OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CUSTOM HOUSE: MUNDRA, KUTCH
MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421
Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62

A	File No.	VIII/48-48/Adj/ADC/MCH/2017-18
B	Order-in-Original No.	MCH/ADC/PSK/18/2019-20
C	Passed by	Shri Prashant Kaduskar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra
D	Date of Order	10.05.2019
E	Date of Issue	20.05.2019
F	SCN NO. & Date	F. No. VIII/48-447/Misc./Import/MCH/Gr.V/2015-16 dated 30.10.2015
G	Noticee / Party / Importer / Exporter	M/s. Tosiba Appliances Co.(P) Ltd., 44, 15(A), Shahbad Daulatpur, Bawana Road, New Delhi

1. यह अपील आदेश संबन्धित को निःशुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए- 1- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

" सीमा शुल्क आयुक्त (अपील), कांडला
7 वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009"
"THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
Having his office at 7th Floor, Mridul Tower, Behind Times of India,
Ashram Road, Ahmedabad-380 009."

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।
Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –

(i) उक्त अपील की एक प्रति और
A copy of the appeal, and

(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं°-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपील ज्ञापन के साथ ड्यूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम,1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (A)on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

Subject:- SCN F. No. VIII/48-447/Misc./Import/MCH/Gr.V/2015-16 dated 30.10.2015 issued to M/s. Tosiba Appliances Co. (P) Ltd., 44, 15(A), Shahbad Daulatpur, Bawana Road, New Delhi

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS
20 MAY 2019
3086
Custom House, Mundra

BREIF FACTS OF THE CASE:

M/s. Tosiba Appliances Co.(P) Ltd., 44, 15(A), Shahbad Daulatpur, Bawana Road, New Delhi, had imported and cleared electrical articles, Home appliances, Shoes and other misc. article under Bill of Entry No.9847485 dated 09.07.2015 having declared value at Rs. 6,91,197.26/- under B/L No. 012/ SEXP/15/615 dated 19.06.2015 and invoice no.0003 dated 09.06.2015. Scrutiny of the bill of entry, found that value declared by the importer was undervalued and transaction value declared by the importer was liable for rejection under sub-rule 3(a) of Rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007("*Valuation Rules, 2007*", in short*)*. The importer vide letter dated 14.08.2015 stated that (i) M/s. Mapana Middle East FZCO registered in Jebel Ali Free Zone, UAE is a 80% owned entity of M/s. Tosiba Appliances Co. (P) Ltd. since 2011 and (ii) the material imported against Bill of Entry No.9847485 dated 09.07.2015 was exported by M/s. Tosiba Appliances Co. (P) Ltd., under Shipping Bill No.9124914, 9125740, 4143514, 4296127 with the exception of the office furniture and few sample products. As per the declaration, M/s. Mapana Middle East FZCO, (MMEF) UAE is 80% subsidiary of M/s. Tosiba Application Co (P) Ltd., so buyer and seller are related as per Rule 2(2) of the *Valuation Rules, 2007*. Therefore, the bill of entry was not assessed as per declared transaction value under Rule 4 of the *Valuation Rules, 2007,* and the goods were assessed under Rule 5 of the *Valuation Rules, 2007,* as per contemporary import of similar goods. Accordingly, the said bill of entry was assessed on the basis of contemporary import prices of similar goods and the value was enhanced from Rs.6,91,197.26/- to Rs.32,31,894/-, under Rule 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The relation with the supplier was not declared as required under Section 46 of the Customs Act, 1962, read with *Valuation Rules, 2007,* at the time of filing of Bill of Entry. In view of the above, a notice to show cause was issued to the importer asking them as to why:

i. the declared value of Rs.6,91,197/- vide Bill of Entry no.9847485 dated 09.07.2015 under Rule 12 of the *Valuation Rules, 2007,* should not be rejected and should not be re-determined to Rs.32,31,897/- under Rule 5 of the *Valuation Rules, 2007;*

ii. the goods imported should not be confiscated under Section 111(m) of Customs Act, 1962;

iii. penalty should not be imposed under Section 112A of Customs Act, 1962.

