circle, "C" Scheme,
Jaipur, Rajasthan-302 005.

Appellant

Versus

M/s. Hub & Links Logistics (I)Pvt. Ltd.

Suite No.101,Rishabh Arcade,
Near to GST Bhawan, Plot No.83,
Sector-8, Ghandhidham-370 201.

Respondent

With

**Customs Appeal No.55116 of 2023
With Customs Stay Application No.50449 of 2023**

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive)

NCRB, Statue Circle, "C" Scheme,
Jaipur, Rajasthan-302 005.

Appellant

Versus

Shri Abdul Kadir S/o Ismail,

Prop. of M/s. Reliable Agencies,
Karim Industrial Estate, Opp. Dada Mill,
Near Dream Honda Showroom,
Udhna, Surat, Gujarat-394 210.

Respondent

With

Customs Appeal No.55117 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive)

NCRB, Statue Circle, "C" Scheme,
Jaipur, Rajasthan-302 005.

Appellant

Versus

M/s. Bright Metal India Pvt. Ltd.

F-671, Road No.9F2, VKI Area,
Jaipur, Rajasthan.

Respondent

And

Customs Appeal No.55118 of 2023

(Arising out of Order-in-Appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur)

Commissioner of Customs (Preventive)

NCRB, Statue Circle, "C" Scheme,
Jaipur, Rajasthan-302 005.

Appellant

Versus

Shri Sanjay Porwal, Director of

of M/s. Bright Metal India Pvt. Ltd.,
C-5, Krishna Marg, Shyam Nagar,
Ajmer Road, Jaipur,
Rajasthan.

Respondent

APPEARANCE:

Shri S.L. Poddar and Shri J.P. Singh, Advocates for the assesseees.
Shri Rakesh Kumar, Authorised Representative for the Revenue.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS.51371-51376 /2023**DATE OF HEARING:27.07.2023**
DATE OF DECISION:26.09.2023**BINU TAMTA:**

All the six appeals, four filed by the Department and the remaining two by the importer company and its Director, arise out of the common order, being Order-in-appeal No.22-24(RLM)CUS/JPR/2023 dated 15.05.2023. The parties are referred to in their capacity as in Appeal No.54929 of 2023, titled as M/s. Bright Metal (India) Pvt. Ltd., Jaipur Vs. Commissioner of Customs, Central Excise and CGST, Jaipur.

2. The facts of the present case are that the importer company had imported Brass Scrap "Pallu" for its business vide Bill of Entry (BOE) No.6601963 dated 09.12.2021, which was filed at ICD (Inland Containers Depot), Concor, Kanakpura, Jaipur under the provisions of Section 46 of the Customs Act, 1962 through Kodiak Containers Lines Pvt. Ltd., Code No.AADCK2481PCH001 having assessable value of Rs.90,23,371/- as the tariff value fixed for Brass Scrap (all grades) under CTH 74040022 @ 5691 USD/MT vide Notification No.95/2021 – Customs (N.T.) dated 30.11.2021 and classification of the same was made under CTH (Customs Tariff Heading) 74040022 and duty was self-assessed BCD(Basic Customs duty) @ 2.5% + SWS (Social Welfare Surcharge) @ 10% + IGST @ 18%.

3. The importer company had uploaded documents regarding its BOE No.6601963 i.e. Bill of Lading bearing reference no.SASLNH21715 dated 28.11.2021, Container No.SVWU9892740/40, Seal No.017410, Port of Lading JEBEL ALI (UAE) along with Pre-Shipment Inspection Certificate (PSIC) issued by Pre-Shipment Inspection Agency (PSIA) bearing certificate No.WFZE/SHJO/9959/2021 dated 13.11.2021, which duly mentioned type of scrap – unshredded, Country of Origin – UAE, Place of Inspection – Sharjah and duly enclosed Commercial Invoice, Packing List, Sales Contract,

Certificate of Origin and Form 6 (Transboundary movement document) mentioning country of import/export as UAE issued by M/s. Aden Scrap Trading (LLC), UAE.

4. The said BOE was given first check by faceless assessing officer and received on the port, i.e. ICD, Concor, Kanakpura for examination first. However, the container tracking on PICT (Pakistani International Container Terminal) divulged that the container had actually originated from Pakistan as the seal numbers mentioned for the container on PICT matched with those mentioned in the Indian Customs EDI (Electronic Data Interface) Systems (ICES).

5. The importer company submitted to the officers of the Customs that they had imported the goods from UAE with complete documents (as required for import) and that they had no knowledge about the discrepancy of goods as the importer company has no connection with the supplier in Pakistan. They further submitted that the importer company had never contacted any person in Pakistan for importing brass scrap or any other commodity and they always imported the goods through middleman i.e. Indenter, and the goods mentioned in BOE No.6601963 was imported through Indenter Mr. Abdul Kader Bombaywala, who is based in Surat. However, the Customs Officers were not convinced about the averments made by the importer company that time and thereafter seized the goods vide BOE 6601963 vide seizure memo dated 19.12.2021.

6. That as the Customs officials alleged that the goods originated from Pakistan instead of UAE, the importer company had submitted applications dated 20.12.2021, 02.03.2022 and 30.12.2022 to the customs authorities to cancel the bill of entry under Section 149 of the Customs Act, 1962 and they may be allowed to re-export the goods back to the UAE at the earliest to avoid any detention/demurrage/ground rent charges.

