CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH,MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Early Hearing Application No. 85378 of 2021

In

Customs Appeal No. 85843 of 2020

(Arising out of Order-in-Original No. 25/2020-21/Commr/NS-III/CAC/JNCH dated 02.07.2020 passed by Commissioner of Customs (NS-III), JNCH, Nhava Sheva)

Jeen Bhavani International **.....Appellant**

A-71, Rustomji Adarsh Regal, Marve Road,
Malad, (W), Mumbai-400 067.

VERSUS

Commissioner of Customs- Nhava Sheva-III **.....Respondent**

JNCH, Nhava Sheva, Taluka- Uran,
District- Raigad, Maharashtra- 400 707.

WITH

Customs Early Hearing Application No. 85379 of 2021

In

Customs Appeal No. 85844 of 2020

(Arising out of Order-in-Original No. 25/2020-21/Commr/NS-III/CAC/JNCH dated 02.07.2020 passed by Commissioner of Customs (NS-III), JNCH, Nhava Sheva)

Mahesh Chandra Sharma Karta **.....Appellant**

A-71, Rustomji Adarsh Regal, Marve Road,
Malad, (W), Mumbai-400 067.

VERSUS

Commissioner of Customs- Nhava Sheva-III **.....Respondent**

JNCH, Nhava Sheva, Taluka- Uran,
District- Raigad, Maharashtra- 400 707.

Appearance:

Mrs. Nisha Bineesh, Advocate for the Appellant
Shri Manoj Das, 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/85674-85675 / 2022

Date of Hearing:14.03.2022
Date of Decision:01.08.2022

PER: S. K. MOHANTY

The appellants have filed the miscellaneous applications, seeking early hearing of the appeals. On going through the averments made in the said applications, we are of the view that the prayer made for out-of-turn hearing can be considered in the interest of justice. Accordingly, the miscellaneous applications are allowed. With the consent of both sides, the appeals are taken up together for hearing today and a common order is being passed.

2. These appeals are directed against the Order-in-Original No. 25/2020-21/Commr/NS-III/CAC/JNCH dated 02.07.2020 (for short referred to as the "impugned Order"), passed by Commissioner of Customs, JNCH, Nhava Sheva.

3. Brief facts of the case are that the appellants herein, M/s Jeen Bhavani International, imported 63 consignments of Linen Yarn, Ramie Yarn and other misc. items from various overseas suppliers, based in China; during the period between 01.08.2014 and 10.11.2016, the appellant filed bills of entry classifying the said goods under CTH 53061090 and 53089010; goods were assessed by the department and ordered for clearance of the same for home consumption, in terms of Section 17 of the Customs Act, 1962 (for short, referred to as the "Act of 1962"). On the basis of specific information received, indicating that the appellant indulged in gross under valuation of the imported goods, Directorate of Revenue Intelligence (DRI), Zonal Unit, Surat conducted a detailed investigation into the matter. Department issued a Show Cause Notice (SCN) proposing rejection of the declared value of goods in terms of Rule 12 of the Customs Valuation (Determination of Prices of the imported goods) Rules, 2007 (for short, referred to as "CVR 2007"); re-determination of the same under Section 14(1) of the Customs Act, 1962 read with Rules 3(1) and 10(1)(e) of CVR, 2007; confiscation of goods under Section 111(m) Customs Act, 1962; recovery of the differential customs duty along with interest in terms of Section 28(4) and 28AA *ibid* respectively and imposition of penalties

on the appellants and other persons/entities under Sections 112(a), 112(b), 114A, 114AA and 117 *ibid*.

3.1. The SCN was adjudicated by the learned Commissioner of Customs, JNCH, Nhava Sheva, by relying on documents namely, cargo transportation insurance policies, copies of emails, invoices and Statements etc. He passed the impugned Order-in-Original, inter alia:

(i). Rejecting the declared value of Rs.6,81,09,687/- in respect of 21 consignments of the disputed goods under Rule 12 of CVR 2007 and re-determining the same at Rs.9,41,16,126/-under Section 14(1) the Customs Act, 1962 read with Rule 3(1) and Rule 10(1)(e) of CVR, 2007;

(ii). Holding that the impugned goods are liable for confiscation under Section 125 of the Customs Act,1962; imposing fine in lieu under Section 125 *ibid*, since the goods were not physically available;

(iii). demanding differential Customs duty, of Rs. 78,09,736, in terms of Section 28(4) of the Customs Act, 1962 along with interest under Section 28 AA ibid

(iv). Appropriating an amount of Rs.42, 00,000, deposited by the appellant during investigation, towards the duty liability mentioned at (iii) above.

