CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 89868 of 2018

(Arising out of Order-in-Original No. 65/2018-19/Commr/NS-V/JNCH dated 04.09.2018 passed by Commissioner of Customs, Nhava Sheva-V)

Kuber Impex Limited **.....Appellant**
304-305, The Magnet Tower, 16/1,
New Palasia, Indodre- 452 001.

VERSUS

Commissioner of Customs-Nhava Sheva- V **.....Respondent**
JNPT, Custom House, Nhava Sheva,
Raigad- 400707.

WITH

Customs Appeal No. 89870 of 2018

(Arising out of Order-in-Original No. 65/2018-19/Commr/NS-V/JNCH dated 04.09.2018 passed by Commissioner of Customs, Nhava Sheva-V)

Kapil Garg **.....Appellant**
304-305, The Magnet Tower, 16/1,
New Palasia, Indodre- 452 001.

VERSUS

Commissioner of Customs-Nhava Sheva-V **.....Respondent**
JNPT, Custom House, Nhava Sheva,
Raigad- 400707.

Appearance:

Shri J. C. Patel Advocate for the Appellant
Shri Ramesh Kumar, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/ 85725-85726/2022

Date of Hearing: 20.04.2022
Date of Decision:22.08.2022

PER : S.K. MOHANTY

Brief facts of the case, leading to these appeals, are summarized herein below:

1.1. During the disputed period, the appellant herein M/s. Kuber Impex Ltd. had imported a consignment of 10,000 pieces of Valve Regulated Lead Acid Batteries (in short 'VLRA Batteries) 12 Volt 7.2 Ampere Hours from the overseas supplier M/s Shenzhen Leoch Battery Technology Co. Ltd., based at China. In the Bill of Entry No. 803525 dated 25.08.2010 filed for clearance of the imported goods, the appellant had declared the unit price of USD 1.17 per piece (Rs. 55.97) as the transaction value of the imported goods for the purpose of payment of customs duties. However, the value declared in the B/Es was objected to by the Customs authorities at the port of import. On objection, the importer had submitted documents to justify consideration of the declared value for the purpose of duty assessment. Statement of Shri Kapil Garg was recorded on 19.10.2010 and 22.10.2010. The importer's business premises was searched, by the jurisdictional Central Excise Officers, under Panchnama on 19.10.2010, in presence of Part time Accountant Shri Rajendra; records and import related papers, a pen drive and a hard disk of Shri Rajendra Mangal, two hard disks of computers in business premises and the stock of imported batteries lying at go down were also seized. Allegedly from the seized records, an invoice bearing LHI1010290001 dated 27.07.2010 issued by M/d Shenzhen Leoch Battery Technology having unit value of US$ 5.75 FOB and consignment value of 10000 batteries as FOB value of US $ 57500 and freight cost US$1200, was found. It was alleged that in case of Bill of Entry No. 785027 dated 10.08.2010 showing unit price of US$

1.17, the invoice by the supplier showing per unit price of US$ 1.17 presented for clearance is fake and manipulated and the invoice showing price of US$ 5.75 is genuine. The consignment of 12 Volts batteries covered by the BE No. 803525 dated 25.08.2010 and one more consignment covered by BE No. 827979 dated 07.09.2010 with the declared unit value of US$ 1.17 per piece were also seized on 10.11.2010.The pen drive seized from Shri Rajendra Mangal and one hard disk was opened on 16.11.2010 and copies were taken. The remaining hard disks could not be opened. On 16.11.2010 one more hard disk was opened and copied and third hard disk could not be opened. The mirror copies of the hard disks were prepared under Panchnama. The market survey of similar batteries was carried out in presence of Shri Sanjay A. Chothani employee of CHA M/s Eagle Shipping Agency to ascertain the market rate and the quotations were taken. Meanwhile the importer filed petition before Hon'ble High Court, Mumbai for provisional release of seized goods which vide order dated 18.11.2010 directed the department to take decision on Appellant request within two weeks. The provisional release of the goods was kept in abeyance till recording statement of Shri Kapil Garg, director of Appellant and Shri Rajendra Mangal. Another statement of Shri Kapil Garg was recorded on 29.11.2010 wherein allegedly he accepted the undervaluation. Shri Rajendra Mangal in his statement dated 03.12.2010 stated that he worked as Part time accountant; he was not looking after work of M/s Kuber Impex; but was looking after the personal accounts of Shri Kapil Garg; one Shri Mahesh Agarwal was looking after work of M/s KuberI mpex; the information in pen drive seized from him was kept by Shri Kapil Garg. Further statements of Shri Kapil Garg were recorded on 03.12.2010 and 13.12.2010. The appellant vide letter dated 10.12.2010 and 13.12.2010 requested for release of seized goods which was accepted on 14.12.2010. Further statements of Shri Kapil Garg were recorded on 17.03.2011, 11.04.2011 and 13.06.2011.The Appellant were thereafter issued show cause notice dated 08.08.2011 alleging that printouts of email and purchase documents from hard disks/