7. On scrutiny of the Bills of Entries submitted by the appellant in respect of the past imports, it was found that same modus operandi was adopted as the container tracking on PICT divulged that the containers had actually originated from Pakistan, the details of 6 Bills of Entries filed and cleared is as under :-

S. No.	B.E. No.	BE date	Total Ass.Value
1.	2643706	06.02.202	8985522
2.	2797226	17.02.2021	8747005
3.	5063295	16.08.2021	8808842
4.	5173059	24.08.2021	7412945
5.	5407130	11.09.2021	7443238
6.	6430842	27.11.2021	8715980

8. That in follow-up action, premises of Mr. Abdul Kader Bombaywala, Indenter of the importer company was searched and statements of Mr. Abdul Kader and Shri Kailash Vittal Mhatre, Sr. Manager, M/s. Hub and Links India Pvt., Ltd. were recorded. As the Importer Company was found to have mis-declared the country of origin as UAE instead of Pakistan with intent to evade customs duty and mis-classified the goods under CTH 74040022 instead of 98060000, the goods imported were seized by the Customs officers under Section 110 of the Customs Act, 1962 (the Act). Accordingly, show cause notice dated 15.06.2022 was issued to the Importer Company and its Directors, which was duly replied by them.

9. Having examined the matter, the Adjudicating Authority passed the order-in-original dated 24.02.2023, whereby the imported goods were confiscated under Section 111(m) and the Importer Company was allowed to redeem the goods for re-export on payment of redemption fine of Rs.10 lakhs under Section 125 of the Act and also imposed penalty of Rs.3 lakh each under Section 112(a)(ii) and Section 114 AA of the Act on the Importer Company. Penalty of Rs.1,50,000/- each under Section 112 (a)(ii) and Section 114 AA of the Act imposed on Shri Sanjay Porwal, Director of the

Company. Penalty of Rs.3 lakh each was imposed on Mr. Abdul Kadir under Section 112(a)(ii) and 114 AA of the Act. Similarly penalty of Rs. 3 lakh each was imposed on M/s. Hub and Links India Pvt. Ltd. under Section 112 (a)(ii) and Section 114 AA of the Act. The said order was challenged, both by the Revenue as well as by the Importer Company and its Directors. The Commissioner (Appeals) affirmed the order of confiscation, allowing of redemption of the goods for re-export of payment of redemption fine of Rs.10 lakh. However, the penalty amount was enhanced on the Importer Company from Rs.3 lakh to Rs.10 lakh under Section 112 (a)(ii) and Rs.3 Lakh to Rs.15 Lakhs under Section 114 AA of the Act. Penalty on Shri Sanjay Porwal was enhanced from Rs. 1,50,000/- to Rs.5 Lakh under Section 112 (a)(ii) and from Rs.1,50,000/- to Rs.15 Lakh under Section 114 AA of the Act. Hence, the present appeals have been filed before this Tribunal both by the Revenue as well as by the Importer Company and its Director.

10. We have heard Shri Rakesh Kumar, Authorised Representative for the Revenue and the learned Counsel for the appellant, Shri S.L. Poddar. We have examined the records of the case and the legal provisions, as interpreted in catena of judgements.

11. Since we are considering the appeal filed by the Importer Company as the lead matter, we would refer to the contentions raised by them, which are as under:-

(a) Investigation and inquiry were inadequate and incomplete as no investigation was conducted with their supplier in UAE or the original supplier in Pakistan.

(b) There is no allegation in the show cause notice that there was acute shortage of Brass Scrap in the international market at the material time or they have purchased at less than the prevailing price in the international market forcing them to procure the goods from Pakistan. In other words, there is no allegation that there was incentive for the company to import the goods of Pakistan origin. Thus, there is no evidence that the Importer Company knowingly and intentionally mis-declared the country of origin.

(c) That all the relevant documents, as submitted by their suppliers in UAE were duly filed by them before the Customs Authorities.

(d) The information obtained from PICT website is not authentic and reliable and relied on the decision of the Apex Court in **M/s. Hewlett Packard India Pvt. Ltd. – 2023 (1) TMI 700**, which says that online sources such as Wikipedia should be used with due caution to support the conclusion of the investigation.

(e) Re-exporting the goods would serve the purpose sought to be achieved by the Government of India in imposing BCD at 200% on the goods originating in Pakistan and referred to the decision in **M/s. Raj Grow Impex LLP & Ors. – 2021 (377) ELT 145**, whereby the Apex Court allowed re-export of the imported beans, peas and pulses, though they were held to be prohibited. The redemption fine and penalty in case of re-export of the goods is not imposable.

(f) The goods are not liable to confiscation under Section 111 (m) of the Act.

(g) Penalty under Section 112(a)(ii) and Section 114 AA of the Act are not sustainable.

12. The learned Authorised Representative for the Revenue has seriously challenged the decision of the lower authorities both on account of allowing re-export of the goods on payment of meagre amount of redemption fine as well as on the quantum of penalty under section 112 (a) and 114AA being not commensurate with the gravity of the case or in terms of the provisions thereof. The submission in this regard is that prerequisite for the import of unshredded metal scrap is restricted by the condition of proper Pre Shipment Inspection Certificate and therefore the goods have to be treated as 'restricted goods'. In the present case the goods have been imported on the basis of fake PSIC certificate which means import is without any certificate. The other limb of the argument is that in the show cause notice there is no proposal for re-export of the impugned goods and

therefore the adjudicating authority had no jurisdiction to order re-export. The proposal of re-export are separate from the adjudication proceedings. Referring to the provisions of section 112 (a) (ii) of the Act the learned AR contended that the penalty recommended therein is not exceeding 10% of the duty sought to be evaded whereas the amount of duty, which is sought to be evaded here is Rs. 2,97,73,709/ and therefore maximum penalty was imposable. Similarly, the penalty under section 114AA has to be five times the value of the goods and the value of the declared consignment was Rs. 1,14,15, 967/- and, therefore, penalty imposed by the authorities does not commensurate with that.

