

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL Nos. C/88129,88400/2018

(Arising out of Order-in-Original No. CC-VA/05/2018-19 Adj.(I)
ACC dated 3.8.2018 passed by Commissioner of Customs (Import),
ACC, Mumbai)

**Matrix Info Systems Pvt. Ltd.
Sunil Jain**

Appellant

Vs.

Commissioner of Customs (AC-Import), Mumbai Respondent

Appearance:

Shri C.K. Chaturvedi, Consultant, for appellant

Shri R. Kumar, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Ajay Sharma, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 25.10.2018

Date of Decision: 17.01.2019

ORDER No. **A / 85122-85123 / 2019**

Per: Sanjiv Srivastava

These two appeals have been filed by the Appellant Company and one of its Director against order in Original No CC-VA/05/2018-19 Adj. (I) ACC dated 03.08.2018 of the Commissioner of Customs Import, ACC, Mumbai. By the said order Commissioner has held a follows:

“31 The declared value of the impugned goods covered by the Bill of entry No 5710820 dated 23.03.2018 stands rejected under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, and the value of the said consignment and duty leviable stands re-determined to Rs 1,07,42,643/- in terms of the Rule 4 (Value of Similar Goods) of the Customs valuation Rules 2007.

32. The said consignment having MAWB No 16041242585 and covered by Bill of Entry No 5710820 dated 23.03.2018 is confiscated under Section 111(d), 111(i), 111(l), 111(m) of the Customs Act, 1962; however, I allow the importer to redeem the goods as envisaged under Section 125 of the Customs Act for the exclusive purpose of export, on payment of fine amounting to Rs 15,00,000/- (Rupees Fifteen Lakhs only) The option of redemption for export shall be available for a period of 30 days from the date of receipt of this order by the importer/ director of the importer/ concerned customs broker.

33. I impose penalty of Rs 7,50,000/- (Rupees Seven Lakhs Fifty Thousand only) under section 112 of the Customs Act, 1962 upon the importer M/s Matrix Info Systems Private Limited.

34. I impose penalty of Rs 7,50,000/- (Rupees Seven Lakhs Fifty Thousand only) under section 112 of the Customs Act, 1962 upon Shri Sunil Jain, Director of M/s Matrix Info Systems Private Limited.

35. This order is issued without prejudice to any other action that may be taken against the importer or any other person under the provision of Customs Act, 1962 or any other law for the time being in force in India.”

2.1 Appellants have filed a Bill of Entry No 5710820 dated 23.03.2018 for import/ clearance of Computer Parts, Memory Modules and declared the value as Rs 11,89,97/- covered by MAWB No 16041242585 dated 06.02.2018. On the Bill of Entry shipper was shown as M/ Decimal General Trading LLC Dubai UAE.

2.2 Since the description of the goods on the Bill of Entry was found to be vague/ inadequate and a large quantity of obsolete goods (2 GB DDR2 Hynix Memory Module) was imported by the importer the goods were detained and taken up for 100% examination. The goods were examined in presence of Panch witness and in presence of authorized representative of the Customs Broker. On examination the goods were found to be grossly misdeclared in terms of description (brand/ make/ model), quantity and value. Also some items (Intel Microprocessors) in the consignment were found to be old and used. Accordingly the goods were seized under a seizure memo dated 11.05.2018 under section 110 (1) of the Customs Act, 1962, as these goods were liable for confiscation under Section 111 for contravention section 46.

2.3 Further investigations wherein the statements of Shri Sunil Jain Director of Appellant Company and Shri Prabhu Das Garji, employee of Customs Broker M/s

Friend was recorded were undertaken by the department.

2.4 Appellants vide their letter dated 26.03.2018, 28.03.2018 and 05.04.2018 inter alia admitted that the goods have been mis-sent by their shipper in Dubai and the shipper has requested for the recall of goods. Accordingly they requested for the permission to re-export the goods.