system shows that the Appellant has imported goods under 62 consignments and other two consignments covered by BE No. 803525 dated 25.08.2010 and 827979 dated 07.09.2010 by resorting to undervaluation and by submitting fake and fabricated invoice from suppliers based at China/ Hong kong. It was proposed to reject the declared value on consignments covered by BE No. BE No. 803525 dated 25.08.2010 and 827979 dated 07.09.2010 and to re-determine and finally re-assess the same under Rule 3 (1) of the Customs Valuation (Determination of Value of imported goods) Rules 2007. It also demanded duty in respect of 62 other Bills of Entry. Out of said 62 BE's, it was proposed to reject the declared value under Rule 12 (1) of the Customs Valuation (Determination of value of imported goods) Rules, 2007 (for 46 imports imported affected on and onwards 10.10.2007) & under Rule 10A of Customs Valuation (Determination of value of imported goods) Rules, 1988 (for 17 import affected prior to 10.10.2007) and to re-determine the same under Rule 3(1) of Customs Valuation (Determination of value of imported goods) Rules, 2007 (in 30 cases being actual transaction value), Rule 3(1) of Customs Valuation (Determination of value of imported goods) Rules, 1988 (in 16 cases being actual transaction value), Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007 (in 16 cases by applying method of valuation of similar goods). It was proposed to demand duty of Rs.3,46,78,022/- on 62 Bills of Entry along with interest and under section 28AA (1) of the Customs Act, 1962 and to impose penalty on M/s Kuber Impex Ltd. and its director Shri Kapil Garg under section 112 (a) and1under. It was also proposed to confiscate the goods and/ or Section 112 (b), Section 114A and Section 114AA of the Customs Act, 1962.

1.2. By the impugned order, the adjudicating authority confirmed the demand of duty along with interest and imposed penalties on Appellant firm and its director Shri Kapil Garg. Aggrieved with the impugned order both the appellants have filed these appeals before the Tribunal.

2. The Learned Advocate appearing on behalf of the appellants argued the matter at length and also filed written submissions. The main contention of the Learned Counsel is that the printouts taken by the officers from the Hard disks allegedly seized from the office of the Appellant is not admissible as evidence. The Panchnama dated 19.10.2010 states about seizure of records and documents along with Hard disks from computer, but in fact there was no computer installed in office. In Panchnama there is no mention of computers or their identity as regard make, model of computer or the place where the same was installed in office. No person is shown to have been using or used computers during the impugned period. The seizure memo shows only seizure of files and records but does not shows seizure of any Hard disks or pen drive. The pen drive and hard disk were shown to have been seized in presence of one Shri Rajendra Mangal a part time accountant who did not appear for cross examination. As per Rajendra Mangal own statement dated 03.12.2010, he was not even looking after work of M/s Kuber. The Panchnama nowhere shows as to how the hard disks were retrieved. The printout of the hard disks has no evidentiary value as the same fails on the mandatory test under Section 138 C of the Customs Act. There is no certificate that any computer was being used in the office or was being used in the regular course of business. There is no person using such computer. Any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) of Section 138C are satisfied. That the admissibility of such a document i.e. electronic record which is called as computer output, is subject to the satisfaction of the four conditions of Section 138C (2) and (4). None of the conditions has been complied with as no computer has been shown to have been used regularly for the

purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer. There is no evidence of such regular use. Most importantly as required in terms of Section 138 C (4), there is no certificate. Even the hard disks were not opened in presence of the director or authorized person of the Appellant unit but by the officers themselves. The alleged printouts of the data from the pen drive and hard disks or from the alleged mirror images thereof were not taken under any Panchnama or in presence of Appellant. Even when they sought inspection of seized records, pen drive and hard disks, the Deputy Commissioner of Customs, SIIB, Nhava Sheva vide letter dated 04.11.2016 informed the Commissioner that the seized documents, hard disks and pen drive on the basis of which the show cause notice was issued are not traceable and cannot be produced for the Appellant’s inspection nor for the perusal by adjudicating authority and hence the confirmation of demand upon the same is liable to be set aside. He relies upon judgments in case of Shree Venkatesh Metal Corpn- 2012 (284) ELT 663 and Tribhuvandas Bhimji Zaveri-1997 (92) ELT 467. He submits that when there is no seizure memo of hard disks, the same were not opened in presence of the Appellant, the printout was not taken in presence of Appellant and nor there is compliance to Section 138 C (2) and (4), the printout has no value as evidence of undervaluation. He relied upon judgments in case of S.N.Agrotech Vs. CC 2018 (361) ELT 761, Premier Instruments & Controls Ltd v CCE – 2005 (183) ELT 65, M/s Ambica Organics Vs. CC – 2016 (334) ELT 97, M/s Agarvanshi Aluminium Ltd v CC – 2014 (299) ELT 83 and M/s Sunrise Stainless Steel P. Ltd v CCE – 2019 (12) TMI 280-CESTAT-AHD. That in such case even the reliance upon emails is also bad in law as the emails were not retrieved from email account but from said hard disks. There is no corroboration of the printouts with any independent evidence.

