

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**
REGIONAL BENCH - COURT NO. II

Customs Appeal No. 786 of 2010

Arising out of Order-in-Original NoCCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Sushil Goel

C-28, PreetVihar,
Delhi

.... Appellant

Versus

**Commissioner of Customs
(ACC & Import), Mumbai**

Air Cargo Complex, Sahar,
Mumbai-400099

.... Respondent

And

Customs Appeal No. 859 of 2010

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Vijay Chand Baid

C-1/59, Ashok Vihar, Phase-II
Delhi -110052

.... Appellant

Versus

**Commissioner of Customs
(ACC & Import), Mumbai**

Air Cargo Complex, Sahar,
Mumbai-400099

..... Respondent

With

Customs Appeal No. 868 of 2010

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

SatishLuthraBaid

351, Mini Agarwal Plaza,
NetajiSubhash Place,Pitampura,
New Delhi.

.... Appellant

Versus

**Commissioner of Customs
(ACC & Import), Mumbai**

Air Cargo Complex, Sahar,
Mumbai-400099

..... Respondent

With

Customs Appeal No. 911 of 2010

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Commissioner of Customs **Appellant**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar, Mumbai-400099
 Versus

Radhe International, Respondent
 S-24, Naveen Shahadra,
 Delhi-110032

With
Customs Appeal No. 912 of 2010
 Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Commissioner of Customs **Appellant**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar,
 Mumbai-400099
 Versus

Universal Electronics, Respondent
 1617A, Uldhan Pur Naveen
 Shahadra, Delhi.

With
Customs Appeal No. 914 of 2010
 Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Commissioner of Customs **Appellant**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar,
 Mumbai-400099
 Versus

Harish Luthra, ... Respondent
Director,
Ramakrishna Electro Components Pvt Ltd
 351, Mini Aggarwal Plaza,
 Netaji Subhash Place, Pitampura,
 New Delhi

With
Customs Appeal No. 915 of 2010
 Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Commissioner of Customs **Appellant**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar,
 Mumbai-400099

Versus

M/s Unique Trade Links.... Respondent
 1617A, UldhanPur Naveen
 Shahadra, Delhi.

With
Customs Appeal No. 917 of 2010

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Commissioner of Customs **Appellant**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar,
 Mumbai-400099

Versus

M/s Oberoi Import Export.... Respondent
 E-56, GurunanakPura
 Jail Road, Delhi.

With
Customs Appeal No. 919 of 2010

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Commissioner of Customs **Appellant**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar,
 Mumbai-400099

Versus

SatishLuhtra, CEO.... Respondent
Ramakrishna Electro Components Pvt Ltd
 351, Mini Aggarwal Plaza,
 NetajiSubhash Place, Pitampura,
 New Delhi

With
Customs Appeal No. 920 of 2010

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Commissioner of Customs **Appellant**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar,
 Mumbai-400099

Versus

Simran Exports RespondentE-42/A, GurunanakPura
Delhi-110092**With****Customs Appeal No. 921 of 2010**Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated
13/08/2010, passed by the Commissioner of Customs (Import) ACC,
Mumbai.**Commissioner of Customs
(ACC & Import), Mumbai****.... Appellant**Air Cargo Complex, Sahar,
Mumbai-400099

Versus

Communication Trade Links,**....Respondent**A-15, MahakVihar
E-42/A, GurunanakPura
New Delhi-110016**With****Customs Appeal No. 21 of 2011**Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated
13/08/2010, passed by the Commissioner of Customs (Import) ACC,
Mumbai.**Radhe International****.... Appellant**S-24, Naveen Shahadra,
Delhi-110032

Versus

**Commissioner of Customs
(ACC & Import), Mumbai****.... Respondent**Air Cargo Complex, Sahar,
Mumbai-400099**With****Customs Appeal No. 22 of 2011**Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated
13/08/2010, passed by the Commissioner of Customs (Import) ACC,
Mumbai.**Jagveer Singh
Proprietor, Universal Electronics****.... Appellant**1617/1A, UldhanPur
Naveen Shahdara
Delhi – 110032

Versus

**Commissioner of Customs
(ACC & Import), Mumbai****.... Respondent**

Air Cargo Complex, Sahar,

Mumbai-400099

**With
Customs Appeal No. 23 of 2011**

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Vinod Kumar Sharma
Proprietor, Air sea Trade Links
1619/3, UldhanPur
Naveen Shahdara
Delhi – 110032

.... Appellant

Versus

Commissioner of Customs
(ACC & Import), Mumbai
Air Cargo Complex, Sahar,
Mumbai-400099

.... Respondent

**With
Customs Appeal No. 24 of 2011**

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Unique Trade Links
1611/1a, UldhanPur
Naveen Shahdara
Delhi – 110032

.... Appellant

Versus

Commissioner of Customs
(ACC & Import), Mumbai
Air Cargo Complex, Sahar,
Mumbai-400099

.... Respondent

**With
Customs Appeal No. 59 of 2011**

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Naendra Singh
Proprietor, M/s. Oberoi Import-Export
GurunankPura, Jail Road
Delhi.

.... Appellant

Versus

Commissioner of Customs
(ACC & Import), Mumbai
Air Cargo Complex, Sahar,
Mumbai-400099

.... Respondent

**With
Customs Appeal No. 60 of 2011**

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

KimtiLal **Appellant**
Proprietor, M/s. CommunicationTrade Links
 A-15, MahakVihar
 New Delhi-110016.

Versus

Commissioner of Customs **Respondent**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar,
 Mumbai-400099

**With
Customs Appeal No. 61 of 2011**

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Shiv Enterprises **Appellant**
 F-81, PrashantVihar
 New Delhi-110086

Versus

Commissioner of Customs **Respondent**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar,
 Mumbai-400099.

**And
Customs Appeal No. 62 of 2011**

Arising out of Order-in-Original No CCD-MJ/14/2010 ADJ ACC dated 13/08/2010, passed by the Commissioner of Customs (Import) ACC, Mumbai.

Simran Exports **Appellant**
 E/42, A, 2nd Floor
 Guru Nanak Pura, Delhi-110092

Versus

Commissioner of Customs **Respondent**
(ACC & Import), Mumbai
 Air Cargo Complex, Sahar,
 Mumbai-400099

Appearance:

Shri Ramesh Kumar, AC, Authorized Representative for the Appellant/Respondent Revenue

Dr. Prabhat Kumar, Advocate & Shri C.M. Sharma, Consultant for the Respondent/Appellant Assessee

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85555-85573/2020

Date of Hearing: 13.09.2019

Date of Decision: 11.03.2020

Per: P. Anjani Kumar

Based on intelligence received, the officers of the Directorate of Revenue Intelligence, Delhi Zonal Unit (hereinafter referred to as DRI) conducted searches at the office/ business premises of Shri Satish Luthra, MD of M/S Ramakrishna Electro Components Pvt. Ltd., (RECPL in short) and some of the other importers, namely, M/s Communication Trade Links, M/s Unique Trade Links, M/s Radhe International, M/s Oberoi Import Export, M/s Sanjay Enterprises, M/s Universal Electronics, M/s Simran Exports and M/s Shiv Enterprises; Statements of various persons of RECPL and other importers were recorded by the officials of DRI. DRI issued Show Cause Notice, F. No. DRI/23/14/2005/DZU-Pt/1334 to 1353 dated 31.3.2006, to various importers and persons, alleging that the importers have undervalued their imports; Shri Satish Luthra imported in the name of other companies and arranged to pay the differential amounts to foreign buyers through Hawala. The SCN sought to redetermine the value of imported goods and to impose penalties on various persons individually and severally.