2.5 After completion of investigations a Show Cause Notice dated 6th July 2018 was issued to the appellant asking them to show cause as to why;-

“a) the said consignment having MAWB No 16041242585 and covered by Bill of Entry No 5710820 dated 23.03.2018 should not be confiscated under Section 111(d), 111(i), 111(l), 111(m) of the Customs Act, 1962;

b) The value of the impugned goods covered by the Bill of Entry No 5710820 dated 23.03.2018 should not be rejected under Rule 12 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007, and the value of the said consignment and duty leviable thereon should not be re-determined to Rs 1,07,42,643/- and Rs 19,70,946/- respectively, in terms of Rule 4 (Value of Similar goods) of the Customs Valuation Rules, 2007;

c) The penalty under Section 112 of the Customs Act, 1962 should not be imposed upon M/s Matrix Info Systems Private Limited;

d) The penalty under Section 112 of the Customs Act, 1962 should not be imposed upon Shri Sunil Jain, Director of M/s Matrix Info Systems Private Limited."

2.6 After taking into consideration the submissions made by the appellant company and its Director in their written submissions dated 27.07.2018 and during the course of personal hearing on 2.08.2018, Commissioner adjudicated the show cause notice as per the order referred in para 1 supra.

2.7 Aggrieved appellant company and its Director have filed these appeals before tribunal.

3.1 In their appeal appellants have assailed the order of Commissioner on following grounds-

i. Undisputed fact that Bill of entry was filed only on the basis of documentary evidence. Importer would come to know about a wrong shipment only after the goods are examined or when informed by the supplier. In the present case where the goods have been wrongly sent by the supplier it would be wholly unjustified to attribute misdeclaration on them.

ii. The request for re-export is not an afterthought and was made immediately when the shipper came to know about the error.

iii. MAWB is issued by the carrier airline after the receipt of goods on the basis of declaration

made by the shipper or the forwarder of the goods on behalf of shipper.

iv. They have not manipulated or fabricated documents and the allegations made in the show cause notice/ order to this effect are not sustainable.

v. Method of valuation adopted by the revenue vague, cryptic, esoteric and incorrect.

vi. Appointment of chartered engineer to examine the goods not proper and legal.

vii. There was no motive to mis-declare the goods and bonafides of importer are not in doubt.

viii. They rely on following decisions in their support-

a. Guru Ispat Ltd [2003 (151) ELT 384 (T-Kol)]

b. Regal Impex [2016 (332) ELT 835 (T-Del)]

c. Siemens Public Communication Networks Ltd.
[2001 (137) ELT 623 (T-Kol)]

d. HCL Comnet Systems & Services Ltd [2003
(158) ELT 349 (T-Del)]

e. Sripathi Paper and Board Pvt Ltd [2014 (3130
ELT 664 (T-Chennai)]

4.1 We have heard Shri C K Chaturvedi, Learned Consultant for the Appellants and Shri R Kumar,

Assistant Commissioner (Authorized Representative) for the revenue.

4.2 arguing for the appellant learned Consultant submitted that –

- i. the present case is not the case of misdeclaration of the goods but is case where the goods have been mis-sent by the overseas shipper.
- ii. The goods covered by the said bill of entry were never ordered by them on the shipper, and it was error on the part of the shipper that these goods were shipped to them under the cover of said invoice.
- iii. Shipper on realization of his mistake has vide his e-mail dated 25.03.2018 stated that the goods have been mis-sent to them and were actually meant for shipment to Dubai. Accordingly he has recalled the goods mis-sent.
- iv. The Bill of Entry was filed by them on the basis of the document received namely Invoice and they were not in position to know the actual goods shipped till the time the goods were examined or shipper informed them.
- v. Since they had filed the Bill of Entry bonafidely on the basis of the information available with them they should not be held responsible for mis-

declaring the goods in term of description and value.

vi. The manner in which the valuation of the goods has been done is not proper and justified.

