

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 85258 Of 2020

(Arising out of Order-in-Original No. 63/2019-20 dated 8.11.2019 passed by Commissioner of Customs (Import-II), Mumbai)

Junaid Kudia

302-304, Abdul Rehman street, Mumbai,
Maharashtra.

.....Appellant

VERSUS

**Commissioner of Customs-
Mumbai Import-II**

New Custom House, Ballard Estate,
Mumbai-400001.

.....Respondent

WITH

Customs Appeal No. 85260 Of 2020

(Arising out of Order-in-Original No. 63/2019-20 dated 8.11.2019 passed by Commissioner of Customs (MP-II), Mumbai)

M/s Plastic Cottage Trading Co.

302-304, Abdul Rehman street, Mumbai,
Maharashtra.

.....Appellant

VERSUS

**Commissioner of Customs-
Mumbai Import-II**

New Custom House, Ballard Estate,
Mumbai-400001.

.....Respondent

AND

Customs Appeal No. 85262 Of 2020

(Arising out of Order-in-Original No. 63/2019-20 dated 8.11.2019 passed by Commissioner of Customs (MP-II), Mumbai)

Zaid Kudia

302-304, Abdul Rehman street, Mumbai,
Maharashtra.

.....Appellant*VERSUS***Commissioner of Customs-
Mumbai Import-II**

New Custom House, Ballard Estate,
Mumbai-400001.

.....Respondent**Appearance:**

Shri J. C. Patel, Advocate for the Appellants

Shri S. K. Hatangadi, Authorized Representative for the Respondent

CORAM:**HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)****HON'BLE MR. M. M. PARTHIBAN, MEMBER (TECHNICAL)****FINAL ORDER NO. A/86237-86239/2023**

Date of Hearing : 13.06.2023

Date of Decision: 25.08.2023

PER : S.K. MOHANTY

These appeals are directed against the Order-in-Original CAO No. 63/2019-20 dated 08-11-2019 (for short, referred to as "the impugned order") passed by the Commissioner of Customs (Import-II), Mumbai.

1.1 In respect of 31 consignments imported through Bombay Port, the adjudicating authority has rejected the declared assessable value of Rs. 2,46,56,053/- and re-determined the same at Rs.16,19,37,406/-; confirmed differential customs duty amounting to Rs.4,04,17,003/- along with interest; appropriated the amount of Rs.16,50,000/- deposited by the appellant; imposed penalty of Rs.4,04,17,003/- under Section 114A of the Customs Act, 1962 on M/s. Plastic Cottage Trading Company (for short, referred to as "the appellant company"). Besides, the impugned order has also imposed penalties of Rs. 20,00,000/- and Rs. 40,00,000/- on the appellant Shri Junaid Kudia under Section 112(a) *ibid* and 114AA

ibid respectively. Besides, the impugned order has also imposed penalty of Rs.5,00,000/- on the other appellant Shri Zaid Kudia, partner of the appellant company under Section 112(a) *ibid*.

1.2 With regard to the consignments imported through Nhava Sheva port, the impugned order has rejected the declared assessable value of Rs. 13,35,107/- and re-determined the same at Rs.70,27,005/-; confirmed differential customs duty amounting to Rs.16,75,752/- along with interest. The impugned order has imposed penalty of Rs.16,75,752/- on the appellant company under Section 114A *ibid*; imposed penalty of Rs.50,000/- and Rs.2,00,000/- on Shri Junaid Kudia under Section 112(a) *ibid* and 114AA *ibid* respectively. In respect of the appellant Shri Zaid Kudia, the impugned order has imposed penalty of Rs.20,000/- under Section 112(a) *ibid*.

2. Brief facts of the case are that the officers of Directorate of Revenue Intelligence (DRI), Regional Unit, Surat had gathered intelligence that the appellant company is involved in under-valuation of varieties of bags and other accessories, falling under CTH 39269099, 420222290, 73182990, 83089099, 96081019 etc. On 11-04-2017, the DRI officers visited the business premises of the importer. Simultaneously, a search was also conducted at the premises of M/s Winsor Enterprises, Mumbai wherein records/documents/files related to the appellant were found and documents in the form of print outs of emails were recovered. The said emails indicate that the appellant had mis-declared the actual value of the goods before the proper authorities of Customs at the time of seeking clearance. The officers also recorded statements of Shri Mukhtar Kudia, Shri Junaid Kudia and Shri Zaid Kudia during the course of investigation. After detailed investigation into the matter, a show cause notice dated 13-11-2018 was issued to the appellants, proposing demand of Customs duty along with interest and for imposition of penalties on the appellant company and other appellants. In adjudication, learned Commissioner of Customs has confirmed the above demands on the appellants. Feeling aggrieved

with the impugned order, the appellants have filed these appeals before the Tribunal.