2. The show cause notice has been adjudicated upon by Commissioner of Customs (Import), Air Cargo Complex, Sahar Mumbai-400099 vide Order in-Original No. CC/MJ/14/2010/ADJ/ACC dated 13.08.2010 wherein he rejected the declared and/or assessed transaction value; redetermined the value; confirmed duties along with interest on Shri Satish Luthra, holding him to be the actual importer;

imposed equal penalty under Section 114 A on various importers; confiscated the goods seized and allowed them to be redeemed on payment of fine of Rs 2, 00,000 and appropriated the amounts deposited during the investigation.

Sl. No	Name of the Importing Firm M/s	Duty Confirmed Rs	Penalty Rs	Penalty imposed & on Shri
1	Communication Trade Link	48,99,987	45,00,000	4,89,000 KimtiLal
2	Air Sea Trade Link	42,39,705	35,00,000	4,23,000 Vinod Kumar Sharma
3	Unique Trade Link	-	35,00,000	
4	Universal Enterprises	5,07,787	5,00,000	42,000 Jagveer Singh
5	Shiv Enterprises	4,15,463	5,00,000	51,000 D.K. Chopra
6	Oberoi Import Export	-	8,00,000	
7	Simran Exports	3,31,070	10,00,000	2,24,000 Narender Singh
8	Radhe International	22,35,269	5,00,000	1,33,000 Kanchan Kumar Kora
9	Sanjay Enterprises	-	2,00,000	
10	Sushil Goel		2.50,000	
11	Vijay Chand Baid		2,50,000	

2.1. Hence, Satish Luthra and the proprietors of the six firms are in appeal against the confirmed demand. Three firms and/or their proprietors i.e. Unique Trade Link, Oberoi Import Export and Sanjay Enterprises are in appeal seeking refund of the duty deposited in their names. Shri Sushil Goyal and Shri Vijay Chand Baid are in appeal against the penalty imposed on them. Department is in appeal against a portion of demands dropped; non-imposition of penalty under section 114A equal to duty and interest and dropping of penalty against Harish Luthra.

3. Shri C.M. Sharma, Consultant, appeared for the following Appellants/ Respondents:

(i) Communication Trade Links, New Delhi. (Appellant C/60/ 2011 & Respondent in C/921/2010)

(ii). Air Sea Trade Links, New Delhi (Appellant in C/ 23/ 2011 Respondent in C/921/2010)

(iii). Universal Electronics, New Delhi (Appellant in C/ 22/2011 & Respondent in C/ 912/2010) and

(iv). Unique Trade Links, New Delhi (Appellant in C/ 24/2011 & Respondent in C/ 915/2010).

3.1. Shri C.M. Sharma submits that so far as the first three appellants respondents, Learned Commissioner of Customs, vide the impugned Order had rejected the assessable values declared under Rule 10/ 10A of CVR, 1988; redetermined the assessable values under Rule 5 of the CVR, 1988 read with Section 14; confiscated seized goods under Section 111 (m) and 119; has given an option to redeem the goods on payment of fine of Rs. 20 Lakhs; confirmed differential duty under Section 28 (2), along with the interest under Section 28AB; appropriated the amounts deposited by the appellants/respondents and imposed Penalties under Section 114A and 112(a) of the Customs Act, 1962. However, fine of Rs. 20 Lakhs imposed was not quantified relating to any Bills of Entry or to any of the Importers.

3.2. Shri C.M. Sharma further submits that whereas the SCN raised the demand under Section 28 (1) of the Act, impugned order neither raised nor confirmed by invoking proviso clause to the Section 28 (1) of the SCN; while the bills of entry are of February – September, 2004 / October-November, 2004 / July-August, 2003, the SCN is dated 31-03-2006; there is no case for attracting extended period of time and proviso clause is not invoked; consequently, interest under Section 28AB and penalty under Section 114A is also not attracted; just because the declared values are re-determined, it does not amount to misstatement or suppression of material particulars; Provisions of

Section 111(m) for confiscating and penalty under Section 112 (a) of the Act are not sustainable and liable to be set aside; when penalty under Section 112 (a) is imposed, penalty under Section 114A of the Act is not imposable.

3.3. Shri C.M. Sharma further submits that the assessable values were re-determined once at the time of assessments of the Bills of Entry, a further re-determination for the second time is against the law. He relies upon the following cases.

- *Mohan Meakin Ltd Vs CCE, Kochi 2000 (115) E.L.T. 3 (S.C.)*
- *Naresh Kumar Vs CC (Prev) 2017 (357) E.L.T. 383 (Tri-Mum)*
- *CC (Imports), Mumbai Vs Lord Shiva Overseas- 2005 (181) E.L.T. 213 (Tri. - Mumbai)*
- *Hitaishi Fine Kraft Indus. Pvt. Ltd Vs CC, West Bengal – 2002 (148) E.L.T. 364 (Tri. - Kolkata)*

3.4. Shri C.M. Sharma further submits that while the SCN seeks rejecting the values under Rule 10/10A of the CVR, 1988 and re-determination of value under Rule 5 of CVR, 1988, based on identical imports, the impugned order held that only the Branded Goods are identical and that ST Micro Electronics and Sanyo Semiconductor Pte Ltd., Singapore price lists and the values of the identical goods are the basis for re-determined values; the impugned order does not discuss no evidence that the goods imported are compared favourably with the goods with which comparisons are being made as regards Country of origin, quantity imported and timing of imports; no enquiry was conducted for invoking Rule 10 and 10A, and no mandate therein observed.

- *Commissioner Vs Venus Insulation Products Mfg. Co. 2003 (153) ELT A172 (SC)*
- *Venus Insulation Products Mfg. Co Vs Commissioner 2002 (143) ELT 364 (Tri. - Del.)*

3.5. Shri C.M. Sharma further submits that Rule 10A of Customs Valuation Rules, 1988 was not a substantive provision governing determination of value in the sequential scheme under Valuation Rules

as the Rule is only a procedural provision to determine whether Clause (i) or Clause (ii) of Rule 3 will be applicable to a given case; Apex Court, in the case of Eicher Tractors Ltd. [2000 (122) E.L.T. 321 (S.C.)] held that when Department has not been able to establish existence of any circumstances as in Rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, price mentioned in the invoice is to be accepted as the transaction value; Bills of Entry of the identical goods are not disclosed in the SCN or cited in the impugned order and Rule 2 (c) provisions are not considered; Rejection of transaction value under Rule 3 of CVR is not concluded in the impugned order; Essential ingredient of Rule 5 has not been shown as applicable basis of re-determined values; It is not shown as the test values were “at or about the same time as the goods being valued; Contemporaneous import are not shown to be within a period of 90 days from the respective imports of which values are being re-determined. He relies upon the following.

- *VintelDistributorsPvtLtd Vs CC (Sea), Chennai2002 (149) ELT 145 (Tri. – Chennai) and 2003 (153) ELT A101 (S.C.)*(*It was held that goods should be identical and not just similar, corresponding in nature identically in terms of quality, quantity, place of origin and time of origin*)
- *CC, Chennai Vs Forte Garments 2002 (150) ELT 622 (Tri. - Chennai)*(*it was held that Proof of contemporaneousimports of same goods, country, time, quantity and quality as that of impugned goods is required to be produced by Revenue*).
- *Navin Chandra & Co. V/S Cc Mumbai 2003 (162) ELT 287*
- *Varsha Poly Products Pvt Ltd VsCollector 1994 (74) ELT 151 (Tribunal) and 1999 (112) ELT A118 (S.C)* (*it was held that relying upon the Price List of Singapore for the imports from Hong Kong is not just, legal and proper*).