vii. The manner in which the opinion and examination of goods have been undertaken by the chartered engineer too is not in accordance with the prescribed procedure. Commissioner has also not allowed the cross examination of the chartered engineer.

viii. He also submits the Copy of invoice and BE No 5559872 dated 13.03.2018, 5414769 dated 02.03.2018, 5591352 dated 15.03.2018, 6202220 dated 23.04.2018 and 659794 dated 30.05.2018 to establish their bonafides.

ix. Since they have acted bonafidely, the charge of mis-declaration for confiscation of the goods and imposition of penalty on them cannot be sustained as has been held by various authorities referred in their appeal.

x. Appeals of the both appellant company and its Director should be allowed.

4.3 Arguing for revenue learned Authorized representative submitted that –

i. The fact that the goods have been mis-declared on the Bill of Entry is evident from the

examination report prepared under the panchnama dated 26.03.2018.

- ii. It was only after the detention of the goods on 24.03.2018, that the appellants have claimed that the goods have been mis-sent by the shipper.
- iii. Appellants had sought the clearance of the goods sent under the cover of said MAWB by presenting the Bill of Entry as referred. Once the importer file the Bill of entry he has to take the responsibility of the goods covered by the said Bill of Entry.
- iv. The appellants have not be able to produce any evidence to show their bonafides in the matter. Certain e mail correspondence between them and their shipper that too after detention of the goods do not inspire confidence.
- v. In the present case the goods were shipped under the MAWB dated 6.02.2018. The Bill of Entry in the present case has been filed only on 23.03.2018 and examination undertaken on 26.03.2018. In a period of more than a month shipper has not made any correspondence with regards to the goods being mis-sent. This itself shows that importer has sought the clearance of the goods by mis-declaring them, and for the act

of misdeclaration the goods have been appropriately held liable for confiscation under section 111 of The Customs Act, 1962

- vi. Further the goods have been found to be grossly mis-declared in terms of value also.
- vii. Certain goods in consignment are old and used goods, which are prohibited for importation and for clearance for home consumption in absence of requisite permissions.
- viii. In view of the mis-declarations made the goods have been rightly held liable for confiscation under Section 111 and confiscated. However the goods confiscated goods have been allowed to be redeemed on payment of redemption fine of Rs 15,00,000/- (Rupees Fifteen Lakhs only). As requested by the importer (Person filing the Bill of Entry) the re-export of goods has also been permitted.
- ix. For various acts of contravention, omission and commission leading to confiscation of the goods penalty on the appellant company and also its Director under Section 112 justified. Quantum of penalty imposed also is very reasonable and justified and don not call for any interference.
- x. He relies on following case laws in his support

- a. Muscles Fusion FZE [2017 (354) ELT 525 (DEL)]
- b. Commissioner Customs Vs Jt Secretary GOI [2016 (333) ELT 60 (Del)]
- c. Zakir Ali Khan [2016 (631) ELT 227 (Madras)].

xi. He thus prayed that both the appeals be dismissed.

5.1 We have considered the submissions made in the appeal and during the course of argument.

5.2 In table 1 the goods as declared in the shippers invoice and the Bill of Entry are listed and in table 2, the goods as found during the examination on 26.03.2018 are listed.

Table 1: Goods as declared on B/E and Invoice No DGTLLC12022018					
S No	Description		Number	Unit Price	Total
1	8 GB	DDR3 Kingston Memory Module	156	7.00	1092.00
2	4 GB	DDR3 Kingston Memory Module	44	4.00	176.00
3	2GB	DDR3 Kingston Memory Module	4730	3.00	14190.00
					15458.00

Table 2: Goods as actual found on 100% examination on 26.03.2018				
S No	CTN No	Description	Brand	Number