13. Before advertng to the controversy involved in these Appeals it is necessary to notice that the Central Government issued Notification No 05 of 2019-Cus., dated 16.02.2019 under section 8A of the Customs Tariff Act, 1975 (hereinafter referred to as CTA) amending the first schedule of CTA, thereby inserting a new entry CTH 9806 0000 for all goods originating in or exported from Pakistan and levied BCD @ 200% on them. The entry relating thereto reads as:-

(1)	(2)	(3)	(4)	(5)
"9806 0000	All goods originating from the Islamic Republic of Pakistan	--	200%	

Country of Origin:

14. The first and the foremost question to be considered is whether the goods in question originated in or were exported from Pakistan. The goods in question were shipped in container No. SVWU9892740/40. On the basis of the information from the Additional Director General, National Customs Targeting Centre (NCTC), New Delhi that the said container was at high risk as it had originated from Pakistan investigations were carried out. Accordingly, the container No SVWU9892740/40 with seal No. 017410

relating to Bill of Entry No. 6601963 dated 9.12.2021 was verified from the website of Pakistan International Container Tracking Portal (PICT) <https://pict.com.pk/en/online-Tracking> and it revealed that the seal No. affixed on the said container was the same as originated from Pakistan. Further, on physical examination of the goods some worn and torn PP bags filled with brass scrap were found on which the words Karachi, Pakistan, Government of Punjab, Korangi Industrial Area etc. were found printed. Coupled with this, the tracking details also revealed the actual arrival date of the said container, i. e. the B/L from Karachi to JEBEL ALI was issued on 18.11.2021 at Karachi and B/L from JEBEL ALI to Nhava Sheva was issued on 28.11.2021 and the container was found to be intact with the same seal throughout from Pakistan to India. This only reflects that there could not have been any inspection at Sharjah, UAE as per the PSIC Certificate dated 13.11.2021 issued by PSIA and therefore the necessary corollary is that the PSIC was fake and forged. This also points to the fact that the container in question originated from Pakistan.

15. We also find that statement of Shri Kailash Vitthal Mhatre, Senior Manager, M/s HUB & Links Logistics (I) Pvt. Ltd., the delivery agent, was recorded wherein he explained the container wise chart as:

Column No. 1 gives the details of container number.

Column No. 2 provides the details of B/L number and date issued from Karachi.

Column No. 3 refers to the container seal number at Karachi.

Column No. 4 gives the name of goods as per B/L and quantity.

Column No. 5 shows destination as per B/L issued at Karachi.

Column No.6 provides name of the vessel and reaching at destination as per B/L issued at Karachi.

Column No.7 shows B/L number and date issued at JEBEL ALI.

Column No.8 shows container seal number as per B/L issued at JEBEL ALI.

Column No.9 gives the name of goods and quantity as per B/L issued at JEBEL ALI.

Column No.10 shows destination as per B/L issue at JEBEL\ ALI.

Column No. 11 shows name of vessel as per B/L issued at JEBEL ALI.

The aforesaid container wise chart details clearly show that the initial details pertain to Karachi and it is the later ones which relates to JEBEL ALI. This itself proves that the country of origin of the containers is Pakistan and not UAE where the containers have been shown to have arrived later on with the sole object of misleading the country of origin. This conclusion of ours gets further fortified by the earlier six imports managed by the importer company by following similar modus-operandi that the goods in question were loaded in these containers in Karachi Port and were then transported to JEBEL ALI and from there it was transported to Indian ports. The goods once loaded at Karachi were not unloaded from the containers at JEBEL ALI and only B/L date of these containers were changed and all other details, i.e., B/L No., description of the goods, quantity, container number and seal number remained the same. There is no reason to disprove and disregard the aforesaid modus-operandi mentioned in the statement of Shri Kailash Vitthal Mhatre recorded under section 108 of the Customs Act, 1962. The documents showing the movement of the container with goods from Karachi to JEBEL ALI, container wise sheet, container wise tracking details obtained from PICT website clearly indicated that the containers originated from Pakistan. We also do not agree with the reliance placed by the learned Counsel for the appellant on the decision of the Apex Court in Hewlett Packard (supra) which is clearly distinguishable from the facts of the present case. The department having found that the goods originated from Pakistan

was not wrong in re-classifying the goods under CTH 98060000 as per Notification No. 5 /2019-Cus dated 16.2.2019. Nothing further was required to be done at the end of the department as pleaded by the importer company. The justification or non-justification of procuring the goods i. e., Brass scrap "Pallu" from Pakistan was on the importer company which they failed to substantiate by any valid supporting evidence. The burden was exclusively on the importer company and not on the revenue to place on record positive evidence in support of their submissions.