2. After due process of law the Joint Commissioner of Customs, Custom House, Mundra vide Order-in-Original No. MCH/JC/GPM/204/2016-17 issued on dated 30.01.2017, wherein the declared value of Rs.6,91,197/- on imported goods was rejected in term of Rule 12 of *Valuation Rules, 2007,* and re-determined the value to Rs.32,31,897/- under Rule 5 of *Valuation Rules, 2007* and had ordered confiscation of the impugned goods under Section 111(m) of the Customs Act, 1962 and option was given to redeem the goods on payment of redemption fine of Rs.3,00,000/-. The penalty under Section 112(a) of the Customs Act, 1962 was also imposed.

3. M/s. Tosiba Appliances Co. (P) Ltd. filed an appeal before the Commissioner of Customs (Appeals), Ahmedabad, inter-alia arguing that:

a) The impugned order denied principles of natural justice and refused to share the basis of arriving at contemporaneous value and refused to have re-examination of goods, which would clearly show that the imported goods were neither identical nor similar to the comparison drawn in impugned order;

b) The goods had been originally exported by the appellant to M/s. Mapana Middle East FZCO through ICD Tuglakabad and undertakes to produce the proof of such export at the time of personal hearing;

c) Appellant relied on Supreme Court case of Eicher Tractors Ltd. Vs Commr. Of Customs, Mumbai – 2000 (122) ELT 321 (SC) – held that the "special circumstances" have been statutorily particularized in Rule 4(2) and in absence of these exceptions it is mandatory for customs to accept the price actually paid or payable for the goods;

d) Impugned order arrived at the enhanced value of Rs.32,31,894/- without placing on record any supporting documents/evidence and such

evidence/documents were not shared with the appellant is a violation of principles of natural justice;

e) The imported goods were used goods so there is no reason for the revenue authorities to compare price of brand new goods;

f) No examination per se conducted to conclude that the relationship between the appellant and M/s. MMEF influence price; in first check nothing adverse found; 80% equity interest held by the appellant in the overseas supplier and no case to revise the value arrived at on commercial basis and at arm's length manner;

g) No copy of first check examination report in form of evidence provided to the appellant, violation of principles of natural justice;

h) What was imported was in fact exported out of India first and after substantial use was being brought back to India;

i) Appellant relied on case of M/s. Indigo Vs Commr. Of Customs (Gen.) Mumbai – 2005 (183) ELT 105 (Tri-MUM) and contended that goods not examined by experts but by dock authorities, enhancement of value not justified;

j) No evidence to prove that appellant being related had undervalued the goods; relied on case of Peekay Steel Castings Pvt. Ltd Vs Commr. Of Customs, Cochin -2016 (340) ELT389 (Tri.);

k) Has not given opportunity to importer to argue how imported goods were not comparable, relied on case of Commr. Of C. Ex. Kanpur V/s Asia Pacific Distributor – 2012(286) ELT 720 Tri(Delhi); Gira Enterprise Vs Commr. Of Customs, Ahmedabad – 2014 (307) ELT 209 SC;

l) Rejection of transaction value was not supported by evidence of contemporaneous import, relied on case PNP Polytex Pvt. Ltd. Vs Commr. Of Customs, Nhava Sheva – 2015 (318) ELT 649 (Tri. Mumbai);

m) Mutuality of interest between the importer and exporter cannot be blindly assumed in order to hold that the price paid or payable is influenced by such mutuality of interest and relied on case Collr. Of Customs Bombay Vs Maruti Udyog Ltd., Gurgaon – 1987 (28) ELT 390

(Tribunal) which was maintained by SC order in 1989 (41)ELT A61 (SC) and further approved by SC in 2001 (134) ELT 321 (SC);

n) While enhancing the value of re-imported goods Rule 5 of CVR, 2007 which ex-facie cannot be invoked and relied on case of Roches Watches P Ltd. Vs C. Ex. Jaipur – 2015 (327)ELT 125(Tri. Delhi);

o) Only when transaction value under Rule 4 of CVR, 2007 is rejected the recourse can be made to Rule 5 to 8 and relied on case of Commr. Of Customs (Exp) Vs Radhey Shyam Ratanlal – 2006 (202) ELT 500 (Tri. Mumbai);

p) In light of cases laws referred the impugned order was first required to assess the value under Rule 4 and then after rejection could resort to Rule 5; Rule 4 deals with transaction value of identical goods whereas Rule 5 deals with transaction value of similar goods;