3.6.Shri C.M. Sharma further submits that Price List cannot be the basis for re-determination of values; All Appellants herein are an independent entities, with their separate Income Tax PAN Numbers,

IEC Codes and Bank Accounts and operations and conducted their own operations; Goods were subjected to examination and copy of the examination reports are not made available / considered; The variation in the declared values and re-determined assessable values have not be shown in the impugned order and if such variations are in normal course of trade and attendant circumstances. Shri Satish Luthra has nothing to do with business of Appellant herein. Impugned Order travelled beyond SCN and is thus non est. It is a settled principle of law that orders travelling beyond show cause notice are *non-est* as held in the following.

- *Carborandum Universal Ltd Vs Commissioner 2007 (211) ELT 105 (Tri. - Chennai) (affirmed in 2008 (223) ELT A 94 (SC)*
- *Volvo India Private Limited V/S Cc, Chennai 2005 (180) 489 (T)*
- *Vijay Power Generators Ltd. V/S CCE, Meerut 2001 (129) ELT 663 (Tri. Del)*
- *CCE, Mumbai-I V/S Parekh Plast 2000 (124) ELT 1016 (T)*
- *Kalyani Sharp India V/s, Pune 2005 (187) 315 (T)*

3.7. Shri C.M. Sharma submits, in respect of Unique Trade Links, New Delhi (Appellant in C/ 24/2011 & Respondent in C/ 915/2010), that the impugned order has not demanded any duty or imposed any penalty; an amount of Rs. 35 Lakhs deposited by them in February, 2005 / Mar, 2006 has been ordered to be appropriated towards duty / penalty of other importers; such an appropriation is not sanctified by the law.

4. Shri Prabhat Kumar, Advocate, appeared for Appellants M/s Radhe International (C/21/2011), M/s Shiv Enterprises (C/61/2011) and M/s. Simran Exports (C/62/11).

4.1. Shri Prabhat Kumar submits that the Appellants have been engaged in the import of electronic components on their own account and have imported various consignments of electronic components vide various Bills of Entry at through various ports; in some consignments, declared value was enhanced by the proper officer; commissioner confirmed the differential duty on branded goods. Learned Advocate submits that Commissioner has erred in travelling

beyond the scope of show cause notice; he has relied upon an area of EDP where he is said to have seen the brand names declared by the actual importers; as per impugned order, such area is not visible on the hard copy and can be seen only on the soft copy of EDP; there is no mention of such an area in the show cause notice; Even DRI has not seen anywhere the declaration of such brand names; It is a settled principle of law that orders travelling beyond show cause notice are non-est in view of *Commissioner Vs Carborundum Universal Ltd 2007 (211) ELT 105 (Tri. Chennai)* and *(affirmed by SC 2008 (223) ELT A94 (S.C.)) and Asha Celluloid Vs CCE, Surat - 1998 (98) E.L.T. 769 (T)*; adjudication authority is not to assume upon itself the role of investigating agency and go on to investigate something which has not been alleged in the SCN; Ld Commissioner should have shown soft copy of EDP to the appellants also. Not showing the relied upon area in the EDP to the appellant tantamount to denial of natural justice and non-supply of relied upon documents; such orders are non-est; Reliance is placed on the following.

- (i). Silicon Graphics System (India) Private Limited Vs UOI 2006 (204) ELT 247 (Bom.)*
- (ii). Shripra Alloys Ltd Vs CCE, Nagpur. 2007 (220) ELT 297 (Tri- Mumbai)*
- (iii). Novamet Industries Vs UOI 2008 (227) ELT 363 (All)*

4.2. Dr. PrabhatKumar submits that Commissioner devised his own erroneous means to say that the goods are identical by going beyond the scope of SCN; he has travelled beyond the scope of SCN, in gross violation of the principles of natural justice, as far as concluding (Para-60.9) that the goods declared were branded at the time of import and it was very obvious that the goods are identical. Commissioner has erred in upholding the depositions made in the retracted statements despite admitting (in para-63.3.2) that.....*I find from the case records that goods worth about Rs.1.39 crores were seized on 31 01-05 and 28.2.2005 which remained locked out of business till end of July 2005. This might have put pressure on the owner of the goods; after admitting the kind of pressure that was exerted by DRI for extracting the desired statements, Commissioner has fallen back and*

rejected the retractions filed by Mr. Satish Luthra on 3.2.2005 and 8.2.2005 in respect of statements recorded on 31.1.2005 and 1.2.2005; statement recorded on 7.3.2006 was retracted by Mr. Satish Luthra on 8.3.2006; though this statement was recorded after release of the seized goods - released on 29.7.2005 -- but there are a multifarious forms of exerting pressure other than blocking the goods from business mainstream.

4.3. ShriPrabhat Kumar further submits that Commissioner has erred in rejecting examination reports and outcome of cross-examination of AOs and Eos, who testified that the goods examined by them were unbranded; the testimony (Paras-50 and 51); Commissioner has travelled beyond the scope of SCN (Para 63.3.4) of the impugned order while holding that the officers cannot normally see the 'Brand' declared unless they go to screen 18 which is for 'Accessories'; the inference drawn by Commissioner regarding the depositions made by officers is not sustainable in the eye of law. Therefore, the impugned order is liable to be set aside. All the goods were examined by the proper officers and no discrepancy, least of all about the nature of the goods having been declared without any brands, was ever noticed by any of the examining officers. The goods were unbranded and question of their being now termed as branded does not arise. It is submitted that all the Assessment Orders, passed by Assistant Commissioner on the respective bills of entry, have attained finality because no appeal has been preferred against any such order by department. He relies upon.

- *Mohan Meakin Ltd Vs CCE, Kochi 2000 (115) E.L.T. 3 (S.C.)*
- *CC (Imports), Mumbai Vs Lord Shiva Overseas- 2005 (181) E.L.T. 213 (Tri – Mumbai)*

4.4. Counsel submits that the Appellants completely deny all the charges and categorically state that the Appellants are independent importers; the goods have been bought from the foreign suppliers on principal to principal basis; DRI has wrongly alleged under invoicing by alleging that Mr. Satish Luthra approached the foreign supplier namely, M/s Ascend International Hong Kong and M/s Stride

Promotion Pte. Ltd., Singapore; the transactions between the present appellants and the supplier of the goods were on principle to principle basis and at arm's length; Mr. Satish Luthra had nothing to do with the import business of the appellants; all the bills of entry were filed by the Appellants and goods were cleared after following due process of clearance; however, sometimes the Appellants took assistance from Shri Satish Luthra, who is an experienced hand in the import trade; whenever the Appellants faced any difficulties they used to approach many persons, one of which happened to be Shri Luthra; however, that does not lead to the conclusion that Shri Luthra himself became the importer in respect of the consignments imported by them.

4.5. Counsel submits that the allegation of undervaluation not sustainable on the following grounds.

(i). Goods supplied by M/s Ascend International, Hong Kong or and M/s. Stride Promotion Pte Ltd, Singapore were duly examined by the officers; no discrepancy was ever found; there is no basis for the main allegation that branded goods were imported in the guise of unbranded goods was incorrect; during cross examination officers categorically stated that imported goods were duly checked and no discrepancy has ever been found.

(ii). appellants were not provided with examination reports, stating that the examination reports are not relied upon; it is not understood as to how the case of under-valuation can be booked against the appellants without having a look at the same; no vigilance case booked against any of the officers, who according to DRI had connived in not reporting the branded nature of the goods.

(iii). Values (Annexure A-4) given in some imports made by RECPL were relied upon; apart from this, no details of misdeclaration furnished to the Appellants; comparison of values is odious as it does not meet the requirement of Customs Valuation Rules, 1988 as there is no similarity.

