CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Customs Appeal No. 1278 of 2009

(Arising out of Order-in-Original No. 137/2009 CC (I) JNCH dated 09.09.2009 passed by Commissioner of Customs (Import), Nhava Sheva)

M/s. Shivam Traders **Appellant**
(Through Prop. Shri Sanjay Thakur @
Shivnarayan Gupta), R.No.4,
Desai Rane Chawl, Near Ganesh Temple,
AG Link Road, Nityanand Nagar,
Ghatkopar (W), Mumbai 400 086.

Vs.

Commissioner of Customs (I), Nhava Sheva **Respondent**
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad,
Sheva 400 707.

AND

Customs Appeal No. 1279 of 2009

(Arising out of Order-in-Original No. 137/2009 CC (I) JNCH dated 09.09.2009 passed by Commissioner of Customs (Import), Nhava Sheva)

A. Abubacker I Pinjari **Appellant**
Room No.5, A Wing, 2nd floor,
Suraj Apartment, Mahagiri,
Koliwada, Thane.

Vs.

Commissioner of Customs (I), Nhava Sheva **Respondent**
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad,
Sheva 400 707.

Appearance:

Shri Neerav R. Mainkar, Advocate, for the Appellant
Shri Bhushan Kamble, Assistant Commissioner (Authorised Representative) for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/**85905-85906/2020**

Date of Hearing: 28.01.2020
Date of Decision: 28.01.2020

PER: SANJIV SRIVASTAVA

These appeals are directed against Order in Original No 137/2009 CC (I) JNCH dated 09.09.2009 of the Commissioner Customs (Import), Nhava Sheva. By the impugned order Commissioner has held as follows:

1. *“Shri Abubaker Pinjari is the actual importer and owner of the imported goods.*
2. *He declared value is rejected and re-determined at Rs.16.02,390/-. .*
3. *The imported goods are confiscated u/s 111(d) & 111(m) of Customs Act, 1962. However, the importer shall have, u/s 125 ibid, an option to redeem the goods within a period of 30 days from the receipt of this order on payment of fine of Rs 4,00,000/- (Rupees four lakh only).*
4. *There shall be no order for confiscation in respect of the consignments already cleared earlier.*
5. *There shall be a penalty of Rs.1,00,000/- (Rupees one lakh only) on the actual importer Shri Abubaker Pinjari under Section 112(a) of the Customs Act, 1962.*
6. *There shall be a penalty of Rs.1,00,000/-(Rupees One Lakh only) on M/s. Shivam Traders under Section 112(b). As penalty is already imposed on the firm, there is no question of imposing any penalty separately on M/s Sanjay Thakur alias Shivnarayan Gupta, Proprietor of M/s. Shivam Traders firm., as has been held in the case of AAREM CHEMICALS Vs. CCE {1999(114) ELT-3/SC)}.”*

2.1 On the receipt of intelligence that certain unscrupulous importers were illegally importing various items in name of dummy IEC holders, by undervaluing/mis-declaring the same, investigations were initiated by the Rummaging and Intelligence division of Mumbai Preventive Commissionerate. Initial investigations revealed that one such dummy IEC No

0307075605 obtained in the name of M/s Shivam Traders was being used. It was also ascertained that one consignment covered by B/E No 630525 dated 30.09.2008 was awaiting clearance from JNCH port. Same was seized on 14.10.2008. The goods were later examined and inventorized under Panchanama on 18.10.2008 they were found to tally with the invoice/packing list & B/E. Representative samples were also drawn.

2.2 In his statement Shri Sanjay Thakur alias Shivnarayan Gupta proprietor of M/s. Shivam Traders (IEC No. 0307075605). Stated that:

i. The address mentioned in IEC Ie. Room No.4., Desai Rane Chawl, Near Ganesh Temple, AG Link, Nityanand Nagar Ghatkopar (W), Mumbai- 400086 does not exist. And his real name is Shivnarayan Gupta and the IEC No.0307075605 has been acquired on a fictitious name by a friend.

ii. The IEC obtained was mis-used by Shri Abubaker Pinjari for the importation of goods by Abubaker Pinjari on 7 occasions in the past and this is the 8th consignment cleared through JNCH. The items imported were cheap consumer goods from China, which were sold to different wholesaler parties in Mushafirkhana. They have not maintained any books of accounts of the same.

iii. M/s. Shivam Traders is not registered with Sale Tax Department and they have not paid any sales tax on the sale of the goods till date. They had not paid any Income Tax also in the name of M/s. Shivam Traders.

iv. All the related works including sum investment i.e. contacting and placing orders to overseas suppliers, engaging the CHA, engaging the transporter, storing the goods and selling the goods into the local market has been done by Shri Abubaker Pinjari only.

v. In other words, Shri Abubaker Pinjari has used the IEC of Shri Sanjay Thakur alias Shivnarayan Gupta for a money consideration.