2.1. It was alleged that the wire transfer was made by certain person on account of undervaluation. However no investigation was made. There is no evidence of Appellant having paid any amount to any person towards alleged undervaluation. No single person has been shown to have been received any amount over declared prices on account of suppliers from Appellant. The cross examination of Panch witnesses who witnessed the opening of Hard disks and Shri Rajendra Mangal in whose presence the alleged recovery of pen drive and hard disks were made were not presented for cross examination and hence the same are not reliable. He relied upon the judgment of Hon'ble High Court of Gujarat in case of Commissioner Vs. Motabhai Iron & Steel Industries 2015 (316) 374 (Guj). The revenue has relied upon the random imports to show that the prices of similar batteries were imported at higher price. None of the said import is comparable with the imports made by the Appellant in terms of quality, quantity and other aspects. The imports are stary imports from 10,000 to 50,000 batteries whereas the Appellant over the period of time has imported more than 16 lakh batteries.

2.2. As regard market enquiry report he submits that the revenue has relied upon the report of market survey to hold that the declared process were very less. The same is not reliable as the market survey was done in absence of any authorized person of the Appellant concern. The Appellant had sought cross examination of representative of M/s. Global Power Survey (I) Pvt Ltd. M/s Shivam Sales and M/s. Ratandeep Electronic and Electrical whose bills and proforma invoices were relied upon to show that the price of similar batteries in local market is much more. The adjudicating authority held that no specific names were specified in request and hence cross examination cannot be given. The adjudicating authority did not appreciate the fact that except name of Mr. Dipal Udeshi of M/s. Global Power Source (I) Pvt. Ltd on Proforma invoice in case of two other shops i.e. M/s. Shivam Sales and M/s. Ratandeep Electronic and Electricals the no name of person who issued such invoice was appearing. When the department has conducted market survey at their own and that too in absence of appellant, then it was their duty to mention name of person issuing such Proforma invoice. Instead now the department is denying cross examination on ground that the person name was not given. Neither the Appellant knows the shop owners nor was the market survey carried out in their presence. Hence the Appellant cannot be expected to name the person who has issued such Proforma invoice. That when the revenue itself does not know as to who has issued such Proforma invoice and there is no statement of any of the makers of such invoices, in that case the Proforma invoices has no evidentiary value. Further as the cross examination was not given the Proforma invoices cannot be relied upon. The market enquiry report being in the nature of Quotations/ offers of one piece cannot be relied upon, particularly when cross examination not given of the persons giving the quotations/offers. Even the market Inquiry Report dated 12.10.2010 conducted by SIIB is based on three Quotations/ Offers given by three shops for supply of One piece of Battery of 12 Volts. There is no evidence of actual sales at the said prices. The same are merely in the nature of Quotation and that too for one piece. It is settled law that the valuation cannot be done on mere Quotation without evidence of actual sale at the prices quoted. Further, the said quotations are for one piece only, whereas the Appellant's imports are of bulk quantity of lakhs of pieces. Further, no reliance can be placed on the said Quotations/ offers since the cross-examination of the persons who made the same has not been given. In the impugned order the statements of Shri Kapil Garg was relied upon. The statements dated 19-10-2010 and 22-10-2010 of Kapil Garg are exculpatory and his inculpatory statements dated 29-11-2010, 3-12-2010 and 13-12-2010 have been retracted by affirming affidavits dated 2-12-2010 and 15-12-2010. In statement dated 19.10.2020 and 22.10.2010 Shri Kapil Garg has stated that the Appellant in May 2010 had contracted for import of 3,00,000 pieces of 6 Volts Batteries and 60,000 pieces of 12 Volts Batteries from Shenzen Leoch Battery Technology Co. Ltd. He did not agree with alleged Market Enquiry report of the department. His said two statements were exculpatory and there was no confession of any alleged undervaluation. Further statements of Mr. Kapil Garg dated 29-11-2010, 3-12-2010 and 13-12-2010 which are inculpatory, have been retracted by affirming Affidavits dated 2-12-2010 and 15-12-2010. He was forced to give such statements under threat that the seized goods shall not be released. In view of the said retraction and in absence of any corroborative evidence of payment over and above the Invoice price, no reliance can be placed on the said retracted statements. Reliance is placed upon judgments in case of Vinod Solanki v UOI- 2009 (233) ELT 157, Mohtesham Mohd Ismail v Special Director- 2007 (220) ELT 3, Fact Paper Mills Ltd v CCE – 2014 (314) ELT 449, Commissioner Vs. Fact Paper Mill Ltd – 2015 (322) ELT 283.

2.3. The Learned Counsel submitted that vide Final Order No. 50767-50678/2020 dated 14.09.2020 passed by CESTAT, Delhi in case of other Bills of Entry covered by the same investigation which were imported through ICD, Pithampur, the CESTAT after considering all the above aspects held that the alleged printouts or the data from the Hard Disks and Pen did not satisfy the requirements of Section 138C of the Customs Act 1962 and therefore cannot be relied upon. It also held that there was no correlation between the Bills of Entry and the alleged wire transfers and further there was no investigation or confirmation from the persons whose names appeared in the emails for wire transfer. The NIDB data was not comparable to the Appellant's goods. Thus the allegation on basis of electronic device and statement of Shri Kapil Garg are not sustainable. They were importing Lead Acid Batteries of Chinese origin since the year 2004-05. In respect of one such import of 6 Volts Battery made in September 2005 at ICD Pithampur, the department had disputed the transaction value of US $ 0.25 per piece (C & F) and enhanced the same on the basis of contemporaneous imports at higher prices. The same was set aside by the Commissioner (Appeals) vide Order-in-Appeal dated 20th October 2005 on the ground that the imports of the Appellant were in large quantities and hence not comparable with contemporaneous imports at higher price. The said Order-in-Appeal was upheld by the Hon'ble Tribunal by Order dated 27.9.2010.