Responsibility of the Importer Company:

16. Having determined the country of origin of the containers in question we would now examine the defence taken by the learned Counsel for the appellant that they had no knowledge about the country of origin being Pakistan and that they have no connection with the supplier in Pakistan and therefore they have neither mis-declared nor misled the department. In fact the importer company had gone to the extent of saying that they have no means to find out the country of origin of the goods as they do not directly deal with the suppliers rather there are intermediary agents / indenters who process the imports. We do not agree with the submissions of the appellant for the simple reason that the appellant claims to be a very reputed company in the business of manufacturing of brass and copper items for which they have been importing raw material namely, brass/copper scrap from different places outside India. The importer company on the one hand is claiming to be a 'one star export house' and on other hand is pleading ignorance of such basic facts. Declaring the Country of Origin is an essential part of the Bill of Entry and the assessment, *inter alia*, depends on the Country of Origin. Duty could be exempted or increased (as in this case) depending on the Country of Origin. Restrictions on imports and exports could also depend on the Country of Origin. The Country of Origin Certificate also has to be obtained from the authorized agency of that

country. Pre-shipment inspection certificates have to be obtained from the agency, which is authorized to issue such certificate in the country, where they are exported from. Thus, it is impossible that any importer would not know both the Country of Origin and the Country of Export of every single consignment. The appellant being an importer, who seems to be well versed with the import-export policy is responsible for the import and is answerable for any violation of the statutory provisions, mis-declaration or any issues relating to the nature, quantum or valuation of the goods, factum of country of origin etc. and cannot plead ignorance thereof. The appellant has attributed the burden of mis-declaration of the country of origin as UAE on the supplier or the indenter, however the same is not believable as the appellant is a regular importer of these goods and during the investigation of the live consignment the past imports were also unearthed which were also routed in similar fashion.

The Handbook of Procedures 2015-2020, Para 2.56 (b) also makes the importer and exporter responsible as under:-

"2.56 Responsibility and Liability of PSIA, Importer and Exporter

(a)

(b) The importer and exporter would be jointly and severally responsible for ensuring that the material imported is in accordance with the declaration given in PSIC. In case of any mis-declaration, they shall be liable for penal action under Foreign Trade (Development & Regulation) Act, 1992, as amended."

17. The next contention of the appellant is that they have submitted all the requisite documents showing the country of origin as UAE. As noted above, there is complete discrepancy as the PSI Certificate dated 13.11.2021 shows the date of inspection as 11.11.2021 at Sharjah, UAE whereas the containers itself departed from Pakistan on 18.11.2021 as per the B/L from Karachi to JEBELALI, therefore the only logical conclusion is that the

certificate is fake or has been forged and no inspection was actually conducted at Sharjah, UAE. We find that the authorities below have rightly observed that in terms of Para 2.32 of FTP 2015-2020 read with para 2.54 of Handbook of Procedures, such PSI Certificate is not valid and no reliance can be placed thereon.

Confiscation of Goods:

18. We now come to the issue whether goods are liable to confiscation under section 111 (m) of the Act. Having considered in extenso that the country of origin of the containers in question is Pakistan, the same are covered by the notification No. 05/2019, specifically issued to provide high rate of duty for all goods originating in or exported from the Islamic Republic of Pakistan. As discussed above, the PSI Certificate submitted by the appellant having been found to be fake, the import is violative of the Foreign Trade Policy and Rule 13 of the Rules which makes it mandatory to submit the pre shipment inspection certificate for clearance of the brass scrap, however in the present case there is no valid PSIC in respect of the imports in question. The issue needs to be examined in the light of the provisions of section 46 under which the appellant had filed the bill of entry for home consumption as the provisions thereof makes it obligatory on the part of the importer to make a declaration as to the truth of the contents of such bill of entry and shall in support of the same produce to the proper officer the invoice relating to the goods under import. The appellant has submitted commercial invoices along with bill of lading etc showing the country of origin of the goods as UAE, however as discussed above, country of origin of the goods herein is Pakistan. In that view, the goods are liable for confiscation under section 111 (m) of the Act, which categorically provides any goods which do not correspond in respect of value or 'in any other particular' with the entry made under this Act. Thus the order of confiscation passed by the authorities is held to be in accordance with law.

Penalty under Section 112 (a)(ii) and 114AA of the Act:-

19. Both the importer company and its Director has challenged the levy of penalty under section 112 (a) (ii) and 114 AA of the Act on the ground that they were neither aware of the origin of the goods from Pakistan nor had any intent to import the goods having their origin in Pakistan and hence they cannot be penalised. We are afraid we do not agree with this submission in view of the entire discussion above which prima-facie points to the acts of omission and commission on the part of the importer, M/s. Bright Metal (India) Pvt. Ltd., who imported the goods vide bill of entry No. 6601963 dated 9.12.2021 and Sanjay Porwal being the active director of the importer company who looks after all the work of import of the goods and was fully responsible for purchase of the said goods and its clearance thereof, are liable to penalty under section 112 (a) (ii) and 114AA of the Act for contravention of the provisions of the Customs Act, 1962 read with FTP 2015-20. The conclusions arrived at by us gain support from the decision in **Collector of Customs, Bombay Vs. M/s Elephanta Oil & Industries 2003 (152) ELT 257 (SC)**, wherein the Apex Court distinguishing the provisions of section 112 (a) imposing penalty and section 125 providing for redemption fine, upheld the imposition of penalty under section 112 of the Act, observing :

"10. From the aforesaid two sections, it is apparent that both operate in different fields, namely, one requires imposition of penalty and other provides for confiscation of improperly imported goods. Section 111 provides that goods brought from the place outside India are liable to confiscation if the goods are improperly imported as provided therein. In cases where goods are liable to confiscation, discretion is given to the authority to impose penalty. Further, Section 125 empowers confiscation of such goods and thereafter, confiscated goods vest in the Central Government. The Section further empowers the

authority to give an option to the owner or the person from whom goods are seized to pay fine in lieu of such confiscation for return of the goods and the fine is also limited up to the market price of the goods. Therefore, levy of fine in lieu of confiscation is in addition to levy of penalty imposable under Section 112.”