(iv). The basic charge of the goods being branded is without any evidence, factual or otherwise; the origin, quantity and timing of import is not known from the chart in Annexure A-4, as

the relied upon Bills of Entry are not supplied to the Appellants; Values have been simply enhanced to a very high level without giving any particulars of imports in the said chart; The said values may be of different kind and quality and proof of the goods and hence not applicable for comparison of goods imported by the present appellants.

(v). It is a well laid down principle that transaction value cannot be rejected in absence of specific proof or evidence so as to ensure that the case falls under exclusion clause rule 4(2) of Customs Valuation Rules; no such reason has been alleged in the show cause notice; SCN does not allege as to which sub-clause of the aforesaid Rule has been contravened by the importer; there is no misdeclaration vis-à-vis the alleged import by RECPL. there is no evidence on record regarding the misdeclaration of the goods imported by the appellant; in the absence of higher prices declared for imports of the same kind and quality at about the same time, cannot be enhanced; Price of electronic components depends upon the manufacturer's brand, country of origin, timing of imports, quantity imported and other factors as laid down in Customs Valuation Rules, 1988 in the absence of any such allegation, the transaction value declared by the appellants must be accepted as held in the following. Reliance is placed on the following case

- (i). Eicher Tractors Vs CC - 2000 (122) ELT 321 (SC)*
- (ii). CC Vs Jindal Strips Ltd 2003 (156) ELT A385 (SC)*
- (iii). Navin Chandra & Co Vs CC Mumbai 2003 (162) ELT 287 (Tri-Mumbai)-*
- (iv). CC New Delhi Vs Grover Imports 2003 (162) ELT 992.*

(vi). In the present case, DRI has not even examined the prices of contemporaneous imports of the unbranded goods being imported into India; application of Rule 5 and 6 thus has been completely ignored; Law not only requires that there must be evidence of contemporaneous import, but that the importation must match in terms of all details, such as quantity, quality, timing, and all other relevant factors; unless samples are available for comparison, no

comparison can be made and no charge of under-valuation can accordingly be made. Reliance is placed on the following case laws.

- (i). *CC Bombay Vs Nippon Bearings (P) Ltd* 1996 (82) ELT 3 (SC)
- (ii). *CC Vs Iron Master India Pvt Ltd* - 2003 (157) ELT A151 (SC)
- (iii). *Tech Tronix India Vs CC (Port), Kolkata-I* 2006 (203) ELT 301 (Tri - Kolkata)

(vii). Rejecting the examination reports and assessment in such large number of cases that too without any contra evidence is total disrespect to the Customs authorities concerned; DRI does not have any authority over the assessment of those consignments which were done at a higher value than the declared in the respective invoices; rejection of such assessments simplicitor is not permitted under the law in view of the cases of *Mohan Meakins*(Supra) and *Lord Shiva Overseas* (Supra). As no samples were drawn for comparison and as no examination reports were made available, the entire charge of under valuation can be assumed to be based on mere presumptions and assumptions, without scrutiny of documents and without ascertaining the facts; they rely upon *Oudh Sugar Mills Ltd Vs UOI* 1978 (2) ELT (J 172) (SC-Constitution Bench).

(viii). From the definition of "Identical goods" as appearing in Rule 2(c) of Customs Valuation Rules 1988, it is clear that identical goods have to be same in all respects including physical characteristics, quality and reputation except for minor differences in appearance that do not affect the value of the goods; DRI authorities have not examined the physical characteristics, quality and reputation of the goods imported by the Appellants; they have not produced samples of such imported goods in order to make a comparison; the fact that the impugned goods were unbranded itself will go against the allegation of goods being identical goods to those imported by M/s. RECPL; therefore, no

ground exists for rejection of Transaction; declared value must be accepted and no fine and penalty can be imposed in view of Sony ImpexVs CCE & C 2006 (202) ELT 486 (Tri-Kolkata); as the evidence relied upon do not confirm to the “timing of import”, cannot be comparable. As regards the Price List, they cannot per say be an evidence as held in

- (i). *Eicher Tractors Vs CC - 2000 (122) ELT 321 (SC)*
- (ii). *Mirah Exports Pvt Ltd Vs CC 1998 (98) ELT 3 (SC)*
- (iii). *CC Vs Venus Insulation Products Mfg. Co - 2003 (153) ELT A172 (SC)*
- (iv). *Aryan Electronics Vs CC, New Delhi-IV 2004 (177) ELT 908 (Tri-Del)*
- (v). *Vintel Distributors Pvt Ltd 2002 (149) ELT 145 (Tri-Chennai)*

(ix). Learned Counsel submits that there is no case for application of extended period of limitation as held in *Dr. Reddy's Laboratories Ltd Vs CC Hyderabad 2004 (175) ELT 565 (Tri-Bang)*; there is no case of confiscation and levy of penalty as there was no suppression as held in *Kohli Printographics Vs CC, New Delhi 2003 (159) ELT 1178 (Tri-Del)*; It is a settled principle of law that the amount deposited during investigation is not liable to be appropriated when the demand of duty itself is not sustainable; no penalty is imposable when the demand of duty itself is not sustainable as held in *CC Vs M.M.K. Jewellers – 2008 (225) ELT 3 (SC)* and *Collector v/s H.M.M. LTD - 1995 (76) ELT 497 (SC)*; no interest is demandable when the demand of duty itself is not sustainable.

(x). Learned Commissioner erred in imposing penalty on Proprietors when the penalty has been imposed on his proprietary concern as held in *V.K. Enterprises Vs CCE, Panchkula - 2010 (249) ELT 462 (Tri-Del)* and *Jayantibhai J. Patel Vs CCE, Ahmedabad - 2009 (244) ELT 140 (Tri. Ahmd)*; in the absence of *mens rea* penalty cannot be imposed *Akbar Badruddin Jiwani Vs Collector - 1990 (47) ELT 161 (SC)*

5. Learned Counsel, for that the appellant Shri Sushil Goel, Appeal No. C/786/2010, submits that penalty of Rs.2.50, 000, has been imposed on him under Section 112 (a) of the Customs Act, 1962, though a separate penalty has been imposed upon the firm M/s

Communications Trade Links and 8 others firms controlled by Shri Satish Luthra as well as on other co-noticees; appellant has given no objection and had not made any entry in the bill of entries and therefore, Sections 14, 14 (1) & 14 (1A) of the Customs Act, 1962 and Customs Valuation (Determination of Price of Imported Goods) Rules 1988, are not applicable in the present case qua him; entire case has been made against the appellants on the basis of statement of Satish Luthra, who is quoted to have stated that he remitted the differential of the actual price and the under invoiced price declared before the Indian Customs to the foreign supplier in cash through Hawala Operators residing in Karol Bagh, Trans Yamuna in Shahdara and in Ashok Vihar; he did not know the exact names of these Hawala operators; he arranged Hawala amount by selling the undervalued and misdeclared imported goods against the actual price in cash; the statement of the appellant was recorded on 23.03.2006; prior to recording of his statement there was no material on record; he was not implicated by anybody else in whole case either by the importer or by the persons whose companies have been used by the importer i.e. Luthra Brothers; there is no documentary evidence at all in the show-cause notice, whereby the appellant can be connected with the alleged contravention made by the importers; neither the appellant had made any payment on behalf of any person resident abroad nor he had received any payment from any person on behalf of person resident abroad or in India; statement was retracted by the appellant at the first available opportunity; during the cross-examination conducted on 05.01.2009, Shri Satish Luthra specifically stated that he never met the appellant and has not send any money through the appellant; He relies upon to state that in case of retracted statements the burden is on the department to prove.

(i). *UOI Vs Balmukund* 2009 2 JCC Narcotics 76

(ii). *Mohtesham Mohd Ismail Vs Special Director, Enforcement, & another* 2008 (1) JCC 240

(iii). *Vinod Solanki Vs UOI* 2009 (223) ELT 157 SC.