(v). Imposing a Penalty, of Rs. 78, 09,736, on the appellant under Section 114A ibid;

(vi). Imposing a Penalty of Rs. 3,00,00,000, under Section 114AA *ibid* and penalty of Rs. 7,50,000 under Section 112(a) *ibid* on Shri Mahesh Chandra Sharma, Karta of M/s. Jeen Bhavani International

4. Mrs. Nisha Bineesh, learned Advocate appearing for the appellants submits that other than the contents in the Panchanama, the department has not relied upon any substantial evidence in the form of documents or otherwise to strengthen the case of Revenue in support of under-valuation of goods and subsequent confirmation of the adjudged demands on the appellants; referring to both the SCN and the impugned order, she submits that the statutory requirements have not been complied with by the department inasmuch as the important aspects regarding the year of manufacture of the computer, model number, the exact location of the premise where the same was

kept and more importantly, the statement was not recorded from the person, who operated the same, were not discussed by the lower authorities; further, there is no whisper in the Panchanama with regard to description of CPU, the location in the searched premises where it was installed and the manner in which it was seized; the data obtained from the *mail id* is contrary to the provisions of Section 138C *ibid* and that in absence of the statement recorded from the senders of the E-mails, validity of the same is at stake and cannot be relied upon as tangible evidence to prosecute the appellants.

4.1. With regard to the issue of retracted statements furnished by the appellants belatedly, she submits that there was no in-ordinate delay in filing the retraction statement inasmuch as copies of the statements recorded under summon were not furnished by the department immediately after signing of the same during the course of investigation; since the contents of the statements were made known to the appellant through the RUDs annexed to the SCN dated 05.07.2009; thereafter, within reasonable time/nearest opportunity, the retraction letter was filed on 05.09.2019; the retraction made by the appellants needs to be considered as valuable piece of evidence and contrary contentions of Revenue are required to be discarded for achieving the ends of justice, more particularly, in the situation when no credible evidence in the form of documents/records were relied upon for adjudication of the dispute;

4.2. As regards the report furnished by the Regional Forensic Laboratory dated 01.05.2017, learned Advocate submits that for seizure of CPU, the procedures laid down in the Customs statute have not been observed by the Respondent inasmuch as Supurdnama along with Panchanama is required to be drawn simultaneously at the time of seizure of a computer or CPU, which admittedly has not been done, owing to the reason that the Panchanama nowhere specified that the Supurdnama has been drawn before seizure of the CPU; she submits also that the Panchanama does not contain the description of CPU namely, the name, model, make, year of manufacture and specific place, where the same was kept; in the absence of these vital details, adjudication proceedings are vitiated;

4.3. With regard to issuance of the SCN dated 05.07.2019, she submitted that the extended period of limitation as per sub-section (4) of Section 28 cannot be invoked and the demand, if any, should be confined only to the normal period prescribed in the statute; the alleged imports took place during the period between 01.08.2014 and 10.11.2016, whereas, the SCN was issued on 15.07.2019, which was much beyond the normal period; all the import and connected documents were submitted by the appellant at the time of filing the Bills of Entry and during the course of Panchanama proceedings on 10.11.2016 and therefore, the proceedings initiated for recovery of the adjudged demands are clearly barred by limitation of time.