20. We are also of the view that the quantum of penalty imposed by the impugned order is justifiable. Section 112 (a)(ii) provides for duty related penalty, i.e., penalty not exceeding ten percent of the duty sought to be evaded. Thus the outer limit or the maximum amount of penalty that could be levied could not be more than ten percent of the duty. Similarly, the penalty under section 114AA is value related, i.e., penalty not exceeding five times the value of goods. Here also the Commissioner has proportionally increased the penalty and we find no reason to interfere with the same. Normally, the principle in levying penalty by way of punishment has to commensurate in terms of the provisions providing the penalty. As against the penalty imposed by the adjudicating authority, the appellate authority has considerably increased the penalty amount on all counts both against the importer company and also its director which is not only sufficient to penalise them but would also act as a deterrent in future. Hence no interference is called for by us. The reliance placed by the Revenue on the decision of the Apex Court in **CC, Mumbai Vs. Mansi Impex - 2011(270) ELT 631** is of no assistance in the present case, where the Court dealt with the levy of redemption fine and penalty without determination of the market price of the goods confiscated and therefore reduction of the same by the Tribunal was not interfered with.

Re-export & Redemption Fine with Penalty:

21. We find that immediately after the seizure of the goods on 19.12.2021 the appellant on the very next day made an application dated 20.12.2021 requesting to re-export the goods back to UAE. The appellant

repeated the request on 2.03.2022 and subsequently on 30.12.2022. Accordingly, the adjudicating authority vide order in original dated 24.04.2023 confiscated the goods under Section 111(m) and gave an option to the appellant to redeem the goods and re-export them on payment of redemption fine under section 125 of the Act. The said order has been maintained by the Commissioner (Appeal) by the impugned order relying on the decisions of the Supreme Court and the Tribunal holding that request of the importer for re-export is in consonance with the underline object of issuing the notification dated 16.02.2019 under section 8A of the Customs Tariff Act. We may now consider whether the request of re-export has been rightly allowed by the authorities below as well as on the issue of imposition of redemption fine when the goods are allowed to be re-exported back. The department has raised an objection that permission for re-export on a request made by the importer company is not within the purview of the adjudication proceedings in view of the decision of the Tribunal in **Hemant Bhai R. Patel V Commissioner of Customs 2003 (153) ELT 226 (Tri. - LB)**. We find that the goods declared as Brass Scrap "Pallu" are neither restricted nor prohibited goods and are freely available for import. We would like to refer to the relevant part of Para 2.54 of Handbook of Procedures 2015-2020, which reads as :-

"2.54 Import of Metallic Waste and Scrap Import

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

- (a) Import of following types of metallic waste and scrap will be free subject to conditions detailed below:

Sl.No.	Exim Code	Item description
9.	74040010	Copper Scrap
10.	74040022	Brass scrap

The show cause notice proposed confiscation of these goods under section 111(m) of the Act on the ground that the country of origin has been mis-declared by the importer company as UAE instead of Pakistan and consequently mis-classified the goods under CTH 7404 0022 instead of correct classification in terms of the notification as CTH 9806 0000 by submitting false and incorrect documents. It is only after the proposed charge is made for confiscation of goods, the provisions of section 125 of the Act comes into play whereby the adjudicating authority is empowered to offer an option to the owner of the goods to pay fine in lieu of confiscation. Therefore, proposal in the show cause notice is restricted to confiscation of goods under the respective provisions and it is then within the jurisdiction of the adjudicating authority to order confiscation and at the same time exercising its powers under Section 125 allowing the importer to redeem the goods on payment of fine as ordered. At the stage of issuing the show cause notice, it is not within the jurisdiction of the department to invoke the provisions of section 125 of the Act but that does not restrict the powers of the adjudicating authority to impose redemption fine in terms of section 125 of the Act. Once the goods are ordered to be confiscated they vest in the Central Government as per section 126 of the Act, however, if the importer exercises the option to redeem the goods on payment of fine as ordered by the adjudicating authority in terms of section 125 of the Act and a request is made for re-export, as noticed by this Tribunal in **K & K Gems V Commissioner of Customs, Mumbai-I 1998 (100) ELT 70 (Tribunal)**, such re-export is a post redemption facility allowed to the importer at his request. Further, with reference to section 125, Tribunal observed that, "the fine envisaged thereunder is only to get over the order of confiscation

irrespective of whether the goods are cleared for home consumption or for re-export.”

22. The learned Authorized Representative vehemently opposed the permission for re-export granted by the authorities below, however, we have already held that the same cannot be accepted. We, in arriving at the conclusion that the appellant having paid the redemption fine is entitled to redeem the goods and it is permissible to seek re-export thereof, are supported by the decisions of this Tribunal as well as of the superior Courts.

Our view is substantiated by the decision in **Escorts Herion Ltd. – 1997 (107) ELT 599 (Tribunal)**, referred to by the learned Authorized Representative, where the Tribunal specifically stated –

“**5.** The other contention is not of any significance to the fact of the present case. By applying the ratio of the decision in *Padia Sales Corporation v. C.C.* all that would happen is that the permission granted for re-export to be set aside. The goods in other words would have to be cleared on payment of fine for home consumption. We are however told that the goods have already been exported. Apart from this, we do not find it possible to say that there is no provision in the law to permitting goods to be re-exported subsequent to their confiscation.