5.1. Learned Counsel submits that Adjudicating Authority framed issues but left them unanswered; he raised the issue as to whether

Shri Sushil Goel and ShriVinodBaid have any role in remitting any differential value of the goods imported but relies solely on the statements given by Shri Satish Luthra on 07.03.2006, which refers to one "Arjun" who remitted the differential amount through Hawala route; investigations by DRI showed that it was alias for Shri Sushil Goel; it has been admitted by Shri Sushil Goel in his statement dated 23.03.2006 that he was known as "Arjun" in Hawala Market. Learned Counsel submits that the appellant was not implicated by any importer or by Shri Satish Luthra; there was no material to summon Shri Sushil Goel to the DRI office; ShriAswin Sharma of DRI, when cross examined, stated that he does not remember any facts relevant to the case and replied to all questions that 'it is a matter of record'.

6.ShriPrabhat Kumar, Advocate, also appearing for Shri Satish Luthra (C/868/2010), submits all the importer-concerns/business units are independent entities; procured the import export code; placed the order for imports; filed the customs documents like bills of entry; remitted money through their respective bank accounts and were filing their own independent VAT and Income Tax returns; availability of all the proprietors should dispel the doubt and settle the matter at rest that they are independent importers; each unit has been held to be in existence since duty demands are confirmed only against such individual importers; just because appellant's brothersupplied goods to independent importers through his company, no charge can be made against the appellant.

6.1.ShriPrabhat Kumar also submits that Legal provisions have been ignored totally; statements (retracted later) recorded under threat have been given precedence over facts; Shri Satish Luthra retracted his statement recorded on 31.1.2005; there is no corroborative material; Commissioner did not allow Cross-Examination of CHAs, proprietors and others, which was required to prove the charges. not affording cross-examination has resulted in violation of the principles of natural justice and hence not sustainable as held by Hon'ble

Supreme Court in the case of SwadeshiPolytex LtdVs CCE, Meerut 2000 (122) ELT 641 (SC).

6.2. ShriPrabhat Kumar submits thatAs per definition contained in section 2(26) of the Customs Act, 1962,it is clear that to be importer, a person has to either file a bill of entry or should hold himself out to be the importer; Satish Luthra never claimed himself to be the importer; status of importer can be determined only before clearance of goods andno discretion has been conferred on the customs authorities to allege that a person is the importer who has not claimed himself to be so.Even assumingthat, for the sake of argument, Satish Luthra was the beneficial owner, such an amendment in Section 2 (26) of the Customs Act relating to the definition of “IMPORTER” has been incorporated only in the budget of 2017, i.e., much after the import of goods.

6.3. ShriPrabhat Kumar also submits that the demand under section 28 can be raised only against importer and relies upon CC (Import), Bombay Vs VXL India Ltd 2006 (193) ELT 396 (Bom) affirmed 2006 (197) ELT A121 (SC); the word “Jointly and severally” has no legal sanctity under the eye of law; the impugned order confirms duty and penalty only against the importers; there is no authority for the same devolving on the appellant; commissioner has not cited any authority; Section 28 (4) of the Customs Act is very categorical about the duty being demanded only against the importer; it was held in following decisions that Customs authorities must make their mind as to who is the noticee for the payment of the alleged short levy of duty.

(i). *Vision IncArun Kumar*

(ii). *RimjhimIspatVs CCE Kanpur 2013 (293) ELT 124.*

(iii). *JK Pharma Vs CC (Import), Mumbai - 2004 (166) ELT 407 (Tri. - Mumbai)*

(iv). *SreeAravindh Steels Ltd Vs CCE2007 (216) ELT 332 (Tri-Chennai)*

(v). *Famous Textile Vs CCE, Rajkot 2005 (190) ELT 361 (Tri-Mumbai)*

6.4. ShriPrabhat Kumar also submits that confiscationis not proper as it was held (Para 60.6) that there is no link between the seized goods and the imported goods; penalty imposed on other concerns cannot be demanded from Satish Luthra; there is no provision in law to demand

the same; no penalty is imposable in the absence of *mens rea* as held in AkbarBadrudinJiwaniVsCollector (supra).

7. Learned counsel submits, on behalf of Shri Narender Singh, Proprietor, M/s Oberoi Import Export (Appeal No. C/59/2011), that though the commissioner dropped the charges against him, an amount of Rs. 8, 00,000, deposited during the investigation, has been appropriated towards duty liability of M/s. Simran Exports; the Appellant is an independent importer and has nothing to do with Mr. Satish Luthra CEO of M/s. Ramakrishna Electro Components Pvt Ltd; Ld. Commissioner has erred in appropriating the amount, as there is no authority of law to do so.

8. Shri Ramesh Kumar, Learned Authorised Representative for the department, submits that Satish Luthra in connivance with his brothers Jawahar Lal Luthra, and Harish Luthra planned to import electronic goods of ST (ST Micro Electronics) of Philips and Sanyo brand undervaluing them; he adopted a modus whereby they would procure such goods in Singapore and Hong Kong from the original manufacturers; he would generate invoices, in the name of firms viz. M/s Stride Promotion Pte Ltd in Singapore and M/s Ascend International, Hong Kong, owned by Ranjan Shukla, a friend of Satish Luthra and Jawahar Lal Luthra, brother of Satish Luthra, showing lower value; in order to avoid detection by Customs department, he planned to import in the name of various firms (IECs) in the name of his employees or acquaintances who were lured to connive in the fraud for an offer of few thousand rupees; he also opened a firm, in the name of M/s Ramakrishna Electro Components Pvt Ltd (RECPL), with his wife and his brother Harish Luthra as Directors, to show some genuine business; RECPL did not resort to undervaluation and misdeclaration of brands; he opened another firm, namely, M/s SK Trading, under his own proprietorship, to sell goods imported in the name of M/s RECL and others, locally.

8.1. Learned AR submits that Satish Luthra was the mastermind behind the fraud and he was the controlling person of all the nine

firms. Documents pertaining to the imports made by all the nine firms impugned firms were recovered from the searched premises of RECPL; scrutiny of revealed that payments to supplier, CHA and transporters were not made through the bank accounts of these firms in most of the cases; most of these firms did not have an office and the residential premise was shown as the address; they did not have any sales tax registration some addresses were bogus. Further evidence is as follows.

- The proprietors, of these 9 firms, categorically stated that they were only namesake owners; real owner of the firms was Satish Luthra; they had never contacted foreign supplier, the CHA or the transporter.
- Parveen Mahajan, Sales Advisor of RECPL stated, on 31.1.2015, that Satish Luthra used to negotiate with the foreign suppliers viz., M/s ST Micro Electronic (Thompson Group), Singapore, and M/s Phillips Semiconductors, Hong Kong and used to sell goods imported by M/s Communication Trade Links, M/s Air Sea Trade Links and M/s Unique Trade Links.
- Kuljeet Singh, an employee of RECPL, stated on 31.1.2005 that he used to sell the electronic components imported by Satish Luthra through the firms controlled by him.
- various CHAs stated that Satish Luthra had approached them to render their services in respect of Customs Clearance of the goods imported by him in the name of RECPL and the other nine firms; he handed over the copies of IECs & authority letters of the nine firms; used to make payments and arrange for transportation; they did not know the other proprietors / persons except Satish Luthra;
- Various transporters, who transported the imported goods, stated that they had dealt with Satish Luthra with respect to the imports; payments were made by Satish Luthra; they delivered the goods to Shri Luthra.
- Hawala operators viz. Sushil Goel and Vijay Chand Baid also admitted, in their statements on 23.3.2006 and 24.3.2006, that they had send the difference between the actual value and the

declared value through Hawala channel to Jawahar Luthra in Hong Kong for Shri Satish Luthra.