1	KB-3	Hyper-X Fury 8 GB DDR4 2400 Mhz	Kingston	50
2(a)	KL-7	Processor CPU I3-2100	Intel	191
2(b)	KL-7	Processor CPU I3-2120	Intel	192
2(c)	KL-7	Processor CPU I3-2130	Intel	10
2(d)	KL-7	Processor CPU I3-3220	Intel	201
2(e)	KL-7	Processor CPU I3-3225	Intel	3
2(f)	KL-7	Processor CPU I3-3245	Intel	1
2(g)	KL-7	Processor CPU I3-3240	Intel	19
2(h)	KL-7	Processor CPU I3-4160T	Intel	300
2(i)	KL-7	Processor CPU I3-2100S	Intel	2
2(j)	KL-7	Processor CPU I3-2400S	Intel	95
2(k)	KL-7	Processor CPU I3-2500S	Intel	14
3(a)	KB-2	Hyper-X Fury 8 GB DDR4 2400	Kingston	165
3(b)	KB-2	Kingston 8 GB DDR4 2400 Mini	Kingston	100
4(a)	KB-1	Kingston 8 GB DDR4 2400 Mini	Kingston	156
4(b)	KB-1	Hyper-X Fury 16 GB 2400 Mhz	Kingston	20
4(c)	KB-1	Hyper-X Fury 4 GB 2400 Mhz	Kingston	40
5	KL-3	RAM 2GB DDR2 800 MHZ Desktop	Mixed (Samsung, Hynix, Kingston, Nanya, Elpida)	950
6	KL-1	RAM 2GB DDR2 800 MHZ Desktop		950
7	KL-2	RAM 2GB DDR2 800 MHZ Desktop		950
8	KL-4	RAM 2GB DDR2 800 MHZ Desktop		950
9	KL-5	RAM 2GB DDR2 800 MHZ Desktop		950
10	KL-6	RAM 2GB DDR2 800 MHZ Desktop		950
11(a)	KL-8	SP Solid State Drive 120 GB M.2	Silicon Power	80
11(b)	KL-8	Hyper X Predator 32 RAM 2666 (2 X	Kingston	04

		16 GB DDR4)		
11(c)	KL-8	16 GB DDR4-Kingston	Kingston	102
11(d)	KL-8	16 GB DDR4-Kingston	Kingston	100
11(e)	KL-8	4 GB Class 6 Micro SD Cards	ADATA	10000
11(f)	KL-8	8 GB Class 4 Micro SD Cards	ADATA	10000
11(g)	KL-8	8 GB Class 10 Micro SD Cards	ADATA	7200

5.3 From Table 1 and Table 2, it is quite evident that the goods actually imported are not the same as those declared in the Bill of Entry, but are entirely different set of goods. This clearly shows that the appellants have misdeclared the goods on the Bill of Entry and have sought clearance of undeclared and misdeclared goods in this manner. Appellants do not dispute that the goods found on examination were not the same goods as declared by them on the Bill of Entry. However appellants have submitted that since the goods were mis-sent by the shipper they were not aware of the goods that were shipped and hence they should not be held responsible for the misdeclaration.

5.4 Shri Sunil Jain, Director of Appellant has in his statement recorded under Section 108 of Customs Act, 1962 stated:

- *That he started the business of importing computer accessories from Mumbai from around 2015-16; that he also imported similar assorted goods from JNCH, Nhava Sheva and Bombay Docks;*

- *That their vendor for this shipment is based in Dubai; that due to lack of timely communication and mistakes of one employee of the vendor, the vendor has added some more cartons to the shipment which were meant for vendor's Dubai based client;*
- *That they ordered "Memory Modules" and to that effect, he has already submitted copy of purchase order dated 12.02.2018;*
- *That he came to know about the wrong shipment supplied by M/s. Decimal General Trading LLC on 25.03.2018 via E-mail;*
- *That he does not sign on the declaration filed with the Bill of Entry; that on his behalf, CHA sign the declaration;*
- *That the entire shipment does not belong to him and the supplier has sent wrong shipment;*
- *That neither he nor his firm has ever been indicted in any Customs related offences and they have never been charge-sheeted nor given any show cause notice till date; and*
- *That the supplier vide email dated 25.03.2018 has requested to re-export the shipment back to Hong Kong and they also wish the same.*