6. Section 125 of the Act does not specifically provide that an option may be given to redeem the goods for re-export. It empowers an adjudicating officer in case of goods the import of which is not prohibited and directing him, in the case of other goods, to give the owner of the goods, or where the owner is not known to the person from whose possession or custody the goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit. The section applies equally to export goods as well as imported goods. Where goods which have been tendered for export are ordered to be confiscated and an option to redeem them is given under that section, it would follow that option is for the export of the goods. This is no doubt different from re-export. However, re-export is a facility permitting export of goods which have already been permitted to be imported. Except in cases where export is prohibited by any law, those goods which have been imported may be permitted to be exported. The formal procedure of filing a shipping bill and observing other formalities relating to export of goods would have to be followed. There is nothing in

the law prohibiting the Collector from permitting re-export of goods. This long standing practice only simplifies the procedural requirement of a complex and time consuming requirement. Therefore, when an adjudicating authority after ordering confiscation of imported goods permits their re-export the goods he is in effect first ordering the redemption for home consumption and thereafter permitting them to be re-exported. Each of these two actions is permitted by law. An order whereby both are combined therefore is not contrary to law."

In addition, we would like to point out the objections raised by the department in the case **Hemant Bhai R. Patel (supra)**, which clearly reflects that the department accepts re-export as an option. The relevant paras from the decision in **Hemant Bhai R. Patel (surpa)** are as under:-

"6. The learned DR would on the other hand submit that a permission granted for re-export is irrelevant for exercise of the power to impose redemption fine when goods are confiscated. Once the goods are confiscated unless the importer redeems the goods by paying redemption fine he is not reacquiring the ownership of the goods which would entitle him either to clear for domestic consumption or for re-export.

7. The learned DR brought to our notice a decision of the Apex Court in **M.J. Exports Ltd. v. CEGAT, 1992 (60) E.L.T. 161** where the Supreme Court has affirmed re-export of imported goods. After rejecting the contention of the Revenue that if an importer intends to export the goods imported he should clear them for warehousing and then proceed in terms of Section 69..."

Similarly, the case law referred by the Revenue of **Preeti Exim Vs. CC, New Delhi – 2007 (214) ELT 555 (Tribunal-Delhi)**, wherein the contention of the Revenue was that importer has to first redeem the goods by paying redemption fine and, thereafter, the customer can re-export the goods. The Tribunal observed as under:-

"5. I find that the issue raised by the appellant whether the imported goods are liable for fine and penalty in case the order regarding re-export was granted is answered by the Larger Bench of the Tribunal in the case of *A.K. Jewellers* (supra), after relying upon the decision of Hon'ble Supreme Court in the case of *Collector v. Elephanta Oil & Industries Ltd.* reported in **2003 (152) E.L.T. 257** held that power to levy the penalty under Section 112 of

Customs Act for improper importation of goods is different from the power of confiscation of goods under Section 125 of Customs Act. The same view is taken by the Tribunal in the case of *Hemant Bhai R. Patel* (supra)."

24. In **MJ Exports Ltd., V CEGAT 1992 (60) ELT 161**, the revenue had raised an objection that law does not permit an import just for the purposes of export and goods once imported can be only for home consumption or warehousing. The Apex Court rejected the contention of the revenue and held:

"17. The above general consideration apart, there are other indications in the statute which show that the Act does not prohibit the export of imported goods. The Act provides that goods which are cleared from the customs area for warehousing can be cleared from the warehouse for home consumption (S. 68) or exportation (S. 69). At first blush, this may seem to support the Revenue's interpretation that clearance for exportation and clearance for home consumption are two different things. It is indeed suggested by State counsel that, if an importer intends to export the imported goods, he should clear them for warehousing and then proceed in terms of S. 69. But a little thought would show this interpretation cannot be correct. In the first place, where an importer, even at the time of the import purchase has decided to sell the goods in another country (as in the present case), he may, as pointed out earlier, easily ask the goods to be transmitted or transhipped to the country of sale and thus avoid any necessity for their being at all cleared in India. But where, for one reason or other, he wants to import the goods into India and then sell them to the foreign country or where the importer decides on an export sale only after he has arranged for the import of the goods into India, the Act prescribes no form of a Bill of Entry under which he can clear such goods intended for re-export. It would not be correct to insist that he must clear them for warehousing and then export them by clearing from the warehouse. Whether to deposit the goods in a warehouse or not is an option given to the importer. If he is able to pay the import duties and has his own place to stock the goods, he is entitled to take them away. But, where he has either some difficulty in payment of the duties or where he has no ready place to stock the goods before use or sale, he cannot clear the goods from the customs area. The warehouse is only a place which the importer, on payment of prescribed charges, is permitted to utilise for keeping the goods where he is not able to take the goods straightaway outside the customs area. There is nothing in the provisions of the Act to compel an importer even before or when importing the

goods, to make up his mind whether he is going to use or sell them in India or whether he proposes to re-export them. Again, there may be cases where he has imported the goods for use or sale in India but subsequently receives an attractive offer which necessitates an export. It would make export trade difficult to say that he cannot accept the export offer as the goods, when imported, had been cleared for home consumption. S. 69, therefore, should be only read as a provision setting out the procedure for export of warehoused goods and not as a provision which makes warehousing an imperative pre-condition for exporting the imported goods. The second reason for not reading Ss. 68 and 69 as supporting the Revenue's interpretation is even more weighty. That interpretation would mean that imported goods can be re-exported after being warehoused for some time (even a day or few hours) but that they cannot be exported otherwise. Such an interpretation has no basis in logic or sense and makes mincemeat of the broader principle contended for by the Revenue that imports are intended for use in the country and not for export. Incidentally, we may observe that even this principle contended for by Revenue may itself be of doubtful validity as it is based on an erroneous assumption that a re-export of imported goods will always be detrimental to the country. It is true that, in the present case, the appellant has been criticised for having utilised valuable hard currency for the purchases and reselling the goods only for rupee consideration. But, conceivably, there may be cases where an importer is able to import goods from a soft-currency area and sell them in a hard-currency area earning foreign exchange for the country. It is also possible to think of cases where, though economically unremunerative, the re-exports can be justified on considerations of international amity and goodwill such as for example, where the goods are exported to a country which is in dire need of help and assistance. The principle is also non-acceptable on the ground of vagueness as to the extent of its application to exports made after an interval or after changing several hands inside the country by way of sale. We are, therefore, unable to read Ss. 68 and 69 as supporting the Revenue's contention.