3. Learned Advocate appearing for the appellants submitted that the statements, based on which the adjudication proceedings were initiated, were recorded under pressure by DRI and same were retracted by the concerned person subsequently; that the Department's case is solely based on some emails recovered from one Mr. Zulfikar, employee of Appellant's sister concern M/s. Winsor Enterprises and that the appellant's request for grant of opportunity of cross examination of Mr. Zulfikar, from whose email account these so called second set of invoices were retrieved, has not been allowed. Learned Advocate further submitted that cross examination of a person is important in the light of the fact that entire case of the DRI is based on the documents in the form of second set of invoices of import of goods. He also submitted that DRI officials have not recorded any statement of said Mr. Zulfikar and also not obtained his comments on the said second set of invoices, as to how he got such invoices; who had sent the same on his email ID and how the same are related to actual value of the imported goods etc. Thus, he submitted that cross-examination of the witness is natural right of the appellant and cross examination is an important component of natural justice and denial of the same by an adjudicator in quasi-judicial proceedings is highly improper. To support such stand, the learned Advocate has relied on the judgment of the *Pamwi Tissues Ltd. Vs. Collector of Central Excise, Chandigarh* 1996(86) ELT 278 Tribunal, *Manek Chemicals Pvt. Ltd. Vs. Union of India* – 2016 (334) ELT 302(Guj.) and *Andaman Timber Industries Vs. Commissioner of C. EX., Kolkata-II* – 2017 (50) STR 93 (S.C.).

3.1 Learned Advocate also submitted that it is not factually correct that the emails were recovered from the premises of the appellant company. The same were taken by way of computer print-outs during search of premises of M/s Winsor Enterprises and were in fact not available in hard copies even at the said premises on the

date of search. He further submitted that said computer printouts are not admissible as evidence under Section 138C of Customs Act, 1962, as the requirements of the said section have not been complied. In this context, he relied on the judgments of Hon'ble Supreme Court in the case of *Anvar P.V. Vs. P.K. Basheer – 2017 (352) E.L.T. 416 (S.C.)* and *Arjun Pandit Rao Khotkar Vs. Kailash Kushanrao Gorantyal & Ors.-2020 7 Supreme Court cases 1 (Civil Appeal No. 20825-20826 of 2017 dt. July 14, 2020)*. Further, he also submitted that the learned Commissioner has erred in confirming the allegation of undervaluation and payment of differential customs duty against the appellant merely on the basis of second sets of 32 invoices retrieved from email of an employee of the Appellant's sister concern; whereas, in the reply to show cause notice and in the additional submission, the appellant has placed various evidences and facts to show as to how another sets of invoices retrieved from email was not actual invoices and same were only prepared by their employee in his computer for market survey and based on certain market enquiry. It is further stated by the learned Advocate that the DRI has not produced any documentary or other evidences, except copies of invoices retrieved from email account handled by one employee Mr. Zulfikhar, whose statement was not recorded by the DRI; that the disputed invoices are not actual invoices, there is no documentary evidence that the appellant had paid excess amount to the suppliers or other persons over and above invoices/contract price declared in the Bills of Entry. At the time of import, the valuation was examined by the proper officers of Customs. Customs authority at port of import have assessed all the consignments based on NIDB data and found declared value as fair and accordingly, finally assessed the B/Es. Repeated revaluations, in view of the above factual positions as proposed for in the SCN cannot be upheld learned Once the B/Es have been assessed and cleared as per Section 47 of Customs Act by the Proper Officers, such an order not being an administrative order, it can only be reviewed and without such a review, the assessment order of the proper officers cannot be challenged. In the present matter, the B/Es were assessed and they have not been reviewed. Therefore, further re-determination of value done in the impugned

order-in-original is unsustainable. To support such stand, the learned Advocate has relied on the judgment of the Commissioner of Customs (Imports), Mumbai Vs. Lord Shiva Overseas 2005 (181) ELT 213 (Tri.-Mumbai) and Hitaishi Fine Kraft Inds. Pvt. Ltd. Vs. Commr. of Cus., West Bengal - 2002 (148) ELT 364 (Tri.-Kolkata) and Collector of Customs, Cochin Vs. Arvind Exports (P) Ltd. - 2001 (130) ELT 54 (Tri.-LB).