5.5 From the above statement it can be reasonably concluded that the goods in the consignment under importation are not the goods as declared by the appellants. Along with their letter dated 28.03.2018 appellants requested for re-export of goods covered by the Bill of Entry No.5710820 dated 23.03.2018, and submitted the following:-

- *That the Airway Bill is dated 6.2.2018 which would evidently mean that goods under the shipment have been readied and handed over to the forwarder on 06.02.2018; that M/s. Matrix Info Systems Private Limited placed the order for the goods required by them on 12.02.2018 and the import invoice also confirms that the order for the goods is dated 12.02.2018; that thus it is amply evident that the goods covered by the AWB 16041242585 dated 6.2.2018 could not be as per their purchase order and the person/entity acting for the supplier at the port of loading, Hong Kong, has made a serious blunder;*
- *That the goods arrived at ACC Mumbai on 21.03.2018 and they filed the Bill of Entry soon after on 23.03.2018 without realizing discrepancy in the shipping documents to avoid penal provisions contained in Section 46 of the Customs Act, 1962;*
- *That they received an E-mail from the supplier on 25.03.2018 informing them of the wrong shipment of the goods; that the said email clearly demonstrates that the goods have been wrongly shipped and were meant for some other client of theirs in Dubai; that the supplier realizing his mistake has asked vide the said email for the goods to be shipped back to him;*
- *That they submitted a request letter on the very next working day viz. 26.03.2018 seeking permission for the re-export of the goods back to the supplier even before the inspection and examination of the goods;*
- *That it would be evident from the Bill of Entry that the incidence of Customs duty on the goods*

intended to be imported by them is nil; that only IGST is payable for which credit can be obtained at the time of sale of goods; that thus there is no motivation for them to intentionally mis-declare the goods for any gain; and That no payment has been made to the supplier for the import of goods.

5.6 Further vide their letter dated 05.04.2018 while again requesting for re-export of the said goods, appellants submitted –

- *That an HAWB slip bearing number 1008458/hka918030115 was found to be pasted on the subject shipment whereas their consignment pertained to only MAWB bearing no. 16041242585 which reinforces their statement that a wrong shipment had been sent to them by mistake; and*
- *That while unpacking/checking of shipment at the Customs warehouse by the CIU team in the presence of their CHA representative, the slip fell off from the packing; that this can be verified on the CCTV cameras thereon.*

Commissioner has in para 12.3 of the order recorded *“the contention of the importer that the HAWB bearing number 1008458/hka918030115 was pasted on the goods and it fell off during the course of examination of the impugned goods, did not appear sustainable as the said paper was not found pasted on the pallet containing impugned goods at the time of examination and the same is also not evidenced in the panchnama dated 26.03.2018”*

5.7 The submissions made by the appellant do not inspire confidence as in the present case the date of invoice is 12.02.2018 and MAWB is 6.02.2018, whereas as per the appellants the date of purchase order is 12.02.2018. It is the submission of the appellants that *“Master Air Waybill is issued by the carrier airline after the receipt of goods on the basis of declaration made by the shipper of the goods or the forwarder of the goods on behalf of shipper.”* There seem to be no explanation about the fact that MAWB is prior to the dated of purchase order or invoice. In terms of the appellants own submission the goods were handed over by the shipper to the carrier, even prior to receipt of purchase order or issuance of invoice. Even though appellants submit that these goods were meant for certain party in Dubai and were mis-sent by shipper to them against their purchase order dated 12.02.2018, cannot be correct because the Master Airway Bill predates the purchase order. Commissioner has in para 30.2 of his order dealt with this entire aspect in detail and has rejected the theory advanced by the appellants claiming that the goods were mis-sent. He has observed in his order *“The proverbial fly in this ointment happens to be the chronological sequence of events at hand which do little to support this ingenuous theory being propounded by by the noticee. First and foremost is the fact that*