2.4. Thereafter, in respect of imports of 6 Volts Batteries at the price of US $ 0.25 per piece, made by the Appellant from Dahua Storage Battery at Nhava Sheva in October 2006, under the Bills of Entry No. 931771 dated 14.10.2006 and 933937 dated 16.10.2006 which are also involved in instant appeal, the Special Investigation and Intelligence Branch (SIIB) of Nhava Sheva Customs, undertook investigation into the issue of valuation. The said imported Batteries were caused to be tested by the Chemical Examiner, Nhava Sheva Customs Laboratory, and as per the Test Reports, the same had Lead content of 37% to 38%. After getting the Batteries Tested and after carrying out Market Survey, the department enhance the value form US $ 0.25 per piece to US $ 0.41 per piece and further directed assessment of future consignments also at US $ 0.41 per piece. The Appellants could not afford the delay in clearance on account of the said dispute of valuation and hence accepted the said value of US $ 0.41 per piece. Since value was re-determined and enhanced in October 2006 after test of the goods and market survey and that too considering the single import consignment, further enhancement pursuant to present Show cause Notice issued in 2011 is not sustainable in law. In support of the submission that when at the time of import the value has already been enhanced, and that too after test of the goods and market survey, subsequent proceedings for further enhancement are not tenable in law. He relies upon judgments in case of CC Vs. Paras Electronics - 2009 (246) ELT 231, CC Vs. Lord Shiva Overseas - 2005 (181) ELT 213, Shimnit Machine Tools & Equipment Ltd v CC - 2006 (204) ELT 630, Vitesse Export Import v CC - 2008 (224) ELT 241.

2.5. He submits that re-determination under Rule 5 in respect of imports made from Suqian Yongda Imp &Exp Trade Co Ltd and Guangzhou NPP Power Co. Ltd is illegal as there is no evidence of any price other than the Invoice price or of any remittance over and above the Invoice Price even in alleged printouts. Yet the Show Cause Notice proposed to reject the transaction value by relying upon the alleged e-mail correspondence with local buyers and other documents allegedly recovered from the seized Hard Disks and Pen Drive. Since the basis for rejection of the Transaction value itself is bad in law, the re-determination of value is not sustainable. Without prejudice it is submitted that even otherwise, the comparison with stray imports involving small quantities of 10,000 to 50,000 per importer, is not justified considering that the Appellants imports are of Bulk quantity of over 6, 60,000 pieces from the said supplier. There is no evidence to show that quality of the alleged contemporary imports were comparable to the Appellants' imports. The Ld. Counsel submitted that in view of above facts and submission the impugned order be set aside and the appeal be allowed as there is no evidence of undervaluation.

3. The Learned AR for the Revenue reiterated the findings of the adjudicating authority and also submitted written submission. He submitted that during search various documents were seized and email correspondence from the Appellant's computer. He submits that there was no test or market survey as contended by the Appellant in 2006. There is no bar to adopt actual transaction value for calculation of duty when the importer himself has done undervaluation. The Director admitted the undervaluation and mis-declaration in his statement. He relied upon decision in case of M/s. Laxmi Enterprises v. C.C., Preventive 2018 (361) ELT 1054 (TRI). He also relied upon decision in case of Shri Ulaganayagi Anmal Steels Vs. CCE Trichy 2008 (231) ELT 434 (TRI- Chennai). The seizure was effected in presence of and that claiming Shri Rajendra Mangal is not authorized is afterthought. The wire transfers were made contract wise and accepted by the director Shri Kapil Garg. He relied upon the orders in case of Mahalaxmi International Exports Vs. Comm of Cus., Jaipur 2004 (169) ELT 168 (TRI), Win star Electronics Vs. CC 2006

(201) ELT 761 (TRI), Konia Trading Co. Vs. CC, Jaipur 2006 (199) ELT 689 (TRI), Saccha Sauda Pedhi Vs CC (Import) Mumbai, Bharthi Rubber Lining and Allied Services Pvt. Ltd. Vs. cc (Import), Nhava Sheva 2018 (362) ELT 376 to submit that in view of printouts and statement of Shri Kapil Garg the charges of undervaluation are sustainable. He also submits that the strict rule of evidence do not supply to adjudication proceedings as held in case of CC, Calcutta Vs. South India Television P. Ltd. 2007 (214) ELT 3 (SC) and Usman Suleiman Darvesh 2017 (358) ELT 1014 (TRI) and that admitted facts need not be proved as held in Naresh J Sukhwani Vs. UOI 1996 (83) ELT 258 (SC). That the adoption of value of seized records and printouts of computer are sustainable.