4.4. Learned Advocate has relies upon the following judgments.

(a) *Varsha PlasticsPvt. Ltd. Vs. Union of India -2009 (235) E.L.T. 193 (S.C.)*
(b) *Kranti Associates Pvt. Ltd vs Masood Ahmed Khan – 2011(273) E.L.T. 34(S.C.)*
(c) *Tele Brands India Pvt. Ltd. Vs Commissioner of Cus. – Import, Mumbai - 2016(336) E.L.T 97 (Tri-Mumbai)*
(d) *I.S Corporation vs. Commissioner, - 2016 (339) E.L.T. A 125 (Tri.-Mumbai)*
(e) *S.N. Agrotech vs. Commissioner Of customs, New Delhi – 2018(361) E.L.T. 761 (Tri. – Del.)*
(f) *Rajesh Gandhi vs. Commissioner Of Custom Mumbai – Import, 2019 (366) E.L.T. 529 (Tri. – Mumbai)*
(g) *Century Metal Recycling Pvt. Ltd. Vs. Union of India – 2019 (367) E.L.T. 3 (S.C.)*
(h) *Agarwal Metals & Alloys vs. Commissioner Of Customs, Kandla – 2021 (378) E.L.T. 155 (Tri. –Ahmd.)*
(i) *Vinod Solanki vs. Union of India - 2009 (223) E.L.T. 157 (S.C.).*

5. On the other hand, Shri Manoj Das, learned Authorized Representative appearing for Revenue reiterates the findings recorded in the impugned order and submits that the Panchanama drawn in this case on 10.11.2016 is the only piece of uncontroverted evidence, which has not been disputed by the appellant; the appellant in his statement recorded under summons has stated the detailed *modus operandi* adopted by the appellant in gross undervaluation of the goods and for that purpose, has voluntarily made payment of Rs. 42,00,000/-towards the differential duty, during the course of investigation; referring to the statements, of the appellant, recorded by the DRI on different dates, he submits that the retraction made vide letter dated 05.09.2019 by the appellant was almost two and half years after the first statement and three and half months after the last statements cannot be considered, more so, as the statements were not extracted under threat of arrest; retraction of statement after

in-ordinate delay without adducing some evidence that same were obtained forcefully/by coercion/undue influence is clearly self-serving after-thought and loses its significance.

5.1. Learned AR further submits that the report received from the Regional Forensic Science Lab conclusively proved that there was parallel set of invoices for the 21 Bills of Entry, wherein the actual invoice values have been shown, which were less than the declared invoice values; on a conjoint reading of the Email messages retrieved and the parallel invoices indicates that the appellant was mis-declaring the description, quantity and value of certain consignments. As regards, the marine insurance policies recovered from the appellant, he submits that the import consignments were insured under insurance cover provided by three Chinese insurance companies; scrutiny of which reveals that the insured value in respect of 42 consignments was 110% of the invoice value and in respect of the disputed 21 consignments the value has been enhanced, meaning thereby that by showing high value cargo, the appellant has mis-declared the value for the purpose of evading customs duty liability. Learned authorised representative relies on the following.

a) *Pyare Lal Bhargava v State of Rajasthan – AIR 1963 SC 1094.*
b) *Surjeet Singh Chhabra v. Union of India – 1997 (98) E.L.T. 646 (S.C.)*
c) *State (NCT) of Delhi vs. Navjot Sandhu @ Afasan Guru - 2005, 11 SCC 600.*
d) *BalkrishnaChhaganlalSoniVs. State of West Bengal 1983 (13) ELT 1527 (SC).*

6. Heard both sides and examined the case records, including the written note of submissions filed by both sides. The department had *inter alia*, relied upon the evidences namely, panchnama of search of residence-cum-office of the Appellant dated 11.10.2016; import dockets containing import documents, received from the CHA; statements of Shri Mahesh Sharma recorded on different dates; EDI data on past imports received from the EDI Section/JNCH; Email messages retrieved from email account of Shri Mahesh Sharma; data recovered from CPU of Shri Mahesh Sharma by the Regional Forensic Science Lab., etc.

7. On perusal of the impugned order, it transpires that upon assessment of the disputed Bills of Entry by the proper officer, the subject goods were allowed for home clearance on payment of appropriate customs duties on the value declared by the appellant and that based on investigation conducted by the officers of DRI; the present proceedings were initiated by the department under Section 28 of Customs Act,1962, alleging undervaluation of goods, which ultimately has resulted in confirmation of the adjudged demands on the appellant.

7.1. Insofar as assessment of duty liability is concerned, Section 17 ibid through various sub-sections contained therein has provided inter alia, for self- assessment of duty leviable on the imported goods by the importer itself [sub-section (1)]; verification by the proper officer with regard to the entries made by the importer in the Bill of Entry in terms of Section 46 ibid and for that purpose, to examine or test the imported goods [sub-section (2) and (3)]; that in the eventuality, whereupon the proper officer is not satisfied on the basis of the available documents/evidences that the self-assessment has not been done correctly by the importer, then in such case, he will re-assess the duty leviable on the disputed imported goods [sub-section (4)]; finally, it has been mandated that in compliance to sub-rule (4) above, the proper officer shall pass a speaking order on the re-assessment within the prescribed time limit, where the importer has not specifically confirms his acceptance of the said re-assessment [sub-section (5)].