- Satish Luthra on being confronted with these statements, Satish Luthra admitted, on 31.01.2005, 1.2.2005, 9.3.2005 and 7.3.2006 the same on 7.3.2006, that the above were true.
- The request for provisional release, of goods seized, was made under the signature of Satish Luthra though goods were imported in the name of these nine firms; during the course of provisional release, he even submitted a bond, supported by a BG of Rs.50 lakhs, stating that the nine firms are under his control.
- Satish Luthra also made a voluntary deposit of duty to the tune of Rs. 1.5 Crores in the name of these nine firms.
- Satish Luthra in his statement dated 9.3.2005 and 7.3.2006 also admitted to the duty chart prepared on the basis of Price lists and contemporary imports made by him in his own firms RECL.

8.2. Learned AR submits that definition of 'Importer', as in Section 2(26) includes *any owner or any person holding himself out to be the importer*"; Shri Satish Luthra is the person who, between their importation and clearance for home consumption, dealt with the goods; he booked the imports; remitted the value through IECs holders' accounts and also through the Hawala operators; as seen above, this fact is supported by the statements of CHAs, Transporter and Shri Satish Luthra himself; Learned AR submits that admitted facts need not be proved as held in CCE, Madras Vs System & Components Pvt Ltd 2004 (165) ELT 136 (SC) and ACC, Madras -I Vs Govindasamy Ragupathy 1998 (98) ELT 50 (Mad). Relying on following cases, Shri Satish Luthra can be held as the importer and duty demand can be fastened on him.

- (i). CC (Import), Mumbai Vs Pundrick Ravindra Trivedi 2015 (322) ELT 812 (SC)
- (ii). Sushil Agarwal Vs CC (Import), Mumbai 2013 (283) ELT 377 (Tri-Mumbai) affirmed by Hon'ble High Court 2012 (293) ELT 633 (Bom)
- (iii). Shri Ganesh Overseas Vs CC, Ahmedabad 2002 (150) ELT 145 (Tri-Del).

8.3. Learned AR submits on the argument /claim of Retraction, of statement of Shri Satish Luthra, that the counsel for Satish Luthra could not produce any copy of retraction; all the statements, recorded at various intervals, are written by himself in Hindi; such statements running into pages cannot be written under any force or threat. It was held that retraction should be addressed to the authority who had recorded the statement; any other retraction would not be valid and that even if a statement is retracted it is still admissible, in the following cases.

- (i). *Surjeet Singh Chhabra Vs Union of India 1997 (89) ELT 646 (SC)*
- (ii). *ACC, Madras -I Vs Govindasamy Ragupathy 1998 (98) ELT 50 (Mad).*
- (iii). *K.I. Pavunny Vs ACC (HQ), C.Ex Collectorate, Cochin 1997 (90) ELT 241 (SC)*
- (iv). *Zakilshrati Vs CCE, Kanpur 2013 (291) ELT 161 (All.)*
- (vi). *Sidharth Shankar Roy Vs CC, Mumbai 2013 (291) ELT 244 (Tri-Mumbai)*
- (vii). *D.M.Mehta & Bros Vs CC(General), Mumbai 2017(346)ELT 477(Tri-Mumbai)*

8.4. Learned AR submits, on the argument that second time enhancement of value is invalid, that Counsels did not produce any evidence to substantiate their argument; even in such case there is no bar in re-determining the value; Tribunal held, in the case of A.G. Incorporation Vs CC, Delhi 2013 (287) ELT 357, that after loading of value at time of import, It is not proper to throw it out at threshold, without looking at quality of evidence; fraud, if established, unravels all; otherwise, it could be means to evade Customs duty with impunity, by declaring substantially low price in Bill of Entry, somehow getting Customs officer to load value a bit; judicial decisions only protect bona fide purchaser or assessee; they do not deal with situation where approval is obtained by fraud, or unearthing of misdeclaration or suppression of value subsequent to assessment of Bill of Entry; they do not lay down absolute law that assessment made under Section 47 of Customs Act, 1962, cannot be opened through notice issued under Section 28. Hon'ble Tribunal had also distinguished the judgement of Hon'ble Supreme Court in the case Mohan Meakin Ltd (supra).

8.5. Learned AR submits, on the argument that the goods imported in the name of these nine firms are not branded, that a perusal of the

Annexures to the SCN and the Price list of ST Brand clearly reveals that the unique code of these brands are specifically mentioned in the bills of entry, which indicates that the goods are nothing but branded goods; code names specific to the ST brands, such as transistors and ICs like TR 1802, TR 13005, IC FONDA 4 etc, found on invoices are also found in the Bills of Entry; the department is in appeal as even the Adjudicating authority had ignored this fact unnoticed while dropping the demand. Learned AR submitsthat although Assessing officers were cross examined, questions were posed only with reference to one or two bills of entry, as against 171 consignments involved; cross examination had taken place after a gap of 4 to 5 years; it is very difficult for anyone to remember exactly what was presented to them. Adjudicating authority erred in holding that these are unbranded goods; Satish Luthra had himself admitted the duty liability; duty chart prepared on the basis of Price list and contemporary imports. Adjudicating Authority cannot drop an admitted liability; as the bills of entries show the brand code in the description, there is no doubt that these are branded goods and therefore the whole of demand is sustainable. Learned AR submits that valuation was correctly arrived after rejecting the declared price on the basis of contemporaneous Import (Para 24, 25 and 26); price lists available corroborated the correctness of the value of the imported ICs and Transistors, as declared by RECPL; actual prices were declared on goods imported in the name of RECPL but under-invoiced when imported in the name of 9 dummy firms; this fact was admitted by Shri Satish Luthra in his voluntary statements; Price List in question is from the original Manufactures, whereas the invoices produced by dummy firms are from traders like M/s Stride Promotion Pte Ltd. in Singapore, owned by the Ranjan Shukla (a friend of Satish Luthra) and M/s Ascend International in Hong Kong (owned by Jawahar Lal Luthra brother of Satish Luthra); the following judgements hold that manufacturer's Price list or quotations can be relied for arriving at the transaction value.

(i). Mytri Enterprises Vs CC, Mumbai 2004 (174) ELT 389(Tri-Mumbai) affirmed by Supreme Court 2015 (323) ELT A71 (SC).

- (ii). *Pan Asia Enterprises Vs CC 1995 (79) ELT 322 (T) affirmed by SC as 1997 (94) ELT A59 (SC).*
- (iii). *Hind Industries Vs Commissioner 1997 (90) ELT 499 (T) affirmed by SC 1998 (99) ELT A55 (SC).*
- (iv). *Sharp Business Machines Pvt Ltd Vs CC 1990 (49) ELT 640 (SC).*
- (v). *CC, Pune Vs Shri Hari Corporation 2014 (307) ELT 771 (T).*

8.6. Learned AR submits that in view of Madras High Court's judgement in *K V Shivaraj 2017 (346) ELT 547*, penalty can be imposed proprietors of dummy units for allowing third party to gain unauthorized access to IEC; Unique Trade Link (Shri Jagvir Singh) and Oberoi Import Export (Shri Narender Singh) are not eligible for refunds as they are not importers in this case; Shri Satish paid the amounts and not them and refund was not claimed as provided in Section 27.