4. Heard both sides and perused the record.

5. We find that the main issue to be resolved in the case before us is to see whether the appellants undervalued the 6 V and 12 V batteries they imported from Honk Kong/ China over the years? Whether the allegation made by the department legally sustainable in the face of the evidence put forth by investigation? We find that the demand is raised on the basis of an investigation conducted by the department pursuant to the search operation office premises of Appellant importer. Panchnama dated 19.10.2010 was prepared in respect of recovery of document and hard disks said to be retrieved from the office computer and one pen drive and one hard disk from bag of Shri Rajendra Mangal, part time accountant. The hard disk seized from Shri Rajendra Mangal could not be opened and hence no printout was relied upon. The other two hard disks alleged to have been taken from the computers were opened by the officers themselves and mirror images were made and the printout of the same were relied upon. The Officers also recorded statement of Shri Kapil Garg on different dates and this has been made basis to allege under valuation. The demand of duty was confirmed for the period

from 2006 to 2010 on the importation of 6 V and 12 V batteries on the ground of undervaluation.

5.1. The Appellant on the other hand has disputed the veracity as well as the authenticity of the evidences, collected through electronic devices on the ground that neither there is any seizure memo nor the mandatory provisions of Section 138C has been followed. Further that neither the hard disks and seized records were opened in presence of any authorized person nor the same were presented before the adjudicating authority for inspection. They have also relied upon the market survey and the examination report of batteries conducted by the SIIB in 2006 in respect of two consignments of batteries involved in this case and also the order passed by the CESTAT Delhi wherein it was held that no contemporaneous imports has been shown to alleged undervaluation. The Appellant has also relied upon the Final Order No. 50767 – 50678/2020 dated 14.09.2020 passed by the CESTAT, Delhi in respect of six Bill of Entry involved in same investigation where the goods were imported through ICD, Pithampur. The Tribunal held that the evidence in the data seized from the pen drive and hard disks is not reliable and did not satisfy the requirements of Section 138C of the Customs Act, 1962. There was no co-relation between the Bills of Entry and the alleged wire transfer and further there was no investigation or confirmation from the persons whose names appeared in the mails for wire transfers. That NIDB data was not comparable to Appellant’s goods and denial of cross examination sought by appellants resulted into miscarriage of justice and therefore cannot be relied upon.

5.2. The allegation of undervaluation is also based upon the two hard disks said to be taken from the computer in office premises and one pen drive seized from Shri Rajendra Mangal. We find that in case of two hard disk allegedly taken from office computer and the hard disk and pen drive allegedly seized from Shri Rajendra Mangal, the seizure memo attached to the Panchnama dated 19.10.2010 does not show seizure of any pen drive or hard disk. The record of proceedings was prepared on various dates for forensics analysis of the hard disks. The adjudicating authority has observed and relied upon the printouts from mirror image of hard disks which contained the email correspondences made by Shri Kapil Garg and the authenticity of all the said printouts was admitted by him in his statement. On the other hand, the appellants disputed the veracity and authenticity of the evidences, collected through electronic devices. We find that Section 138C of the Customs Act, 1962 provides admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence. The said Section 138C is reproduced below:

> *SECTION 138C.Admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence. –*
> *(1) Notwithstanding anything contained in any other law for the time being in force, -*
> *(a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or*
> *(b) a facsimile copy of a document; or*
> *(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer printout"), if the conditions mentioned in sub-section (2) and the other provisions contained in this Section are satisfied in relation to the statement and the computer in question, shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.*
> *(2) The conditions referred to in sub-section (1) in respect of a computer printout shall be the following, namely :-*
> *(a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;*
> *(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the Information so contained is derived;*
> *(c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and*

(d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether -

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the document, containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. - For the purposes of this Section, -

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

We find that on close reading of Section 138C of the Act, 1962, it is observed that the Customs Act has prescribed the detailed procedure to accept the computer printouts and other electronic devices as evidences. It has been stated that in any proceedings under the Customs Act, 1962, where it is desired to give a statement in evidence of electronic devices, it shall be evidences of any matter stated in the certificate. In present case we find that the mandatory provisions of Section 138C of the Act were not complied as regard use of printouts as evidence. From the facts of the case and the Panchnama prepared for opening up of hard disks and their mirror image, it is clear that the same were not undertaken in presence of any authorized person. The seized pen drive and Hard disks were received from the Central Excise Department by SIIB on 01.11.2010 and thereafter on 16.11.2010 and 06.12.2010, the SIIB officers has taken out the mirror image. Shri Kapil Garg or any authorized person were never asked to remain present at the time of mirror imaging which is said to have drawn under Panchnama on 16.11.2010 and 06.12.2010. Further the printouts of such mirror images were not taken in presence of any person. Even the certificate as required under Section 138 C (4) was not prepared. Apart from above we find that in Panchnama dated 19.10.2010 wherein the seizure of pen drive and hard disks has been shown, the seizure memo does not shows the hard disks and pen drive. There is no identification of computer from which the hard disk was taken out. No evidence is on record that the electronic device was regularly used in the course of business or that the same is compliant with the conditions of Section 138 C (2). During adjudication proceedings the hard disks and pen drive could not be even produced before the adjudicating authority and it was communicated that the same was not traceable. The same were not available for examination before adjudicating authority during adjudication proceedings. The entire case is based upon the electronic documents as evidence. However no compliance with the provisions of Section 138C has been made to establish the truthfulness of neither the documents nor the seizure memo was made and neither the same was presented before adjudicating authority. Thus the evidence of electronic devices in the form of printouts cannot be relied upon as evidence. In case of S.N. Agrotech Vs. CC 2018 (361) ELT 761 (SC), the Tribunal has placed reliance upon the Apex Court judgment in case of *Anvar P.V*. v. *P.K. Basheer & Others* - (2014) 10 SCC 473 = 2017 (352) E.L.T. 416 and decision of Tribunal, in the case of *Tele brands Pvt. Ltd.* v. *C.C.* - 2016 (336) E.L.T. 97 holding as under :