B. Since the goods appear to have been imported by a person actual (importer) using the IEC of some other person and mis-declaring / suppressing the facts, at least, to that extent, there exists reasonable doubt about the correctness of declared value within the purview of Rule 12 of Customs Valuation Rules, 2007 read with Explanation appended thereto; the declared value also appeared to be very low. The importer also failed to produce manufacturer's Invoice or any other document to prove the correctness of the value declared. Therefore, a team of officers of N.S.P.U along with the representative of the CHA and the Importer/IEC holder, conducted market enquiry in respect of the value of the said goods. The prices were ascertained from three different shop owners namely

a. M/s. Al-Raza Corner, Saboo Siddik Road, Municipality Chawl No. 2. Shop No.4, Near Musafirkhana, Mumbai-400001,Tel. No. 66589046.
b. M/S. A.M.Keychain Corner, B.M.C. Building No.5, Ground Floor, Shop NO. 42/43, Opp. B.M.C Building No. 2, Mumbai - 400001, Tel. No. 66589474
c. M/s. Azmat collection, Shop No. 58/59, B.M.C. Building No.5, Ground Floor, S.S. Musafirkhana Road, Mumbai-400001, Tel 66589312

2.4 The highest of prices ascertained by market survey conducted in the presence of Shri R D Singh the representative of CHA and Shri Zaheer Abbas Mohammed Khan was taken for determination of the assessable value as per the deductive method.

S No	Description	Unit	No	1-Rs	2-Rs	3-Rs	Assessable value	
							Ascertained	Declared
1	Rope Light 8 Mtrs	Roll	80	255	245	245	8804.17	3428.95
2	Rice Light 180 Bulbs	Pc	2000	60	60	60	51788.76	30842.88
3	Rice Light 160 Bulbs	Pc	1200	50	52	50	26930.13	16437.35
4	Rice Light 100 Bulbs	Pc	2700	32	30	30	37287.88	23145.41
5	Rice Light 88 Bulbs	Pc	1000	30	31	30	13378.76	7511.88
6	Rice Light 50 Bulbs	Pc	2000	29	30	29	25894.38	8572.38

7	Rice Light 36 Bulbs	Pc	7750	28	27	27	93651.34	23971.72
8	Rice Light 24 Bulbs	Pc	600	25	22	21	6473.50	12195.75
9	Rice Light 20 Bulbs	Pc	1200	23	20	20	11911.41	2104.95
10	Rice Light 6 Bulbs	Pc	9750	20	20	20	84156.73	13355.67
11	Toy Balloons	Doz	150	180	177	175	111352.50	19884.38
12	Toy Small Ball	Doz	550	360	360	350	97990.20	11665.50
13	Mini Plastic KeyChain Light	Doz	800	72	72	70	24858.60	3535.00
14	Small Plastic Folding Table	Doz	40	3600	3555	3600	62146.51	31815.00
15	Small Plastic Picnic Table	Doz	250	450	450	450	48551.96	22093.75
16	Mini Plastic Torch	Doz	700	300	295	290	82358.43	81543.00
17	9” B/W TV V (Unbranded)	Pc	100	900	890	880	38841.57	38457.00
18	Brace (Imitation Jewellery)	Doz	1200	120	110	110	65797.05	65145.60
19	Ear Ring (Imitation Jewellery)	Doz	8100	120	110	110	444130.12	439732.80
20	Vacuum Cleaner	Pc	250	650	600	575	64451.88	63813.75
21	Mini Butterfly Massager	Doz	200	600	590	600	54830.88	54288.00
22	Small Folding Chair	Pc	500	450	450	440	97103.92	96142.50
23	Small Fridge (12 ltrs)	Pc	10	3200	3150	3100	12692.06	12566.40
24	Small Laundry Bag	Doz	150	180	180	180	11652.47	11537.41
25	Garden Swing	Pc	10	175	173	175	755.24	747.77
26	Salad Cutter	Doz	120	180	180	175	9063.03	8973.3
27	Yoga Mat	Doz	40	720	700	680	12429.30	12306.4
28	Pillow	Doz	20	360	350	340	3107.32	3076.56
	Total						**1602390.1**	**431387.46**

2.5 On the basis of the ascertained assessable value total duty payable on the said consignment was determined as Rs 4,51,933.76/- as against that computed on the basis of declared value of Rs 1,29,343/-. Statement of Shri Zaheer Abbas Mohammed Khan was again recorded on 02.01.2009 wherein he admitted the prices ascertained during the market survey and stated that he was ready to pay the duty, redemption fine and personal penalty as deemed fit by the department.