3.2 Learned Advocate further submitted that the department has to follow the procedures and norms provided in the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. In the present matter, the adjudicating authority has re-determined the value and confirmed the charges of undervaluation and has proposed redetermination of customs value in terms of Rule 10 (1)(e) *ibid*. The said sub-rule envisages to include all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller or a third party, to be included in the assessable value. However, in the present matter, there is no evidence available on record to prove that any extra payment, over and above the contracted amount was made to the seller or any third party, in context with the importation of subject goods. The conclusion by the DRI is solely based on the so-called confessional statement of Mr. Junaid Kudia, which was recorded under duress and pressure and the said statement has already been retracted. Further, DRI officers have not tried to investigate overseas supplier through Indian Consulate. DRI not having concrete case of undervaluation, they have not made any enquiry with Customs authority at the port including landing or port of discharge to get invoices of the overseas seller to prove that value declared by the appellant is not the actual value. In the impugned order, learned Commissioner has not specified any tangible reason for rejection and simply rejected the declared price on the ground of print outs of certain invoices, retrieved from email of an employee, who even was not interrogated and his statement was not recorded to corroborate with these invoices. DRI has relied upon 32 sets of such invoices, which are different than the invoices under which the

goods were imported and also the value, quality or quantity, currency etc. were also different, the fact of which has also been admitted by the DRI itself. Therefore, these second set of discrepant invoices cannot be accepted as evidence and hence this ground is not sufficient and valid for rejection of declared value in respect of the goods imported by the appellant and therefore, differential duty demand is required to be set aside.

4. On the other hand, the learned AR appearing for the Respondent reiterated the findings recorded in the impugned order and further submitted that documents in the form of print outs of emails were recovered, which indicated that the Appellant had mis-declared the actual value of the goods before the proper officers at the time of Customs clearances. Mr. Junaid Kudia admitted to have declared less value of the imported goods during the customs clearances with an intention to evade customs duty and agreed to pay the differential amount. The statements given by Mukhtar Kudia, Junaid Kudia are very well acceptable as evidence in the eyes of law. In this context, the learned AR has relied on the decision of Hon'ble Supreme Court in Asstt. Coll. Of C. Ex., Rajamundry Vs. M/s Duncan Agro Industries Ltd. – 2000 (120) ELT 280 (S.C.) and Surjeet Singh Chhabra Vs. Union of India – 1997(89) ELT 646 (SC). He further submitted that though the appellant wanted to cross examine Mr. Zulfikar Shaikh, but even after issuance of many summons, Zulfikar Shaikh did not turn up to join the investigation. In the present matter, learned Adjudicating authority rightly denied the cross examination. In this regard, the learned AR has relied on the decisions in the case of Union of India Vs. Rajendra Bajaj [2010 (253) ELT 165 (Bom)], Kanungo & Co. Vs. Collector of Customs, Calcutta And Others [1983 (13) ELT 1486 (S.C.)], Fortune Impex Vs. Commissioner of Cus., Calcutta [2001 (138) ELT 556 (Tri.-Kolkata)] and Suman Silk Mills Pvt. Ltd. Vs. Commissioner of Cus. & C. Ex., Baroda [2002 (142) ELT 640 (Tri.-Mumbai)].

5. Heard both sides and perused the case records, including the written submissions filed during the course of hearing of appeals.

6. Rejection of declared value on Bill of Entry is a serious charge and the same could have been rejected on the basis of cogent examination of evidences and justifiable reasons. We find that the DRI officers conducted search operation in the business premises of M/s Plastic Cottage Trading Co. and M/s Winsor Enterprises. Panchama's both dated 11-4-2017 were prepared in respect of recovery of records/ documents/ files/ print outs of emails and sets of invoices retrieved from emails /computers/ mobile phones and laptop. The Officers also recorded statement of Shri Junaid Kudia, Shri Mukhtar Kudia on different dates. On the basis of mails retrieved from the email ID of Shri Mukhtar Kudia, i.e., mukhtarkudia@yahoo.in or Shri Zulfikar Shaikh, office Assistant at M/s Winsor Enterprises i.e., zeeshu666@rediffmail.com it was contended that the actual rate of commodities imported by the appellant were different from that declared before the customs authorities. Accordingly, the demand of customs duty was confirmed for the period from January, 2014 to April, 2017 on the importation of Varieties of Bags etc. on the ground of under valuation. The issue involved in these cases is mainly confined for determination, as to whether, the transaction values declared by the importer/ appellant are correct or otherwise. The adjudicating authority observed that the evidence for the actual price was retrieved from the E-mails and invoices retrieved from E-mails. The authenticity of all the said Email printouts was admitted by partners of the appellant in their statements. On the other hand, the appellants disputed the veracity and authenticity of the evidences, collected through electronic devices.