8.7. On departmental appeals, C/911/2010 (Respondent M/s Radhe International), C/912/2010 (Respondent M/s Universal Electronics), C/915/2010 (Respondent M/s Unique Trade Links), C/917/2010 (Respondent M/s Oberoi Import Export), C/920/2010 (Respondent M/s Simran Exports) , C/921/2010 (Respondent M/s Communication Trade Links), learned AR reiterates the grounds of appeal and submits that the adjudicating authority erred in dropping the portion of the demand holding that some of the goods are unbranded; regarding appeal No. C/914/2010 (Respondent Shri Harish Luthra), he submits that the impugned order was incorrect as far as dropping of penalty on Shri Harish Luthra; Shri Harish Luthra is the Director of RECPL; he accepted, his role as stated by Shri Satish Luthra, in his statement dated 31.01.2005; Shri Harish Luthra was aware and was a part of the whole fraud and therefore, is liable to penalty and in respect of appeal No. C/919/2010 (Respondent Shri Satish Luthra, CEO), learned AR submits that the Adjudicating Authority erred in not imposing penalty under Section 114A equal to duty and interest; which requires to be rectified.

9. Heard both sides and perused the records of the case. Brief issues that require consideration in these set of appeals are as to whether

- (i). Shri Satish Luthra can be held to be the importer in respect of various imports for which the bills of entry have been filed in various

names and thus, whether Shri Satish Luthra is liable to pay duty, interest penalty etc in respect of the impugned imports?

(ii). whether department could establish the charge of under valuation in respect of the impugned imports and if so whether the redetermination of value was correctly made?

(iii). whether the appellants, S/Shri Sushil Goel, Vijay Chand Baid, Kanchan Kumar Kora (M/s Radhe International), Jagveer Singh (Universal Electronics), Vinod Kumar Sharma (Air Sea Trade Links), Narendra Singh, Kimti Lal (M/s Communication Trade Links) and D.K. Chopra (M/s Shiv Enterprises) are liable to pay penalty?

(iv). whether the respondent, Shri Harish Luthra is liable to pay penalty.

10. The SCN makes a case against Shri Satish Luthra that he controls M/s RECPL engaged in import and sale of branded electronic goods; in order to evade customs duty, he set up nine other firms with proxy owners controlled by him and imported electronic goods in the names of nine firms by under declaring the value and remitting the difference between declared value and actual value through Hawala route. Learned Commissioner has concluded that all the nine firms are proxy for the reasons that import documents pertaining to the all importing firms were found in the premises of RECPL controlled by Sh. Satish Luthra; three firms were found to be non-existent at their given addresses; letters written to the nine firms were returned by Postal authorities; they do not have Sales Tax Registration; the addresses of some companies were in residential areas and their accounts do not show any proof of payment to the overseas suppliers. He also concludes that Sh. Satish Luthra is the actual importer for the reasons that vide letter dated 11.03.2005, Sh. Satish Luthra requested for provisional release of goods seized at New Delhi Railway Station though the imports were in the name of Shiv Enterprises; the CHA and the transporters identified Sh. Luthra to be the person with whom they dealt with in respect of the impugned imports. Learned Commissioner interprets the word “person” in the definition of “importer” to mean “persons” relying on the fact that Section 13 of the General Clauses

Act 1897 stated that in all (Central Acts) and Regulations, unless there is anything repugnant in the subject or context words importing the masculine gender shall be taken to include females, and words in the singular shall include the plural.

11. We find that Learned Counsel for the appellants submits that Shri Satish Luthra never claimed himself to be the importer; status of importer can be determined only before clearance of goods and no discretion has been conferred on the customs authorities to allege that a person is the importer who has not claimed himself to be so. Learned Counsel submits that all the importer-concerns/business units are independent entities; procured the import export code; placed the order for imports; filed the customs documents like bills of entry; remitted money through their respective bank accounts and were filing their own independent VAT and Income Tax returns; availability of all the proprietors should dispel the doubt and settle the matter at rest that they are independent importers; each unit has been held to be in existence since duty demands are confirmed only against such individual importers; just because appellant's brother supplied goods to independent importers through his company, no charge can be made against the appellant.

12. we find that it will be beneficial to have a look at the definition of the word "importer" Section 2 (26) of the Customs Act defines importer as follows:

"Importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes an owner or any person holding himself out to be the importer".

A bare reading of the definition implies that the term "importer" includes any person holding himself out to be the importer. However, it is important to note that such a person holding himself out to be the importer would be considered an importer any time between the importation of the goods and the clearance of the same for home consumption. In the instant case, it is not in dispute that the entire case is about the goods which have been imported and cleared for

home consumption after due assessment. It is evident that Shri Satish Luthra has not been held to be an importer before the clearance of goods for home consumption and as such he cannot be held to be an importer after the clearance of the goods for home consumption. Learned Counsel submits that though an amendment, in Section 2 (26) of the Customs Act, including “the beneficial owner” to be an importer has been incorporated only in the budget of 2017, the same is after the impugned imports have taken place. We find merit in the contention of the Learned Counsel for the appellants. We also find that post 2017 amendment also, the time period wherein any person can be deemed to be an importer has not been changed. Therefore, it cannot be construed that Shri Satish Luthra is the importer in the impugned case. Therefore, we find that for the purpose of Section 2 of the Customs Act 1962, Shri Satish Luthra cannot be held to be an importer and as such cannot be a person referred to in Section 28 of Customs Act 1962. Therefore, neither the demanded duty nor the imposed penalty can be held to be devolved on Shri Satish Luthra.

13. Coming to the issue of alleged under-valuation of goods, we find that the entire allegations in the show cause notice and consequently the impugned order are based on statements of different persons. Some of them have been since retracted. We find that all the impugned goods imported by or imported in the name of nine importers have been cleared for home consumption by the proper officers. The Department has sought to re-determine the value of such goods which have been already cleared for home consumption without filing appeals against the respective assessments in the Bills of Entry. We find that Learned Commissioner has been categorical in holding that there is considerable difference between price of branded goods and un-branded goods of the same specification. The investigation has not made any efforts to cross-link the seized goods to the goods imported under the Bills of Entry filed by the nine importers. He also observes that the demand is made in respect of all the goods imported by the nine firms during the period December 2002 to February 2005 assuming that all the goods imported under these Bills of Entry were

branded goods without co-relating the seized goods to the goods imported under the impugned bills of Entry or producing any other documentary evidence to prove that. Though the Learned Commissioner finds as above goes on to make a case against the appellants on the point that some of the Bills of Entry have an indication that the goods are branded and that indication is normally not visible on the printout of the Bills of Entry. The Learned Counsel for the appellants has submitted that the Learned Commissioner has set out a new ground which was not discussed in the SCN. Thus, he has travelled beyond the scope of the SCN. Learned Counsel also submits that it is also a settled principle of law that orders travelling beyond show cause notice are *non-est* in view of Commissioner Vs Carborundum Universal Ltd (supra) and Asha Celluloid Vs CCE, Surat (supra); adjudication authority is not to assume upon itself the role of investigating agency and go on to investigate something which has not been alleged in the SCN; Learned Commissioner should have shown soft copy of EDP to the appellants also. Not showing the relied upon area in the EDP to the appellant tantamount to denial of natural justice and non-supply of relied upon documents.

14. We find that in the instant case Commissioner has, on the one hand, found that there is no co-relation between the impugned seized goods and the Bills of Entry. He has set out a new ground of some of the goods being branded by looking into the portion of the Bills of Entry which is normally not visible on the printed copy. He has not supplied the copies of Bills of Entry showing that the goods are branded. In doing so, Learned Commissioner has not only travelled beyond the scope of the SCN but also has contravened the principles of natural justice. Moreover, it is pertinent to note that the counsel's submission that none of the examination reports have indicated to be branded in nature. Officers on cross-examination have submitted that if the examination reports indicated the goods to be unbranded, the goods are unbranded. The evidence that commissioner seeks to rely during the course of adjudication, is not supplied to the appellants and thereby, an opportunity to defend themselves has been denied to

them. Under the circumstances and in view of the various case laws as cited above, we find that such an order is not maintainable and is liable to be set aside.