7.2. On going through the case records, we have noticed that the requirements of Section 17 ibid have not been complied with diligently by the Customs department inasmuch as the value declared by the importer at the stage of self-assessment was not disputed, the payments made towards the duty liability was accepted and that the disputed goods were also cleared for the intended purpose. These facts are evidenced for the findings recorded in the impugned order at paragraphs 5.9, 6.1(ii) and (iv). Further, we find that there is no whisper either in the SCN or the impugned order that any speaking order has been passed by the department as mandated in sub-section (5) of Section 17 ibid in support of re-assessment of the disputed Bills

of Entry and that the importer-appellant has furnished any confirmation in writing that they do not wish to have any speaking order, confirming the proposed action for such re-assessment. Therefore, under such circumstances, it cannot be inferred that the assessments of the Bills of Entry were made under Section 17 ibid read with Section 2 (2) ibid. In other words, it can be concluded that in absence of non-compliance of the provisions contained in Section 17 ibid, more particularly, sub-section (5) therein, the assessments cannot be considered as complete or final.

8. We find that the learned adjudicating authority has relied upon the documents/records namely, Panchanama of search of residence-cum-office of the Appellant, dated 11.10.2016; import dockets containing import documents, received from the CHA; seven numbers of statements of Shri Mahesh Sharma recorded on different dates; EDI data on past imports received from the EDI Section/JNCH, email messages retrieved from email account of Mahesh Sharma and data recovered from CPU of Shri Mahesh Sharma by the Regional Forensic Science Lab., to conclude that the charges framed in the SCN with regard to undervaluation of goods are proved and accordingly, the appellants are liable to pay the differential duty along with interest and are also exposed to the penal consequences as per the statute.

9. The provisions with regard to search of premises are contained in Section 105 ibid. It has been mandated that the provisions of Code of Criminal Procedure, 1898 relating to searches shall, as the case may be, apply to searches conducted under the Customs Act, 1962. The basic purpose and objective of drawing Panchanama has been made clear in Section 100(4) in the said code. As per the statutory mandates and the law laid down by the judicial forums, the purpose for drawing the Panchanama is to conveyance the court that the officer-in-charge has in fact carried out the investigation, search or seizure, if any, and have acted upon the directions of the court and guard the case from unfair dealings on the part of the officers. We find that the description, make, model, number, year of manufacturing etc. of the seized computer has not been furnished by the Department in the Panchanama drawn by them. Further, no statement has been recorded

from the person who operated the seized computer. Though, there is reference of seizure of CPU from the premises of the appellant, but the description of such CPU and the location of installation of the same were not forthcoming from the statement drawn by the Department. It is further observed that the emails were drawn in violation of the provisions laid down under Section 138C ibid. The Department also failed to obtain the statement from the sender of the emails, Mr. Yang Xiao Jiang; thus, validity of the emails is at stake and same cannot be relied upon as per the mandates of statute. From the above discussions, it is apparent that the manner of drawing a Panchanama prescribed in the statute has not been scrupulous followed by the Department. It is also an admitted fact on record that excepting the Panchanama used as a corroborative piece of evidence; no substantive documents were relied upon to strengthen the case of Revenue that there was mis-declaration of goods.

10. The learned AR for Revenue submits that Revenue has relied upon the following facts on record to corroborate with the deposition of the appellants, in support of under valuation of goods in question:

i. The Appellant stated in first deposition in 15.11.2016 has stated that he would pay the differential duty and has actually deposited Rs.42,00,000/- vide TR-6 challans dated 03.12.2016,25.01.2017 and 09.02.2017.

ii. Emails messages dated 14.06.2016, 25.08.2016 and 03.11.2016 retrieved from the email address of the Appellant provided the actual description, quantity and value of the consignments imported; they prove the mis-declaration of description, quantity and value.

iii. Forensic Analysis of the CPU of the computer system of the Appellant which was seized at the time of search Appellant's flat in Mumbai by Forensic Science Lab also reveals that the Appellant has parallel invoices saved in his computer. Comparison of the two sets of invoices also reveals value disparity between the declared value and the actual value paid to the supplier.

iv. Clinching documentary evidences in form of marine cargo insurance notes issued by different insurance companies to different suppliers show the actual values of the import consignment which tally with the admitted values admitted by the Appellant.