> ***8***. *On close reading of Section 138C of the Act, 1962, it is seen that the Legislature had prescribed the detailed procedure to accept the computer printouts and other electronic devices as evidences. It has been stated that any proceedings under the Act, 1962, where it is desired to give a statement in evidence of electronic devices, shall be evidences of any matter stated in the certificate. In the present case, we find that the provisions of Section 138C of the Act were not complied with to use the computer printouts as evidence. The Ld. Counsel for the appellants submitted that there is a gross illegality committed during the retrieval of the electronic documents. It appears from the Panchnama and record of proceedings that the alleged date recovered from electronic documents, so seized, were copied in a hard disk in presence of one person and, thereafter, it was opened in front of other persons. It is noted that the certificate was not prepared during the seizure of the electronic devices, as required under the law.*
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> ***9.*** *The investigation is normally started after collecting the intelligence/information from various sources. The investigating officers are procuring the evidences in the nature of documents, statements, etc., to establish the truth. During the evolution of technology, the electronic devices were used as evidence. In this context, the law is framed to follow the procedure, while using the electronic devices as evidence for authenticity of the documents, which would be examined by the adjudicating authority during adjudication proceeding. In the instant case, it is found that the entire case proceeded on the basis of the electronic documents as evidence. But the investigating officers had not taken pain to comply with the provisions of the law to establish the truthfulness of the documents and merely proceeded on the basis of the statements. Hence, the evidence of electronic devices, as relied upon by the adjudicating authority cannot be accepted.*
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> ***10. The Hon'ble Supreme Court in the case of Anvar P.V. (supra), while dealing with Section 65B of the Evidence Act, 1872 (Parimateria***

to Section 138C of the Act, 1962), observed as under :

"14. Any documentary evidence by way of an electronic record under the Evidence Act; in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. *- Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original.*

15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied :

(a) There must be a certificate which identifies the electronic record containing the statement;
(b) The certificate must describe the manner in which the electronic record was produced;
(c) The certificate must furnish the particulars of the device involved in the production of that record;
(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record, is duly produced in terms of Section 65B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

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"22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under

Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generaliaspecialibus non derogant, special law will always prevail over the general law. It appears, the Court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

11. *Upon perusal of the judgment of the Hon'ble Supreme Court in the case of Anvar P.V. (supra), we note that the Apex Court has categorically laid down the law that unless the requirement of Section 65B of the Evidence Act is satisfied, such evidence cannot be admitted in any proceeding. We note that the Section 138C of the Customs Act is parimateria to Section 65B of the Evidence Act. Consequently, the evidence in the form of computer printouts, etc., recovered during the course of investigation can be admitted as in the present proceedings only subject to the satisfaction of the sub-section (2) of Section 138C. This refers to the certificate from a responsible person in relation to the operation of the relevant laptop/computer. After perusing the record of the case, we note that in respect of the electronic documents in the form of computer printouts from the seized laptops and other electronic devices have not been accompanied by a certificate as required by Section 138C(2) as above. In the absence of such certificate, in view of the unambiguous language in the judgment of the Hon'ble Supreme Court (supra), the said electronic documents cannot be relied upon by the Revenue for confirmation of differential duty on the appellant. In the present case, the main evidence on which, Revenue has sought to establish the case of undervaluation and misdeclaration of the imported goods is in the form of the computer printouts taken out from the laptops and other electronic devices seized from the residential premises of Shri Nikhil Asrani, Director in respect of which the requirement of Section 138C(2) has not been satisfied. On this ground, the impugned order suffers from uncurable error and hence, is liable to be set aside.*

12. *The Ld. AR for Revenue relied upon the decision of the Tribunal in the case of M/s. Laxmi Enterprises (supra) in which the Tribunal upheld the charge of undervaluation and demand for differential duty. In the said decision, Tribunal overruled the objection of the appellant in connection with Section 138C, by holding that the documents printedout from laptop will be admissible as evidence in view of the fact that the truth of such documents stand admitted by the proprietor in his statement.*

We have gone through the said decision of the Tribunal and we note that the judgment of the Hon'ble Supreme Court in the case of Anvar P.V.