q) No basis brought on record to show how such price is adopted by the revenue authorities and relied on Commr of Cus., New Delhi Vs Shankar Merchant P Ltd – 2008 (227) ELT 228(Tri. Delhi);

r) All parameters regarding the characteristics of the goods reimported has to be considered while re-assessing the value of the goods, and at present the appellant has admittedly reimported used and old goods and the assessing authorities should resort to values of such identical/similar old and used goods only;

s) Sales price charged to customer in India cannot be considered as price in course of international trade as held by SC in case C. Ex. Nagpur Vs Morarjee Brembana – 2015 (318) ELT 600 (SC);

t) They re-imported old and used goods and accordingly the goods shall be assessed at lower value and not at value at which the identical goods are available in market and relied on the case of Volvo India P Ltd. Vs Commr. Of Cus – 2005 (180) ELT 489 (Tri. Bang)- wherein the facts are different but establishes the principle of law that value of original goods cannot be brought at par with the value of spare goods;

u) Transaction value cannot be enhanced unless established by the department that relationship between importer and supplier influence transaction price- Relied on Volkswagen India P Ltd Vs Commr. of Cus (Imp.) Mum-2014 (299) ELT 209 (Tri. Mumbai);

v) Value of export declaration may be relied upon for ascertainment of assessable value under Customs Valuation rules and not for determining the price at which goods are ordinarily sold at the time and place of importation- Relied on Comm. Of Customs, Calcutta Vs South India Television P Ltd., 2007 (214) ELT (SC) ;

w) Transaction value cannot be rejected solely on the basis of contemporaneous import-Relied on Rashesh & Co. Vs Commr. Of Cus (I), Mumbai, 2008(227) ELT 573 (Tri. Mumbai);

x) Department to put on records relevant documents/evidence of contemporaneous import and is required to reject the invoice value - Relied on Commr. of Customs Mumbai Vs J D Orgochem Ltd., 2008 (226) ELT 9 (SC);

y) Revenue authorities nowhere justified as to how and which special circumstances exists to ignore declared transaction value and relied on

(i) CC Vishakhapattnam Vs Aggarwal Ind. -2011 (272) ELT641 SC

(ii) Rabindra Chandra Paul – 2007 (209) ELT 326 (SC)

(iii) Topsia Estates P Ltd – 2015 (330) ELT 799 (Tri-Chennai)

(iv) CC, New Delhi Vs DM International – 2013(289) ELT 169 (Tri-Delhi)

(v) CC, Rohtak Vs Sai Sales Corporation – 2012 (278) ELT 197 (Tri. Delhi)

(vi) PDM Impex – 2005 (191) ELT 1121 (Tri. Kol)

z) Enhancement of value on basis of contemporaneous import of similar quantities is held as unsustainable and relied on

(i) Makers Laboratories Ltd – 2002 (148) ELT 780 (Tri-Mumbai)

(ii) A D Jayveerapandia Nadar & Sons – 2002 (148) ELT 1190 (Tri-Chennai)

ab) Enhancement of value is disputed and therefore no consequences of differential duty, interest and penal liability including confiscation and fine;

4. The Commissioner of Customs (Appeals) in his Order-in-Appeal dated 15.03.2018 has observed in para 7 of the Order-in-Appeal as

"....I find that some of the issue raised by the appellant in their grounds of appeal and written submissions as stated above in para 3 have not been discussed in the impugned order. The appellant has contended that the **impugned order denied principles of natural justice** and refused to share the basis of arriving at contemporaneous value and impugned order arrived at the enhanced value of Rs.32,31,894/- without placing on record any supporting documents/evidence and such evidence/ documents were not shared with the appellant is a violation of principles of natural justice. Original authority has the data, details and basis of re-determination and enhancement of assessable value. Copy of appeal was served to the original authority for para-wise comments; however, no comments have been received from the department. Therefore, remitting of the case with suitable directions for *de novo* decision becomes *sine qua non* to meet the ends of justice. In view of the above, the impugned order is set aside and the matter is remitted to the lower authority for denovo decision. In this regard, I rely upon the *case of* Prem Steels P. Ltd. - 2012-TIOL-1317-CESTAT-DEL and the case of Hawkins Cookers Ltd. - 2012 (284) E.L.T. 677 (Tri. – Del), which have also relied upon the case of Medico Labs – 2004 (173) ELT 117 (Guj.), wherein it has been held that Commissioner (Appeals) continue to have power of remand even after the amendment of Section 35(A) of the Central Excise Act, 1944 by Finance Act, 2001 w.e.f. 11.05.2001."