MAWB pre-dates the purported invoice/ purchase order and the second fact is that the application for re-export is post the detention of the goods. Merely on the ground that the department did not serve a communication to the importer after detention but before the receipt of the request for re-export, it cannot be said proved that the importer was ignorant of the fact of detention. It sounds too much of coincidence that the email from the supplier was also received after the detention of goods and not before it. The fact of the matter is that the importer had filed a Bill of Entry and it was the duty/ liability of the importer to declare the contents of the consignment correctly in the Bill of Entry and the importer can certainly not take refuge in the amendment of Customs Act (amendment of Section 46 which mandates filing of Bill of Entry within prescribed time or else pecuniary penalty on account of delay) to justify mis declaration. It sounds to be too much of a coincidence that despite the contention of the importer regarding wrong good having been shipped, the weight of the consignment is exactly equal to the declared weight. Hence, I have no hesitation in recording my finding that the goods were misdeclared in terms of description, quantity and value.”

5.8 By mis-declaring the goods, appellants have sought to clear certain goods which were old and used. The clearance of such old and used goods for home

consumption in India is not permitted under Export Import policy 2015-20 (Para 2.31 read with Notification No 35 (RE-2012)/2009-14 dated 28.02.2013), without proper authorization from Director General Foreign Trade.

5.9 On the basis of contemporaneous import available in NIDB data, the value of the goods imported was determined in terms of Rule 5 and 9 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007. On the basis of such determination it was found that against the declared value of consignment as Rs 11,89,997/- the correct value was Rs 1,07,42,643/-.

5.10 Accordingly the charge of mis declaration of the consignment in terms of description, quantity and value is well founded. In case of Kumar Overseas [1997 (95) ELT 231 (T-Del)] tribunal has upheld the charge of misdeclaration and violation of ITC Policy-

“2. Appellant is a trader at Ludhiana. Three containers described as containing Heavy Melting Scrap No. 1 of Japanese origin reached Bombay Port on 27-9-1995 for onward transmission to Jalandhar. On permission obtained by the appellant from Bombay Custom House goods were allowed to be transported under Bond to Jalandhar. On 25-10-1995 Department received information that the consignment consisted really of used diesel engines and auto parts camouflaged as melting scrap. Three consignments were located at Jalandhar

and detained on 6-11-1995. IGM No. 2308, dated 27-9-1995 described the goods as 58.490 MT of STC Heavy Melting Scrap No. 1. Import documents presented at the Bombay Custom House while seeking permission for onward transmission to Jalandhar also described the goods as 'scrap'. On 21-11-1995 Steamer Agent moved an application before the Assistant Commissioner Import Department, Bombay seeking amendment of IGM description as old diesel engines, auto spare parts and scraps. IGM was duly amended on the next day. On 23-11-1995 appellant submitted Bill of Entry with revised invoice, revised packing list, revised bill of lading, etc. describing the goods as old and used diesel engines, spare parts and scrap and purporting to seek clearance under OGL. The Appraiser prepared a list of valuation, according to which correct value of diesel engines and spare parts would be much more than the value declared by the appellant. On 1-12-1995 goods were seized. Show cause notice dated 28-5-1996 was issued alleging violation of licensing requirement, alleging fraud and manipulation in the import of diesel engines, and spare parts in the garb of scrap, mis-declaration of description and mis-declaration of value and proposing confiscation of the goods and imposition of penalty on all the above grounds.