15. Moreover, we find that the OIO failed to give proper grounds to establish that the transaction value declared by the appellants is liable to be rejected. The OIO does not rely upon any contemporaneous imports of identical or similar goods to establish that the goods are mis-declared. In Para 60.8 of the OIO, Commissioner has rejected the contention of OIO to ascertain the price of the goods comparing them to identical goods imported by M/s RECPL; commissioner finds that the Show Cause Notice does not state the basis for considering that the goods imported by M/s RECPL are identical to the goods imported. Having deviated from the assertions in the SCN, Learned Commissioner does not state clearly as to why the declared values are liable to be rejected. He sets forth a new ground of goods being branded and makes reference to price lists. We find that one important pitfall in this approach is that whereas the importers have imported from traders, the OIO seeks to apply the values, in respect of certain goods treating them to be branded, on the basis of the price list of manufacturers. We find that Supreme Court in the case of *Eicher Tractors Ltd. v. Commissioner of Customs, Mumbai* 2000 (122) E.L.T. 321 (SC) wherein the Apex Court has laid down that 'it is only when 'the' transaction value is rejected, then under Rule 3(ii) the value shall be determined by proceeding subsequently through Rules 5 to 8 - 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.' We find that the impugned order does not record any reasons for rejection of the declared value. Impugned order on the one hand rejects the adoption of value of identical goods imported by M/s RECPL and on the other relies on the price lists of the manufacturing company where as the goods are imported by traders. Learned counsel for the appellants allege that provisions of Rules are not followed and bills of Entry of the identical goods are not disclosed in the SCN or cited in the impugned

order; rejection of transaction value under Rule 3 of CVR is not substantiated; it was not even displayed that essential ingredients of Rule 5, as to test values were at or about the same time as the goods being valued, are not complied; it is also not made known whether the contemporaneous imports shown are within a period of 90 days from the respective impugned imports. Moreover, even though, the SCN and the impugned order alleged that the differential between the actual price and declared price of the imported goods has been sent through Hawala route using the services of Shri Sushil Goel aka Arjun, no evidence whatsoever, even for a single transaction has been produced to establish the fact.

16. The assessing/examine officers have stated during the cross-examination that the goods were not branded goods. The SCN does not provide any proof as to how some of the goods could be treated as branded goods. The SCN neither discusses nor alleges if there was any connivance/collusion on the part of the assessing/examining officers. Learned Commissioner observes that:

"Actually, while filing Bill of Entry there is a separate field for "Brand Name". The information regarding brand name of the items covered by the above Bills of Entries are given in that field which is not normally seen in the Print out. Some importers declare the brand name in the "Description" itself in those cases the officers is able to see the brand name directly on the screen at the time of assessment and examination. But when this information is declared in the field for Brand name the officers can see it only if they go to a different screen by name "Accessories". Since the officers did not look at this information at the time of cross-examination the answers given by them were based on mistaken notion. At any rate the question of facts whether the brand name was declared at the time of filing of BE is to be decided from the records and not from the opinion of the officers. So, I do not find the deposition of these officers to be of any consequence to my finding."

However, it can be seen that the learned Commissioner has not only travelled beyond the SCN but also did not botherto supply the copies of the Bills of Entry, which he relied upon to come to the conclusion that some of the goods are branded. Therefore, we find that the impugned order is liable to be set aside. We find merit in the appellants submission that the Assessment Orders, passed by Assistant Commissioner on the respective bills of entry, have attained finality, as no appeal has been preferred against any such order by department as held in Mohan Meakin Ltd Vs CCE, Kochi 2000 (115)

E.L.T. 3 (S.C.) and in CC (Imports), Mumbai Vs Lord Shiva Overseas-2005 (181) E.L.T. 213 (Tri – Mumbai)

17. Though in the operative portion of the order learned commissioner has observed that the declared value is redetermined under Rule 5 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, no reference to any bill of entry is given and it is not established as to how the referral goods are identical to the impugned goods, in terms of quality, quantity, place of origin and time of origin as held in VintelDistributorsPvtLtd Vs CC (Sea), Chennai 2002 (149) ELT 145 (Tri – Chennai) upheld by Supreme Court 2003 (153) ELT A101 (S.C.)

18. We find that learned counsel for the appellants submits that whereas the SCN raised the demand under Section 28 (1) of the Act, impugned order neither raised nor confirmed by invoking proviso to the Section 28 (1) of the SCN. We find that while the bills of entry pertain to the period July-August, 2003; February – September, 2004 and October-November, 2004, the SCN is dated 31-03-2006. We find that proviso for extending the limitation for demanding duty has not been invoked in the how Cause Notice and there is no mention as regards invocation or finding as regards justification for the same, in the impugned order. Admitted fact of the case is that the goods have been duly cleared by the Customs for home consumption after examination and assessment. No suppression of facts etc has been either alleged or substantiated. On the contrary, learned commissioner goes beyond the SCN and says that some of the goods are declared as branded goods. Therefore, we find that no case is made out invoking extended period of time. Thus, we find that the notice is barred by limitation.

19. We find that the entire case of the Department is built upon the statements of different persons involved and most of the statements have been retracted. Once, the statements have been retracted, the onus lies on the Department to prove that the statements are correct. We find that the same has not been discharged. We further find that other than statements, no evidence documentary or otherwise has been put forth by the Revenue to substantiate the allegation of

under-valuation. No samples were drawn and no enquires were made. As discussed above, no reasons for rejection of the assessable value of the goods, more so looking in to the fact that the goods have been once cleared by Customs after due process of examination and assessment, as declared by the importers have been given. The respective Bills of Entry have not been challenged at appropriate forum. Connivance/collusion of assessing/examining officers, if any, have not been alleged/established. No enquiries relating to the existence of higher contemporaneous values have been done. Retractions have not been challenged on concrete evidence and have been brushed aside as routine and afterthought. In some cases, cross-examination has not been allowed and wherever it was allowed, the averments thereon have not been taken into consideration. Show Cause Notice has been issued much after the relevant date; SCN does not invoke proviso to Section 28(1) of the Customs Act, 1962 and the impugned order also does not discuss and substantiate such invocation. Therefore, the impugned SCN is barred by limitation also. Thus, we find that the impugned order suffers from various lacunae and thus is liable to be set aside. When the charge of under-valuation is not established, no case is made out for imposition of redemption fine, penalties and demand of duty from any of the appellants involved.

20. Though, we find that Sh. Ramesh Kumar, Learned AR for the Department has made a spirited attempt to defend the case for the Department, in view of the discussions above and the facts of the case and the evidence on record weigh the balance heavily against the Revenue. The case law cited by him, of Pundrik and Ganesh Overseas etc (supra), on redetermination of value were under the circumstances when the assessments of the goods were not complete and goods were not released by customs for home consumption and the cases which involve smuggling. In the instant case, the issue is of redetermination of value of goods which have been cleared for home consumption. The appellants also relied upon a number of cases but

we find that all of them need not be discussed. As the facts of the cases are different, the ratio cannot be applied. Moreover, we find that each case stands on its own and ratio of one case cannot be applied unless the facts are identical. As we find that Shri Satish Luthra cannot be held to be importer in the instant case and that the charge of undervaluation is not established, we do not find merit in the departmental appeals, which are filed for imposing penalty on Shri Harish Luthra and for inclusion of interest in the quantum of penalty. We find that they are liable to be set aside.

21. In view of the above, the following order is passed.

(i).Appeal filed by Revenue i.e. Appeal NosC/911/2010, C/912/2010,C/914/2010, C/915/2010, C/917/2010, C/919/2010, C/920/2010, C/921/2010 are rejected.

(ii).All other appeals are allowed with consequential relief, if any.

(Pronounced in open court on 11/03/2020)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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