5. In view of the above, the Commissioner of Customs (Appeals), has remitted the matter to adjudicating authority with direction that he shall examine all facts, documents, submissions by the appellants and then pass the Order afresh in this case following the principle of natural justice.

Details of Personal Hearing:

6. The personal hearing in the matter was held on 27.03.2019 wherein Shri Saurabh Dixit, Advocate appeared. The learned Advocate stated that goods imported are mostly utility items which were earlier exported for the employees of the M/s. Tosiba Appliances Co. (P) Ltd. for use at their site office in UAE. The company somehow did not function and was closed down and as per local regulations, the goods had to be brought back to India and could not be sold/abandoned locally. The learned advocate also added that there the relation did exist as M/s. Tosiba Appliances Co.(P) Ltd. had company site office and they had to have a local partner (M/s. Mapana Middle East FZCO in Jebel Ali Free Zone) as per local law and this local partner had to be taken on board.

The learned Advocate further stated that when the goods landed in India (reimported goods which were earlier exported), the value of these re-imported goods was enhanced to Rs.32,31,897/- without any evidence of contemporaneous import being disclosed. On this ground, in fact, the Commissioner (A) has remanded the matter back for denovo adjudication. He stated that he submits the copy of the Shipping Bills whereunder the goods were initially exported. The utility goods are lying in Warehouse and are old and used and do not have much value and they would like to abandon the cargo as it is neither having any fine etc. as of now imposed on these goods. The matter is merely under denovo adjudication. The abandonment is in term of Section 22 read with Section 23 of the Customs Act, 1962. He also gave voluminous written submission with voluminous case laws. He requested to drop the Show Cause Notice.

WRITTEN SUBMISSION:

7. At the time of personal hearing the learned Advocate Shri Saurabh Dixit gave a voluminous written submission. It is argued that:

I. The goods are still lying in possession of Custom Authorities at the bonded warehouse and this fact regarding used state of goods is deemed to be within knowledge of the Customs authorities.

II. It is precisely on this reason that the first Appellate Authority vide OIA No. MUN-CUSTM-000-APP-459-17-18 dated 15.03.2018, quashed and set aside earlier OIO dated 25.01.2017 and remanded the matter back to the original authority. Hence, unless and until the evidence regarding contemporaneous imports is not shared with their client, and sufficient time and opportunity to rebut the same is afforded, the declared value cannot be enhanced and no demand on differential value can be confirmed against them.

III. That moreover Rule 3(3)(a) of the Customs valuation (Determination of Values of Imported Goods) Rules 2007 envisages that when the buyer and seller are related the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price. That prima facie the assessing authority had not conducted any such examination per se to conclude that the relationship between the noticee and M/s. MMEF influence the price. On the contrary, upon first check, nothing adverse was even observed. As such, irrespective of 80% equity interest held by the noticee in the overseas supplier, there is no case whatsoever for revising the value arrived at on commercial basis, and at arm's length manner.

IV. Further, the Department during the material period had resorted to "First Check" before assessment of the goods in question but nothing has been placed on records as such in order to identify the nature of the goods or influence on the price. Even the subject SCN has remained silent in respect of the outcome of the examination report conducted in pursuance of the first check. Whereas the earlier OIO dated 25.01.2017 at Para 3.6 on being pointed out by the noticee in the reply filed against the subject SCN had mentioned that the goods were examined on first check basis under supervision of Superintendent (dock) and it confirmed the description, quantity and rate with respect to packing list. Hence the goods imported by the said importer were found as declared one and nowhere the said articles were declared as old and used. But no copy of the report in the form of evidence has been provided to the Appellant, which per se is also violation of principles of natural justice. Accordingly in light of the said factual position it is submitted that no such supporting documents or any reasoning during the entire course of the dispute was provided by the assessing authorities and in light of the same

related party transactions under Rule 5 of the CVR 2007 cannot be imposed on the Appellant.