3. *Appellant resisted the notice contending that an order had been placed before the supplier over telephone for supply of Heavy Melting Scrap No. 1 in August, 1995 but a shipment intended for some other party and containing used diesel engines, auto scrap etc. were wrongly shipped to the appellant. It was pointed out that even on 30-10-1995 the supplier's bank, that is, Bank of Baroda, had sent a telex message to Punjab National Bank, the importers bank, seeking return of the import documents*

and on 31-10-1995 appellant received a fax letter from the supplier intimating that the consignment was wrongly shipped though meant for some other party and requesting the appellant to accept the consignment "as on whereas basis in view of the old business relation". Documents were collected and sent back to the supplier who issued fresh set of documents describing the goods as shown in the amended IGM.

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7. For the reasons indicated above, we confirm the order to the extent it relates to confiscation of the goods in regard to ITC angle and mis-description of goods and imposition of penalty but set aside confiscation on account of mis-declaration of value, quantification of redemption fine and quantification of penalty. The case is remanded to the jurisdictional adjudicating authority for deciding afresh the correct assessable value and quantifying redemption fine and penalty. If the Department desires to rely on further documents, copies of the same may be furnished to the appellant who will also be at liberty to produce documents in regard to controversy requiring decision."

5.11 In case of Monica Enterprises [2002 (149)ELT 1264 (T-Del)] it has been held as follows:

"27. In paragraph 75 of the impugned order, the Collector has discussed the point regarding shipment of excess goods than those declared in the bills of entry. The appellants' plea before Collector was that the fact of excess shipment came to notice of the foreign supplier based on the auditor's scrutiny. Collector has not accepted this plea. He has observed that the Directorate of Revenue Intelligence started enquiry on 18-3-1986 and Shri Jatinder Uppal came to know about this enquiry on

18-3-1986, by which date the assessment was done by Custom and the duty was paid on 17-3-1986. The duplicate bills of entry were collected by Shri Uppal and the goods were not yet examined. Collector has also observed that the appellants could not give any positive evidence to show what were the quantities ordered for ICD Delhi, what quantities were ordered for Madras and how much had been received or not received at Delhi vis-a-vis those received at Madras. In the absence of any such evidence, the Collector has held that the telex dated 21-3-1986 was a solicited one. Further, the Director, Overseas Communication Service, Delhi reported non-receipt of incoming call to Delhi Telex No. 3165628 from Singapore. In these circumstances, Collector was justified in rejecting the assertion of the appellants. Considering the totality of the facts and circumstances of this case, we observe that it was not at all difficult for Shri Uppal to obtain a solicited telex to meet the enquiry already started by D.R.I. and the Collector was justified to hold that the appellants were guilty of deliberate mis-declaration and to confiscate the goods under Section 111(m) of the Customs Act. The excess goods which were imported in the consignments, but not declared in the bills of entry are also liable to confiscation under Section 111(l) of the Customs Act. The value of the excess goods was not declared in the bills of entry, which also rendered the goods liable for confiscation under Section 111(m) of the Customs Act.”

5.12 Hon’ble Delhi High Court has in case of Muscles Fusion FZE [2017 (354) ELT 525 (DEL)] held as follows:

“23.The submission that the same was a bona fide mistake clearly appears to be an afterthought. This stand of the petitioner is not borne out from any

contemporaneous documents on record. There is no invoice, airway bill, purchase order or any other document stating that goods were meant to be delivered to a Singapore based customer. The petitioner has failed to make out a case of bona fide mistake and the findings of the ACC (Imports) to the said effect are unsustainable in law. The non-imposition of fine is also contrary to a bare reading of Section 125 of the CA which reads :

Option to “125. pay fine in lieu of confiscation. -

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof if prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

Where any fine in (2) lieu of confiscation of goods is imposed under sub-section (1) of the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.”

24. Mere non-imposition of penalty/fine, which is the mandate under Section 125 of the CA in case of confiscated goods, cannot automatically result in letting the petitioner go scot-free. The ACC (Imports) had no

discretion not to impose fine as the provision clearly provides that “officers..... shall give to the owner of the goods..... an option to pay in lieu of confiscation such fine as the said officer thinks fit.....”. Thus, the imposition of fine under Section 125 was a logical and mandatory consequence once the goods were confiscated. Once the fine is imposed, the owner of goods is liable to any duty and charges payable in respect of the said goods under Section 125(2) of the CA.”