2.6 Further investigations revealed that in the past by adopting similar modus operandi, seven import consignments of similar goods from China had been cleared in the name of M/s Shivam Traders. The total declared value of the consignment cleared in the past was ascertained as Rs 53,57,192/-.

2.7 A show cause notice dated 13.02.2009 was issued under Section 124 of the Customs Act, 1962 to the appellants asking them to show cause why the goods imported against the B/E no 630525 dated 30.09.2008 and against seven bill of entries in past, should not be confiscated under Section 111(d) and 111(m) of the Customs Act, 1962, read with section 7 & 11 of the Foreign Trade (Development and Regulation) Act, 1992, Rule 2 (c), 12 & 14 of the Foreign Trade (Development and Regulation) Rules, 1993, and para 2.12 of the Foreign Trade Policy, 2004-2009, and penalties should not be imposed on them.

2.8 The show cause notice was adjudicated by the Commissioner as per the impugned order. Aggrieved by the order Appellants have preferred this appeal before CESTAT.

3.1 We have heard Shri Neerav R Mainkar, Advocate for the appellants and Shri Bhushan Kamble, Assistant Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the Appellants learned counsel submits that-

a. Permitting the use of IEC for bringing goods of other is not a violation of Customs Act, 1962 as have been held in following decisions-

- R Mohandas [2016 (336) ELT 399 (Ker)]
- Gopal Agarwal [2015 (326) ELT 593 (T-Del)]

b. In case of J D Orgochem Ltd [2008 (226) ELT 9 (SC)], it has been held that the burden of proof to show that the declared transaction value is misdeclared lies on the revenue, even if the declared transaction value is not binding on the revenue. Revenue should discharge the said burden by producing the contemporaneous evidence.

c. Penalty could not have been imposed both on the proprietor and proprietorship concern as have been held by the tribunal in case of Tapi Textiles Pvt Ltd [2016 (339) ELT 83 (T-

Mum)] and Saccha Saudha Pedhi {2015 (328) ELT 609 (T-Mum)].

3.3 Arguing for the revenue learned authorized representative submitted as follow:

a. Importer has agreed with the prices ascertained during the market survey he also stated that he is ready to pay the duty, redemption fine and personal penalty.

b. The adjudicating authority has rightly rejected the transaction value in terms of Rule 12 of the Customs Valuation Rule, 2007 and re-determined the value in terms of Valuation Rule 7 & 9 of the Customs Valuation Rules, 2007.

c. Section 7 of the Foreign Trade (Development and Regulation) Act, 1992 which state that no person shall make any import or export, except under an Import-Export Code number granted by Director General or the officer authorized by the Director General in this behalf in accordance with the procedure specified in this behalf by Director General;

d. Section 11 of Foreign Trade (Development and Regulation) Act 1992, which states that no import or export shall be made by any person except in accordance with the provisions of this Act, and

e. Section 12 of the Foreign Trade (Regulation) Rules 1993 provides inter alia that on imposition on any customs port of any goods the importer shall in the Bills of Entry or any other document prescribed by the rules made under the Act, 1962, state the Importer Exporter Code number allotted to him by the competent authority. Hence goods are liable for confiscation under Section 111 (d) and Section 111 (m) as it is established that goods are under invoiced and

f. Para 2.12 of Foreign Trade Policy 2004-2009 states that no import or export shall be made by any person without an IEC number unless specifically exempted. Therefore the goods so imported become prohibited goods as defined in section 2(33) of the Customs Act, 1962 read with above mentioned sections of FTDR & FTP and hence the said goods are liable for confiscation under Section 111 (d) and also under Section 111

(m) of Customs Act, 1962, as it is established that goods are under invoiced.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments on appeal.

4.2 The case under consideration is in respect of the imports made-

- Making use of the IEC of some other person,
- Undervaluation of the goods

4.3 Commissioner has recorded the role of the two appellants in the present case in his order stating as follows:

"1) Shri Abubaker Pinjari is the actual importer and owner of the imported goods; the facts coming out of the investigation, as stated in Para - 2 above, amply establish it. Shri Abubaker also claims to be so, I hold the same.