> *(supra) has not been cited and was never brought to the notice of the Bench. Consequently, we are of the view that the decision in the case of Laxmi Enterprises is not applicable to the facts of the present case.*
> ***13.** It is submitted by the Ld. Counsel for the appellant that the adjudicating authority had not examined the witnesses, as per the provisions of Section 138B of the Act, 1962. He has relied upon the decision of Hon'ble Delhi High Court, in the case of J&K Cigaratte v. Collector of Customs - 2009 (242) E.L.T. 189 = 2011 (22) S.T.R. 225 (Del.). In that case, the Hon'ble High Court, while dealing with Section 9D(1) of the Central Excise Act, 1944 (Parimatria to Section 138B of the Customs Act, 1962) have held that the procedure as prescribed in the statute is required to be followed for proving the truth of the statement. The said decision of the Hon'ble Delhi High Court has also been relied upon by the Hon'ble Punjab & Haryana High Court, in the case of G-Tech Industries v. Union of India - 2016 (339) E.L.T. 209 (P & H). We find force in the submissions of the Ld. Counsel for the appellant that the adjudicating authority had not followed the procedures prescribed under Section 138B of the Act, 1962. We have already observed that the demand of duty cannot be sustained, as the evidences as available for the alleged undervaluation cannot be accepted under the law, as per the mandates of Section 138C of the Act. Hence, there is no need to discuss the said issues, as raised by the appellants regarding consideration of the provisions of Section 138B ibid.*
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> ***14.** In view of the above discussions and analysis, we do not find any merits in the impugned order, in confirming the adjudged demands against the appellants. Therefore, the impugned order is set aside and the appeals filed by the appellants are allowed.*

6. In view of above facts and judgment we are of the view that the printouts from electronic devices relied upon to make allegation against the Appellant and are not admissible as evidence. Similarly in case of Premier Instruments & Controls Ltd v CCE – 2005 (183) ELT 65, M/s Ambica Organics Vs. CC – 2016 (334) ELT 97, M/s Agarvanshi Aluminium Ltd v CC – 2014 (299) ELT 83 and M/s Sunrise Stainless Steel P. Ltd v CCE – 2019 (12) TMI 280-CESTAT-AHD in absence of compliance to the provisions of Section 138C the evidence produced in the form of electronic evidence were held as not reliable. We also find that since all the above exercise right from the seizure of hard disks till taking printout was undertaken in absence of Appellant hence they had sought cross examination of Shri Rajendra Mangal in whose presence of pen drives and hard disks were seized and the Panch witness who had witnessed the opening of pen drive, hard disks and mirror images of pen drive. However Shri Rajendra

Mangal was not made available and the Panch witness cross examination was not granted. In such facts apart from our findings on admissibility of electronic evidence as document under section 138C, the printouts of hard disks and pen drive cannot be relied upon as held in case of Arya bhushan Bhandar Vs. UOI 2002 (143) ELT 25 (SC) and UOI Vs. Kisan Ratan singh 2020 (372) ELT 714 (SC). Coming to the statement of Shri Kapil Garg we find that his statement dated 19.10.2010 and 22.10.2010 are exculpatory. His statement dated 29.11.2010. 03.12.2010 and 13.12.2010 were retracted by affirming affidavits dated 02.12.2010 and 15.12.2010. Further, in absence of any corroborative evidence of payment over and above the declared value and above invoice price. In such case when the statements stands retracted the same has no evidentiary value and cannot be relied upon. Our views are also supported by the orders in case of Vinod Solanki v UOI- 2009 (233) ELT 157, Mohtesham Mohd Ismail v Special Director- 2007 (220) ELT 3, Fact Paper Mills Ltd v CCE – 2014 (314) ELT 449, Commissioner Vs. Fact Paper Mill Ltd – 2015 (322) ELT 283. Even otherwise we find that apart from relying upon the electronic evidence and the retracted statements, no independent enquiry was made. It has been alleged that the emails found in Hard disks had communication regarding wire transfers. However we find that there is no investigation or enquiry from the persons whose name are appearing in alleged emails for wire transfer and thus the printouts are not corroborated by any evidence or investigation and hence not reliable.

7. The revenue has further relied upon the alleged market enquiry report in the form of quotations/ offers of one piece of battery from three shops. We find that the same is not sales invoice but only quotation and there is no evidence that the same is of actual sales price. The valuation cannot be undertaken on the basis of merely quotation of one battery. Further the same is not comparable as the Appellant has imported lakhs of batteries in bulk. From the quotations, it cannot be made out from the said Proforma invoice as