11. It is an admitted fact that during the course of investigation, the appellant had paid an amount of Rs.48,00,000/- which was appropriated in the impugned order towards duty liability in respect of 21 consignments. Such payments made by the appellant cannot be decisively linked with the differential amount between the re-determined values considered in the impugned order vis-a-vis as declared by the importer-appellant in the disputed Bills of Entry. Further, the person, residing in India, to whom the alleged amount was paid by the appellant, as claimed by the department, has not been questioned about the further disposal of money and ultimate payment to the foreign supplier; it could have been tangible evidence. No summonses were issued to either such person or the foreign supplier and no statements were recorded for ascertaining the fact or purpose of the payment of the alleged amount. Furthermore, since the appellant has retracted the statements recorded under summons issued on different dates, such retracted statements cannot be relied upon in isolation to conclude that the payment made during the course of investigation was towards the differential duty on the goods imported by the appellant. Hence, it is evident that the department has failed to establish that there was financial flow back to the overseas supplier against supply of the alleged goods. It is a settled principle of law that undervaluation cannot be established, unless remittance is proved. We find that it has been held in a number of cases that charge of undervaluation cannot be proved unless payment of extra consideration, over and above, the price declared or shown in the invoice, is proved. In the case of *NPT Papers Pvt Ltd & Others V. C. C. Mundra & Others , (MANU/CS/0120/2021)* Tribunal, by following the judgments in *Bayer India Ltd. V. Commissioner Of Customs, Mumbai [2006 (198) ELT 240],* upheld by Hon'ble Supreme Court [*2015 (324) ELT 17 SC]* and *Tele Brands (India) Pvt. Ltd. V. Commissioner Of*

Customs (Import) Mumbai reported in *[2016 (336) ELT 97 (Tri.Mum)]* held that there should be evidence on record to show that the importers have paid directly or indirectly any amount over and above the invoice value. Once it is proved that there is no evidence of extra remittance, transaction value cannot be discarded.

11.1. We find that Ahmadabad Bench of the Tribunal in the case of M/s Sunland Metal Recycling Industries, vide Final Order A/11871-11874/2019 dated 10.01.2019, has recorded the following findings:-

> *9. Most pertinently we find that the whole case is also based upon allegation that the differential amount was paid by the Appellant through Hawala Channels or transfer. However we find that in the show cause notice not a single person was identified or investigations were made as whom the differential value amount was handed over. Except naming Chaganlal no person has been named. There is no evidence as to how the Appellant came into possession of cash alleged to be differential amount towards scrap import neither there is any evidence of any cash being handed over to any person representing suppliers. In absence of same the allegation of undervaluation cannot be supported.*

11.2. In the instant case before us too, we find except admittance by the appellant in the retracted statement, no proof has been adduced the department to prove payment to overseas supplier. No enquiries even have taken place in that direction. Therefore, simple averment by the appellant during the recording of the statement cannot be relied upon in the absence of corroborative evidence.

12. In this case, out of 63 consignments of the disputed goods imported by the appellant during the period between 01.08.2014 and 10.11.2016, the declared value of 42 consignments was accepted by the department and in respect of 21 consignments, such value was rejected solely based on the emails retrieved from the email address of the appellant. From the submissions made by the learned Advocate and on perusal of the records, we find that description of the goods mentioned in the invoices is different from the description contained in the email; the quantities of goods imported by the appellant were also different as mentioned in the email; that there is no allegation by the

department that over and above the quantity mentioned in the commercial invoices, the appellant had imported any further goods reflected in the email's; the statement of the sender of the email was not taken nor was he cross examined in the manner provided in the statute. Therefore, the charges of undervaluation, without proper substantiation, would not meet the ends of justice in support of confirmation of the adjudged demands.