(2) Shri Abubaker Pinjari did not use or did not have his own IEC for importing the impugned goods; he used the IEC code No. 0307075605 of M/s. Shivam Traders., belonging to and obtained by as its proprietor. Shri Sanjay Thakur alias Shivnarayan Gupta for a consideration of money [Para 2(6) above refers]. This is in violation of Section 46(4) of the Customs Act, 1962, Section 7 & 11 of Foreign Trade (Development & Regulations) Act, 1992 read with Rule 2(c), 12 and 14 of Foreign Trade (Regulations) Rules 1993, read with Para 2.12 of Foreign Trade Policy 2004-09, read with Section 11 of Customs Act, 1962 rendering subject goods liable to confiscation under Section 111 (d) of the Customs Act, 1962.

(3) The declared value is liable for rejection for reasons stated in Para 3 above; I reject the same. The goods are unbranded and of Chinese Origin Consumer Goods and do not carry specification like Model No., MRP and Make etc. it is, therefore, not possible to ascertain their value from NIDB, based on the contemporaneous import: Rules 4 & 5 of Customs Valuation Rules cannot be made applicable in this case. For similar reasons, Rules 7 & 8 are also inapplicable. In the SCN value has

been sought to be determined on the basis of market inquiry under Rule 7. But, I think, quoting of Rule 7 is inappropriate in this case as there is nothing on records that the goods compared with were similar goods' as defined u/r 2 of the Valuation Rules (and if it were so, Rule 5 itself would have been applicable) and that they were imported within a period of 90 days or the importation of the impugned goods. The value, therefore, has to be determined ulr 9. ibid. The way the value has been determined through marker inquiry is, in fact, the 'best judgement' assessment u/r 9 in line with the ratio of Rule 7. I accept the same and re-determine the value at Rs. 16.02,390/-. At this point I make it clear that non-quoting /mis-quoting of rule does not vitiate the proceedings, as has been held by Hon'ble Supreme Court in the case of CCE Vs. Pradyumna Steel Lid. (1996 (82) ELT 441 (SC)). Thus the goods were heavily under-valued making them liable for confiscation U/s 1111m) of CA, 62. Thus the goods were heavily under-valued making them liable for confiscation v/s 111(m) of C A, 62.

(3) There is a proposal in the SCN to confiscate the goods imported vide Bills of Entry No. 801629 dtd. 24.04.08, 845188 dt.27.05.08, 943897 dl. 04.08.08, 922719 d. 21.07.08; 810267 dt. 01.05.08, 767131 dt 30:03.08 and 890042 01:27.06.08 total valued at Rs. 53,57,1927- by Shri Abubaker Pinjari misusing the IEC of M/s. Shivam Traders. The legal position is : when the goods are seized, the possession custodian of the goods is with the department though the ownership continues to be with the party and when they are confiscated, both the ownership and the custody vest with the Çovl. These goods have already been cleared and are not available, may be even with the importer himself, nor is there any bond or security against the same; they are neither available for confiscation, nor can any fine in lieu of confiscation be imposed in respect of these consignments. Judgments in the cases of Sun Exports Vs CC [2008 (228) ELT 545 (T --M)] and CC Vs. Kiran Jewels (2008 (230) ELT 627 (T -M)] refer.

(4) For the above acts rendering the imported goods liable for confiscation, Shri Abubaker Pinjari has become liable for penal action under Section 112(a). Once penalty is imposed under section 112 (a) under the facts and circumstances of the case, I do not consider it necessary to impose penalty also under section 114 AA separately.

(5) Shri Sanjay Thakur alias Shivnarayan Gupta knowingly allowed Shri Abubaker Pinjari to use the IEC of M/s. Shivam Traders for a monetary consideration. He is, therefore, liable for penalty u/s 112(b) of CA, 62."