18. On the other hand, there are provisions which indicate that export of imported goods is very much envisaged under the statute. The provisions contained in S. 74 fully reinforce this interpretation. Indeed S. 74 would be redundant if the Department's stand that imported goods cannot be exported were to be accepted as correct. As pointed out by counsel for the appellant, para 174(1) of the Policy which reads :

"No REP benefits are admissible in the case of imported goods which are re-exported in the same State without undergoing any processing or manufacturing operations in India."

25. In **K & K Gems** (supra), the Tribunal while considering the issue that redemption fine cannot be levied for re-export as section 125 does not empower such a levy, distinguished the fine under section 125 as a condition for re-export and fine in lieu of confiscation under section 125 referring to the earlier decision in **Allen Bradley India V Collector 1992 (58)ELT 268**, where the Tribunal held that the goods need not have been subjected to confiscation and levy of fine in lieu of confiscation in view of clear findings that wrong goods had been shipped because of suppliers mistake and the importer had disclosed the fact to the department even before the examination of the goods. Thus, fine in lieu of confiscation has been found to be in consonance with the provisions of section 125 of the Customs Act, 1962 as an option to the importer to redeem the goods which have been confiscated and has not been made as a condition for re-export which had been allowed in response to the request made by the appellant therein.

26. The Apex Court in **Elephanta Oil and Industries** (supra) rejected the contention of the appellant therein that once the imported article is re-exported there is no question of levying any penalty or redemption fine holding that confiscation of goods and thereafter permitting the respondent to re-export the same would not mean that penalty under section 112 of the Act cannot be levied. Following the said decision of the Apex Court, the Larger Bench of the Tribunal in **A.K. Jewellers V Commissioner of Customs, Mumbai, 2003(155)ELT 585** dealt with similar issue:-

"Whether while passing an order under section 125 of the Customs Act the authorities can direct confiscation of goods and payment of fine in lieu of confiscation together with a direction to re-export the goods. The Tribunal decided the issue in affirmative as under:-

"10. After going through the provisions of Section 125 of the Customs Act, we find that provisions of this section do not specifically provide that an option may be given to redeem the goods for re-export. It empowers an adjudicating authority in case of goods the import or export of which is prohibited under

Customs Act or under any law in force, to grant an option to pay in lieu of confiscation such fine as the said authority thinks fit. The provisions of this section equally apply to the goods to be exported as well as imported goods. Where the goods which have been tendered for export are ordered to be confiscated and an option to redeem the goods on payment of fine, it would follow that option is for the export of the goods. This is no doubt different from re-export. Re-export is a facility permitting export of goods which have already been permitted to be imported. Except in cases where import is prohibited by any law, those goods which have been imported may be permitted to be exported. The formal procedure of filing a shipping bill and observing other formalities relating to export of goods would have to be followed. There is no prohibition on the adjudicating authority from permitting re-export of the goods. When an adjudicating authority after ordering confiscation of imported goods permits their re-export, he is in effect first ordering the redemption of the goods on payment of fine and thereafter permitting them to be re-exported. Each of these two actions is independent and is permitted by law. An order whereby both are combined, therefore, is not contrary to law.

11. If we take up the issue from another angle that where the adjudicating authority allows re-export of the prohibited goods and in such a case, by holding that the order of confiscation and redemption fine is not justifiable, this will make the provisions of Section 125 of the Customs Act redundant which specifically empowers the adjudicating authority to exercise his powers in respect of prohibited goods. As confiscation and redemption fine in lieu of confiscation and re-export are two independent actions, hence the view taken that in case the assessee is allowed to re-export, the confiscation and redemption fine is not justified, is not a correct view. Further, we find that this view is also taken by the Hon'ble Supreme Court in the case of *C.C. v. Elephanta Oil & Industries Ltd.* reported in [2003 \(152\) E.L.T. 257](#) (S.C.) rejected the contention of the importer that once the imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine. The Hon'ble Supreme Court held that power to levy the penalty under Section 112 of the Customs Act for improper importation of goods is different from the power of confiscation of goods under Section 125 of the Customs Act. The question of law referred to the Larger Bench is answered accordingly."

27. Another Larger Bench of this Tribunal in **Hemant Bhair R Patel V Commissioner of Customs, Ahmedabad** (supra) distinguished the decisions of the Apex Court in **Siemens Ltd V Collector 1999 (113) ELT 776** on the ground that the issue whether redemption fine could be imposed when goods are liable to be confiscated even when re-export is permitted was not an issue before the Apex Court. Agreeing with the decision in **K & K Gems** (Supra), **Escorts Herion Ltd V Commissioner 1999(107) ELT**