5.13 In view of the discussions as above, we do not find any merit in the submission of the appellants that the goods were wrongly shipped by the shipper. In fact as pointed out and discussed above, these goods were sought to be imported into India contrary to the EXIM Policy restriction and also by grossly undervaluing the same. There is no merit in the submission of the appellants with regards to bonafides, which in any case is not established in this case. Hence the decisions of Tribunal relied upon by the appellants are clearly distinguishable.

5.13 Role of the Appellant Company and its Director has been well discussed in the para 14.2 and 14.3 of the order. The said para are reproduced below:

“14.2 As detailed above, it appeared that the importer imported the goods covered by BE No.5710820 dated 23.03.2018 which were found to be mis-declared in terms of description, quantity, value as well as some undeclared and old & used goods were also found during examination. Further the importer appeared to have deliberately tried to

mislead the investigation by producing shipper's invoice/purchase order dated 12.02.2018 whereas the MAWB is dated 06.02.2018, and by submitting that some more cartons were added to their shipment which were meant for the vendor's Dubai based client, appeared to be nothing more than an afterthought, as the importer has submitted the same after having known that the subject consignment was put on hold by CIU Officer. Further, the importer did not have any authorization from DGFT to import old and used goods which are restricted as per para 2.31 [FTP 2015-2020](#) and import of which requires an authorization from DGFT. Further, the importer in his letter dated 28.03.2018 has submitted that the subject goods had been wrongly shipped by the Dubai based supplier and the entire shipment does not belong to the importer while in his statement dated 05.04.2018, he (Importer) has submitted that his Dubai based supplier mistakenly added few more cartons to their shipment which was originally meant for vendor's Dubai based client. This appeared to be self-contradiction of the importer's earlier stand. Thus, the contention and submission of the importer appeared to be afterthought and a self knitted story to cover up the lapse/omission on their part. In view of the above the impugned goods valued at Rs.1,07,42,643/- appeared to be liable to confiscation under Section 111(d), 111(i), 111(l), 111(m) of the Customs Act, 1962 and consequently the importer M/s. Matrix Info Systems Pvt. Ltd. appeared to be liable for penalty under Section 112 of Customs Act, 1962.

14.3 From the foregoing, it is appeared Shri Sunil Jain fabricated the shipper's invoice/purchase order so as to mislead the departmental investigation as the said documents cannot be of the date later to the date of MAWB. MAWB is issued on the basis of HAWB which is a receipt given to the shipper as an acknowledgment of having received the goods from the shipper/consignee. In such circumstances, agreement of sale between the importer and shipper must have been executed before the date of MAWB i.e. before 06.02.2018. Thus the documents viz. shipper's

invoice/purchase appears to have been fabricated by Shri Sunil Jain to mislead the departmental investigation. Further, the paper bearing No. 1008458/HKA918030115 has no nexus with the said shipper's invoice/purchase as well as with the goods found during the course of examination. Moreover, the goods are also not found as per the declaration in the said shipper's invoice/purchase. Thus, in view of his above acts of omission and commission, Shri Sunil Jain appeared liable for penal action under Section 112 of the Customs Act, 1962."

5.14 Since the Appellant Company and its Director have by their acts of omission and commission have rendered the goods liable for confiscation penalty imposed on them under Section 112 is justified. In our view taking into account the re-determined value of the consignment and the fact that some of the goods sought to be imported were old and used thus restricted under the EXIM Policy the quantum of penalty to is quite reasonable.

6.1 We do not find any merits in the appeals filed by the appellant company or its Director and hence dismiss the same.

(Pronounced in court on 17.01.2019)

(Ajay Sharma)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)