to who the person who prepared was and as to how the price was arrived at. The market survey was conducted at the back of Appellant. Shri Kapil Garg in his statement before the investigating officer has stated that the market survey was wrong and that survey of comparable batteries has not been done. As the show cause notice placed reliance on market survey, the Appellant had requested for cross examination of representative of M/s Global Power Survey (I) Pvt. C-10, Satyam Shipping Centre, M.G. Road, Ghatkopar. East, Mumbai - 77, M/s Shivam Sales, Shop No. 2, Gr. Floor, Pahelvi Building, Lamington Road, Grant Road (East), Mumbai - 7, M/s. Ratandeep Electronic and Electrical who have given Performa invoice during market enquiry. The adjudicating authority rejected the request on the ground that no specific names were specified in request. We find that the Appellant had sought cross examination of representative of M/s. Global Power Survey (I) Pvt. Ltd. M/s Shivam Sales and M/s. Ratandeep Electronic and Electrical whose bills and Proforma invoices were relied upon to show that the price of similar batteries in local market is much more. The adjudicating authority did not appreciate the fact that except name of Mr. Dipal Udeshi of M/s. Global Power Source (I) Pvt. Ltd on Proforma invoice in case of two other shops i.e M/s. Shivam Sales and M/s. Ratandeep Electronic and Electricals the name of person who issued such invoice was not appearing. When the department conducted market survey and the persons were there witness, it was their duty to mention name of person on such Proforma invoice or to find such person from cross examination as the Appellant were not made present during market survey. The market survey was conducted in absence of Appellant and they could not be expected to name the person who has issued such Proforma invoice. When the revenue itself does not knows as to who has issued such Proforma invoice and there is no statements of makers of such invoice, in that case the Proforma invoices has no evidentiary value. Further as the cross examination was not given the Proforma invoices cannot be relied upon.

8. Apart from our above findings we also find that the allegation of undervaluation in respect of six Bills of Entry involved in the same investigation came up before CESTAT, Delhi. The Tribunal in its Final Order No. 50767-50678/2020 dated 14.09.2020 held that the alleged printouts or the data from the Hard Disks and Pen did not satisfy the requirements of Section 138C of the Customs Act 1962 and therefore cannot be relied upon. There was no correlation between the Bills of Entry and the alleged wire transfers and further there was no investigation or confirmation from the persons whose names appeared in the emails for wire transfer. The NIDB data was not comparable to the Appellant's good. In view of our above findings as above and the CESTAT order dated 14.09.2020, we are of the view that the charges of undervaluation on the basis of printouts and retracted statement of Shri Kapil Garg which are not supported by any independent evidence are not sustainable.

9. Coming to the prices declared by the Appellant on perusal of records, we find that in respect of two Bills of Entry Nos. 931771 dated 14.10.2006 and 933937 dated 16.10.2006 which are subject matter of the present appeal also, the SIIB had undertook investigation which included the market survey and chemical examination of battery. Though the Ld. AR has submitted that there is no evidence of such exercise, however we find from Page 163 and 165 of the Appeal papers that the SIIB conducted market survey and the Chemical Examiner; Nhava Sheva conducted Chemical examination of battery. The lead content was found to be 37% to 38%. The department thereafter enhanced the value from US $ 0.25 per piece to US $ 0.41 per piece. The Appellant accepted the valuation as they were incurring demurrage. We find that when the valuation, of the batteries in question was arrived at after testing and market survey, at 0.41 US $, rejection of declared price based on allegations of show cause notice in present appeal is not sustainable. Our views are also based upon judgment in Appellant's own casein case of import of batteries the declared value of 0.25 US $ was

disputed by the department in reference to 6 Volt batteries in September 2005 and the same was enhanced based on the ground that the prices under contemporaneous imports were high. The enhancement was set aside vide Order-in-appeal dated 20.10.2005. The said order passed by the Commissioner (Appeals) was set aside by the Tribunal, New Delhi vide Final Order No. C/141/10 dated 27.09.2010 on the ground that no contemporaneous import of such bulk quantity has been shown and the declared price cannot be rejected.

10. In view of our above observations the redetermination of value under Rule 3 (1) on the basis of printouts and other documents taken from Hard disks is not sustainable. Further in case of M/s Suqian Yongda Imp Exp Trade Co. Ltd. and Guanzhou NPP Power Co. Ltd. the value has been re-determined under Rule 5 of Valuation Rules. As there is no evidence hence the transaction value was proposed based upon correspondence with local buyers through emails and printout from hard disks. We find that no investigation was made at local buyers nor there is evidence of either payment to the overseas supplier or receipt of any amounts from local buyers, over and above the sale price by the Appellant. Hence the rejection of declared price is also not sustainable. The revenue has also relied upon the lead content by contending that the lead content in battery is around 56 to 58 %. We find that no chemical test was carried out. Further the actual test on imported batteries in 2006 shows the lead content as 36%. Thus there is no justification to value enhanced by the revenue. As regard comparable imports the revenue has relied upon the imports of 10,000 to 50,000 batteries of 6 Volts holding the same to be contemporaneous. However we find that in the instant case the Appellant had imported more than 15 lakhs batteries from suppliers over the period of time and were regular importer in bulk. Hence the imports cited by the revenue are not comparable and cannot be said to be contemporaneous. Similarly in case of 12 Volt battery we do not find any evidence to reject the declared value apart from reliance

based on printouts and also on the face of the facts that no contemporaneous imports of such bulk quantity has been relied upon. Hence we hold that there is no reason to reject the declared prices and the impugned order is not sustainable. Similarly, in appeal filed by Shri Kapil Garg, as the charges of undervaluation are not sustainable, hence there is no reason to impose penalty upon him.

11. In view of above facts and findings we set aside the impugned order and allow both the appeals with consequential reliefs, if any.

(Order pronounced in the open court on 22/08/2022)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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