12.1. Section 138C ibid deals with the situation, where the computer printouts cannot be considered having evidentiary value in certain circumstances. Various conditions have been prescribed under the statute. Admittedly, in this case, the prescribed conditions have not at all been complied with by the department. More particularly, the required certificate in terms of sub-section (4) of Section 138C ibid has not been furnished by the department. In this context, the Tribunal in the case of *S.N. Agrotech (supra)* has held that in absence of certificate required under Section 138C ibid, the electronic documents in the form of computer printouts cannot be relied upon by Revenue for confirmation of the adjudged demands. The relevant paragraphs in the said order are extracted herein below:

> *"7. 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 there under and shall be admissible in any proceedings there under, 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 there from by calculation, comparison or any other process.

***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.*

***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.*

***10.** The Hon'ble Supreme Court in the case of Anvar P.V. (supra), while dealing with Section 65B of the Evidence Act, 1872 (Pari materia 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. Generalia specialibus 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 pari materia 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."*

12.2. Further, in the case of Tele Brands (India) Pvt. Ltd. (supra), the Tribunal by relying upon various authoritative judgments has also held that the computer printouts allegedly recovered from the computer of the assessee cannot be relied upon as admissible evidence, in absence of compliance of the conditions laid down in Section 138C ibid. In the instant case, it is not established that the computer in question was in regular use by the appellant in the course of his business. No certificate whatsoever, as required under the provisions of Section 138C (2) was obtained. It is settled proposition of law that if a certain act is to be done by a certain authority, in a particular manner, the same should be done in the manner in which it is ordained. There are no short cuts in investigation. Without fulfilling the statutory requirements, subjecting the computer to forensic analysis is of no help and would not help the cause of Revenue. Therefore, we are of the considered opinion that the emails/ documents etc retrieved in the instant case are not reliable evidence for the reasons cited above.

12.3. With regard to seizure of CPU and alleged data retrieved there from, the department has concluded that there was parallel set of invoices for the 21 Bills of Entry, wherein the actual invoice values have been shown, which were less than the declared invoice values. We find that the procedures laid down under Section 138C have not been observed by the department, in addition to non mentioning of the details of the CPU, the place of installation in the premise, custodian of the CPU etc. Therefore, we find that as per the ratio laid down in the above referred judgments, the documents retrieved, lost their evidentiary value and cannot be relied upon for upholding the charges of undervaluation of goods and demand of the differential duty.

13. Further, Revenue relies on the fact that the insurance policies contracted by the appellants for the imports indicate higher values than those mentioned in import invoices and declared in bills of entry. We find that higher insured value of consignments and payment of premium to the insurance companies cannot be the justifiable ground for rejection of the transaction value, as several factors are involved for negotiation between the parties to the contract of sale, including the insurance companies. Higher value may be declared for insurance purposes for claiming higher compensation in case or damaged to the insured goods. Moreover, there is every chance that the appellants have mis-declared the value to the insurance companies. Such mis-declaration at the best may be an offence under some other law but cannot be a conclusive proof for establishing undervaluation of imported goods. The department in this case has conveniently assumed that the value declared to insurance companies was higher than the value declared to Indian Customs. We do not think that in a case, an importer declares a lesser value to the insurance companies, for whatsoever reason it may be, department would not have considered the same as true transaction value. Department has not conducted any enquiry to find out the reasons for declaring high value for insurance policies by the overseas entity and as to whether such values were correct. Therefore, we are of the considered opinion that

rejection of declared value, on the basis of value declared to insurer, is not legal, proper and justified. This Tribunal in the case of I.S. Corporation- 2016(339) E.L.T. A125 has taken a similar view, holding that enhancement of the transaction value on such ground is unsustainable.

13.1. Moreover, it's not the case of the department that the insurance policies were suppressed by the appellant. The appellant has been submitting the said insurance policies along with the other documents on each of the imports. Its surprising that the department has not questioned the same any time and not even to ascertain the CIF value for assessment. Department having kept silent on the documents submitted by the appellants from time to time and failing to verify the same immediately, cannot take recourse to invocation of extended period on this count.