4.4 The above findings of Commissioner are in line with the order of Tribunal in the case of Sacha Saudha Pedhi [2015 (328) ELT 609 (T-Mum)], wherein tribunal has state as follows:

*"**9.** From the above factual position that is based on confessionary statements of Shri Bhumish Shah and Shri Ashok Raghuveer Goyal and also the documents recovered from Shri Bhumish Shah which was accepted by him, it is clear that the appellant M/s. Saccha Soudha Pedhi has undervalued the goods and evaded differential duty. As regard the stand taken by Shri Ashok Raghuveer Goyal at the time of cross examination that he is not authorized person, it is observed that the statement of Shri Ashok Raghuveer Goyal was recorded on 20 March 2001, whereas cross examination was conducted on 27-1-2006, that is after more than 5 years which is clearly afterthought. Shri Ashok Raghuveer Goyal was not prevented from retracting his statement immediately after recording his statement, therefore all his averments made during cross examination is clearly afterthought and statement given by him on 20 March 2001 hold good and the same was legally and correctly relied upon by ld. Adjudicating Authority. Moreover, he has provided various documents related to this case and categorically admitted undervaluation. He has in pursuance of his interrogation has also deposited Rs. 10 lakhs toward duty. From the statement it is clear that he was actively involved in all the activities of the appellant M/s. Saccha Soudha Pedhi therefore reliance of his confessionary statement cannot be disputed at all. Similarly as*

regard anything contrary to the statement of Shri Bhumish Shah submitted by him during cross examination after 5 years is also clearly afterthought and the same cannot be taken into account for the purpose of the defence of the appellant. Apart from admission of Shri Bhumish Shah and Shri Ashok Raghuveer Goyal in their statements and documentary evidence recovered from Shri Bhumish Shah the price of the goods indicated in the public ledger clearly suggests that the appellant has grossly undervalued the spices imported by them. As regards appellant's plea in appeal that there is no reliance on price of contemporaneous import, we are of the view that once the witnesses admitted the undervaluation and accepted the actual price contained in the fax messages of foreign supplier, then the said admitted price become the transaction value. In such case there is no need to resort to price of contemporaneous import. In view of the above factual position and discussion thereupon we hold that the valuation of the goods determined by the ld. Adjudicating Authority is legal and correct and consequently the differential demand of custom duty on such value and corresponding interest and penalties imposed under Section 114(a) of Customs Act, 1962 is also upheld."

4.5 In view of the above we uphold the manner of determination of value as adopted by the Commissioner in case of these goods which are unbranded, without any MRP or any specifications affixed on them. Further we also note that the Importer IEC holder has in his statement admitted that the goods have been undervalued and has accepted the value as determined by the department using the deductive method. He was party to the market enquiries and surveys and also has admitted its authenticity and correctness. In our view in present case revenue has successfully discharged the burden to show that the declared transaction value was not the actual transaction value as per the Section 14 of the Customs Act, 1962. Thus the decision of Hon'ble Supreme Court in case of J D Orgochem Ltd [2008 (226) ELT 9 (SC)], would not help the case of appellants.

4.6 From the findings as noted above and recorded by the Commissioner we are in agreement with the observations made by the Commissioner to the effect that for various acts of omission and commission leading to the Confiscation of the goods the penalties are imposable on the appellants. We also note that-

- Shri Abubaker Pinjari has in fact sought to clear the said goods by misdeclaring the value, thereby evading the payment that should have been levied in respect of these goods. For his act of misdeclaration the goods became liable for confiscation under section 111 (m) of Customs Act, 1962. Since the goods have been held liable for confiscation under section 111 (m), penalty under section 112 (a) on the person whose act of omission and commission has rendered these goods liable for confiscation is a natural consequence as per the scheme of Custom Act, 1962. However taking into account all the circumstances and the fact that valuation has been done taking the highest of the value assessed during the market enquiry and also the fact that appellant had suffered huge demurrage etc., the penalty calls for reduction.
- Shri Sanjay Thakur alias Shivnarayan Gupta proprietor of M/s. Shivam Traders (IEC No. 0307075605), who had obtained the IEC in the name of his firm and has permitted the use of the same by Shri Abubaker Pinjari for the purpose of monetary gain, a fact which has been admitted by the appellants. Since the goods imported making the use of his IEC have been held liable for confiscation under section 111 (m), penalty under section 112 (b) on the person whose act of omission and commission has rendered these goods liable for confiscation is a natural consequence as per the scheme of Custom Act, 1962. However taking into account all the circumstances and the facts of the case, the penalty calls for reduction, more so over when we propose to reduce the penalty imposed on the person who has actually imported the goods.

4.7 In view of the fact as above we reduce the penalties imposed on the appellants as follows:

i. Penalty Under Section 112(a) imposed on Shri Abubaker Pinjari is reduced from Rs 1,00,000/- to Rs 40,000/-.
ii. Penalty Under Section 112(b) imposed on M/s Shivam Traders is reduced from Rs 1,00,000/- to Rs 40,000/-.

5.0 In view of the above the appeal filed are partially allowed modifying the impugned order as indicated in para 4.7. Apart from the above modifications the impugned order is upheld.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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