599, Kothari Filaments V Commissioner 2002 (144) ELT 80 and **Smt. Kusumbhai Dahyabhai Patel V Collector 1995 (79) ELT 292**, and also on the decision of the Apex Court in **M. J. Exports** (supra) the Tribunal decided the issue in affirmative holding that it is open to the adjudicating authority to impose redemption fine as well as penalty even when permission is granted for re-exporting the goods. The Department has relied on the observations of the Tribunal in the case of **Hemant Bhai R. Patel (supra)** that, " A permission granted for re-export on the basis of a request made by the owner of the goods is outside the purview of the adjudication proceedings, as mentioned above". We are of the view that the issue before the Tribunal was not whether the Adjudicating Authority had power to order for re-export or not rather the issue formulated for their reference related to power under Section 125 to impose redemption fine when confiscation is established and permission for re-export is granted. Therefore, the aforesaid observations relied on by the Department is erroneous as it amounts to obiter dicta and is, therefore, not binding. Moreover, once the Tribunal agrees with the view taken in the cases of **K & K Gems**, etc. (referred above), the logical conclusion is that it upholds the view that option to the importer to redeem the confiscated goods on payment of fine is in consonance with the provisions of Section 125 and is not a condition for re-export. In so far as the decision of the Apex Court in **C.C., Kolkata Vs. Grand Prime Ltd. – 2003 (155) ELT 417** referred by the Revenue is clearly distinguishable as the goods were imported on the condition of re-export of finished/semi-finished goods qua the imports made.

Thus the issue is no longer *res integra* and hence we are of the considered view that re-export of the goods is permissible and both redemption fine as well as the penalty under section 112 and 114AA of the Act are leviable even if the goods on redemption are allowed to be re-exported.

28. The learned Counsel for the appellant has placed on record the latest decision of the Delhi High Court in **Ajay Kumar Gupta vs Commissioner of Customs 2023 (5) TMI 207**, inter-alia observing, that there is no provision under the Customs Act which entitles the revenue to retain the goods after the concerned party has paid the redemption fine as well as the penalty as determined. The Court further held that merely because the revenue seeks to challenge the order passed by the appellate authority is no ground for non compliance of the said orders. Here, the appellant has submitted that pursuant to the order in original, they have paid the redemption fine of Rs. 10,00,000/- and penalty of Rs. 6,00,000/-towards penalty on 3.04.2023, however the department has not permitted them to re-export the goods. In view of the decision in **Ajay Kumar Gupta** (supra) we have no hesitation in directing the department to allow the appellant to re-export the goods once they deposit the enhanced amount of penalty as directed in the impugned order. The importer company, namely M/s Bright Metal (India) Pvt. Ltd., and its Director, namely Sanjay Porwal may deposit the balance of the enhanced amount towards penalty under section 112 (a)(ii) and under section 114AA of the Act in terms of the impugned order within a period of three weeks and on such deposit being made, the department shall forthwith release the goods for the purpose of re-export.

29. We would now like to refer to the decision of the Apex Court in the case of **Union of India versus Raj Grow Impex LLP – 2021 (377) ELT 145 (SC)**, which has been referred to both by the learned Counsel for the appellant as well as by the revenue. One of the issue considered was whether the exercise of discretion for absolute confiscation was justified. The Court while appreciating the relevant considerations and the principles for exercise of such discretion observed as :

"82. The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interests of national economy and more particularly, the interests of farmers. This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. When personal business interests of importers clash with public interest, the former has to, obviously, give way to the latter. Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of *bona fide* and the only proper exercise of discretion would be of absolute confiscation and ensuring that these tainted goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released is, obviously, warranted.

84. Hence, on the facts and in the circumstances of the present case as noticed and dilated hereinabove, the discretion could only be for absolute confiscation with levy of penalty. At the most, an option for re-export could be given to the importers and that too, on payment of redemption fine and upon discharging other statutory obligations. This option we had already left open in the order dated 18-3-2021, passed during the hearing of these matters."

30. Considering the aforesaid decision, we are of the considered opinion that the exercise of discretion both by the adjudicating authority as well as by the appellate authority in not ordering absolute confiscation and allowing the importer to redeem the goods on payment of redemption fine and penalty with permission to re-export the goods is in consonance with the object and purpose with which the notification was issued, i.e. to dissuade commercial transactions with Pakistan by imposing extremely high penalty of 200%.

31. Suffice it to say, that Notification No 05/ 2019 dated 16.2.2019 in simple words provides that the goods imported having country of origin as

Islamic Republic of Pakistan shall be classified under the new entry CTH 9806 0000 and BCD @200% shall be applicable on them. It nowhere says that such goods shall not be allowed to be re-exported. It is a settled principle of law that the words of the notification has to be read as they are and the contents thereof cannot be added or expanded by way of implication. Since there is no express bar for re-export of such goods in the notification, we uphold the impugned order allowing the appellant to re-export the goods.

Conclusion

32. We, therefore conclude that the country of origin of the containers in question is Pakistan and therefore, the same are classifiable under the Notification No.5/2019 as per CTH 980060000. Since the goods have been imported on the basis of fake PSIC, they are liable to be confiscated in terms of Section 111(m). In the event of confiscation, the redemption fine under Section 125 has been rightly levied. As the importer company and its director are responsible for the import having been made in violation of the statutory provisions and [FTP 2015-2020](#), they are liable to penalty both under Section 112 (a)(ii) and also under 114 AA. We are also in agreement with the quantum of penalty levied on the importer company and its director under the impugned order. In view of our findings, the appeals filed by the importer company and its director are devoid of any merits. The consequential relief of re-export, in the facts of the case, needs to be affirmed on payment of redemption fine and also enhanced penalty both under Section 112 (a)(ii) and Section 114AA of the Act. Thus, the appeals filed by the Department also deserves to be dismissed.

33. We do not see any reason to interfere with the impugned order. Accordingly, all the four appeals filed by the department as well as the appeals filed by the importer company and its director needs to be

dismissed. The miscellaneous application and the applications for stay stand disposed of.

34. The appeals stand dismissed.

[Order pronounced on 26.09.2023]

(Binu Tamta)
Member (Judicial)

(P. V. Subba Rao)
Member (Technical)

Ckp.