14. We find that revenue heavily relies on the statements of Shri Mahesh Chandra Sharma, though retracted later. The adjudicating authority has held that no documents are available in the case records to show that the statements, recorded between November, 2016 and June, 2019, were retracted by the appellant. Further, he also held that belated retraction has no evidentiary value and the evidences available on record in the form of statements cannot be ignored. On perusal of the appeal records, we find that by letter dated 05.09.2019, addressed to the adjudicating authority, the appellant had retracted all the statements, assigning the reason that the appellant had never stated regarding mis-declaration of value, quantity or description of goods and accordingly, deny the whole statements recorded under Section 108 ibid. It has further been stated that the statements were obtained by threat, duress etc.

14.1. We find that the statements were recorded by the department from Shri Mahesh Chandra Sharma on different dates in a span of 3 years. However, the copies of same were not furnished to the appellant immediately on completion of the summon proceedings. Upon receipt of the SCN together with the RUD's, the appellant came

to know about the content in the statements, though made by him and thus, had sent the retraction letter within the reasonable time. Thus, it cannot be said that there is inordinate delay in filing the retraction letter. Further, the letter of retraction cannot be discarded on such ground, without examining the genuineness of the transactions and for that purpose, to verify the authenticity of available documents and those retrieved during the course of investigation, which admittedly has not been done by the department. In this context, the law is well settled that merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability and having also made a few payments as per the statement, it cannot lead to self-assessment or self-ascertainment. In the case of *Vinod Solanki [2009 (223) E.L.T. 157 (S.C.)]*, the Hon'ble Supreme Court has ruled that the initial burden to prove that the confession was voluntary is upon the department and that evidence brought by confession if retracted, must be corroborated by other independent and cogent evidence. Madras High Court in the case of Shri Nandi Dhall Mills India Private Limited held that merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability and has also made a few payments as per the statement, cannot lead to self-assessment or self-ascertainment. Though the judgement was pronounced in respect of GST, it goes to indicate that acceptance by the appellant during the course of recording the statement is not just enough and the same has to be confirmed by adducing independently corroborative evidence. The whole case cannot rest simply on the basis of a retracted statement though belatedly.

14.2. We find that the appellants have shown enough cause for delayed retraction. Learned Commissioner has simply brushed the same aside. He should have examined the appellant during the adjudication proceedings in terms of Section 138(B) of the Customs Act, 1962, to confirm the veracity. Learned adjudicating authority could have examined the officers too. Section 138B (1) ibid deals with the aspect of relevance of statements under certain circumstances. It has been provided that a statement made and signed by a person during any enquiry or proceeding shall be relevant, for the purpose of

proving an offence, when the person, who made the statement, is examined as a witness in the case before the court. In this case, having acknowledged that the retraction has been made by the appellant in the course of the adjudication proceedings, more specifically, during the period between issuance of SCN and passing of the impugned order, it was incumbent upon the learned adjudicating authority to examine the person, who made the statement. However, the adjudicating authority chose to rely on the statement alone as evidence, which is beyond the scope and ambit of the statutory provisions. Thus, contents of the retracted statement cannot simply be brushed aside, to conclude that the appellant has indulged into the activity of undervaluation of goods.

15. The ratio of the judgments relied upon by Revenue is distinguishable from the facts and circumstances of the present case inasmuch as the facts involved in those cases and the nature of offence is entirely different. In the instant case, no iota of evidence was submitted by Revenue regarding under valuation of goods. The only credible evidence, according to Revenue was the insurance policy taken by the supplier for the higher value of the goods. Revenue failed in appreciating the purpose of the insurance policy was entirely different and has no connectivity with the customs statute, wherein the transaction value alone is to be considered for determination of the duty liability and not otherwise. Further, corroboration of the data retrieved from the email of the seized computer/CPU lost their evidentiary value inasmuch as the provisions of Section 138C have not been complied with by the department. Ratio of the judgment in the case of Pyare Lal Bhargava (supra), relied upon by Revenue support the case of appellant inasmuch as the Hon’ble Supreme Court has held that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars.

16. In view of the above discussion, it is evident that none of the evidences relied upon by the department, to allege the undervaluation

resorted to by the appellants, stand the scrutiny of Law. We find that department reliance on retracted statements, documents retrieved from computer without following due procedure as per law and the arguments on the basis of insurance policies which as per our discussion above fall flat. Therefore, we are of the considered opinion that the department failed to substantiate the allegations by cogent and legally admissible evidence. Under the circumstances, the benefit should undoubtedly go to the appellants.

17. In the result, the appeals are allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 01.08.2022)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Sinha