7. In this context, we find that Section 138C of the Act, 1962 provides admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence. For the proper appreciation of the case, Section 138C of the Act, 1962 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."

8. On reading of Section 138C of the Customs 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. It is noted that the certificate was not prepared during the seizure of the electronic devices, as required under the law. The investigation is normally started after collecting the intelligence/information from various sources. The investigating officers procure 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 proceedings. 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.

9. We also find that 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 :

"13. 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.....

14. 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.

15. 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.

16. 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.

17. 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. Generalia speciali bus 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.”

10. 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 proceedings. 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 in the present proceedings, only subject to the satisfaction of the sub-section (2) of Section 138C *ibid*. 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) *ibid* 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 in respect of which the requirement of Section 138C(2) *ibid* has not been satisfied. On this ground, the impugned order suffers from incurable error and hence, is liable to be set aside.

11. The Learned AR for Revenue relied upon the decision of the Tribunal in the case of *M/s. Laxmi Enterprises* (*supra*), in which the Tribunal has 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 printed out 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.

12. It is submitted by the Learned Counsel for the appellant that the adjudicating authority had not examined the witnesses, as per the provisions of Section 138B of the Act, 1962. In this context, we find that the Hon'ble Delhi High Court, in the case of *J&K Cigarette v. Collector of Customs* - 2009 (242) E.L.T. 189 = 2011 (22) S.T.R. 225 (Del.), 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 Learned Counsel for the appellant that the adjudicating authority has not followed the procedures prescribed under Section 138B of the Act, 1962. We are also in agreement with the Appellant that the statements of witnesses cannot be relied upon as Learned Adjudicating authority not conducted cross-examination. Hence, on this ground also demand of duty cannot be sustained.

13. We also noticed that the Adjudicating authority in order to justify the under valuation, has relied upon the statements of partners of the appellant's company. However, the Appellant has objected to such reliance, as the statements were retracted. The Appellant has pleaded that retracted statements cannot be accepted as evidence for confirmation of demand. The adjudicating authority in the impugned order has chosen not to consider the retraction. We are of the view that the said approach of the adjudicating authority is incorrect. Be that as it may, we note that statements cannot be the sole reason to confirm the charge of undervaluation. We also note that in the present matter there are no evidences produced by the department that the excess amount over and above the invoice price was paid to suppliers. There is no evidence as to how the Appellant came into possession of cash alleged to be differential amount towards goods imported, nor there is any evidence of any cash being handed over to any person, representing suppliers in India. Department had failed to produce corroborative evidences regarding the undervaluation of imported goods. Hence, in our view, the charge of undervaluation of imported goods in the present matter is not sustainable.

14. Further, we also find that in respect of disputed imported goods, Bills of entry were already been assessed at the time of importation of the goods and hence, further proposal to re-enhance the value, in the eventuality, when the earlier assessment orders having not been appealed against/reviewed, have attained finality

and accordingly, cannot be proceeded with for rejection of the declared value. In other words, there cannot be any re-assessment of the said values, which had become final for want of appeal against the same. Our views are supported by the judgments in case *CC v. Lord Shiva Overseas (supra)*, *Malhotra Impex v. Commissioner of Customs, Ahmedabad* - 2006 (203) E.L.T. 561 (Tri.-Del.) and *Commissioner of Customs (Prev.), v. Paras Electronics* - 2009 (246) E.L.T. 231 (Tri.-Mumbai).

15. In view of our above observations and findings, we are of the opinion that the duty demand confirmed against the appellant M/s. Plastic Cottage Trading Co. and penalties imposed upon it is not sustainable. For the same reason, the penalty imposed on the co-appellants namely, Shri Junaid Kudia and Shri Zaid Kudia is also not sustainable. Therefore, the impugned order confirming the adjudged demands on the appellants is set aside and the appeals are allowed with consequential relief to the Appellants, as per law.

(Order pronounced in the open court on 25/08/2023)

(S. K. Mohanty)
Member (Judicial)

(M. M. Parthiban)
Member (Technical)