V. Be that as it may be, even if one assumes without accepting that as per the first check report the goods are not old and/or used still the same cannot be considered as evidence in order to state the characteristics/nature of the goods. We say so by relying upon the case of Indigo Vs. Commissioner of Customs (Gen.), Mumbai as reported in 2005 (183) E.L.T. 105 (Tri. – Mumbai) whereby it is held that Old and second-hand goods - Extent of use and deterioration, depreciation value etc. not taken into consideration - Goods not examined by experts but by dock authorities - Enhancement of value not justified. Accordingly it is not fit to say that the contents of the first check report shall form basis in order to contend that the noticee had not reimported the used /old goods.

VI. Notwithstanding and without prejudice to the contentions raised above in absence of any evidence in order to prove that the noticee being related had undervalued the goods, valuation under CVR 2007 cannot be resorted to. That in support of the said contention we wish to refer and rely upon the case of Peekay Steel Castings Pvt. Ltd. Vs. Commissioner of Customs, Cochin as reported in 2016 (340) E.L.T. 389 (Tri.- Bang) whereby it is held that Valuation (Customs) - Transaction Value - Enhancement of value - Revenue not able to prove any undervaluation or mis-declaration to convincingly reject transaction value - Enhancement of value just by citing contemporaneous imports by other importers through different contracts entered into after a month from date of contracts in present cases not proper - Transaction value acceptable - Section 14 of Customs Act, 1962 read with Rule 4 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

VII. That further the Hon'ble Principal Bench in the case of Commissioner of Central Excise, Kanpur Vs. Asia Pacific Distributor as reported in 2012 (286) E.L.T. 720 (Tri. – Delhi) has held that Enhancement of value - Transaction value - Department has reiterated that as per NIDB data, the value should be on higher side - Department has not given any reason for rejecting transaction value - Without showing that the data taken from NIDB satisfies Rule 4 or Rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and without giving any opportunity to importer to argue how imported

goods were not comparable, NIDB data cannot be used to enhance value of any imported goods.

VIII. That similarly the Hon'ble Bench in the case of PNP Polytex Pvt. Ltd. Vs. Commissioner of Customs, Nhava Sheva as reported in 2015 (318) E.L.T. 649 (Tri. – Mumbai) has held that Valuation (Customs) - Transaction value - Department could not show any evidence that value declared by importer was not price actually paid, that buyer and seller were related persons and price was not sole consideration - No investigation carried out beyond point that director of importer was a NRI was residing at Taiwan for 25 years - Also, rejection of transaction value was not supported by evidence of contemporaneous import - Value arrived at by cost construction also, but no reason given for not adopting it - *HELD :* In such case, theory of preponderance of probability, cannot be resorted to prove the case as it is not a substitute for lack of investigation and absence of evidences - Section 14 of Customs Act, 1962.

IX. That recently the Hon'ble Supreme Court in the case of Gira Enterprises Vs. Commissioner of Customs, Ahmedabad as reported in 2014(307) ELT 209 (SC) has held that Valuation (Customs) - Contemporaneous imports - Revenue claiming to have information about imports valued at higher rate, but did not supply to importer computer printout which formed basis of their conclusion about undervaluation - *HELD :* Importer did not have opportunity of establishing that Revenue's claim was unsustainable in law - Mere existence of alleged computer printout was not proof of existence of comparable imports, and assuming such printout did exist and content thereof were true, question remained whether transaction evidenced by it were comparable to impugned transaction of importer - Importer had to be given reasonable opportunity to establish that transactions were not comparable - Rule 5 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 - Section 14 of Customs Act, 1962.

X. That further as stated supra the Hon'ble Supreme Court in the case of Eicher Tractors Ltd has specifically established that Customs view that the international value of the goods be ascertained on the basis of the data other than the price actually paid for the goods is not correct. Further the Hon'ble Supreme Court has held that price list of the foreign supplier/manufacturer is not a proof of transaction value

invariably and existence of the price list cannot be sole reason to reject the transaction value. Under the present dispute similarly the authorities are essentially required to restrict themselves to the price actually paid for the goods and not simply rely upon the price list available in the international market.

XI. That further mutuality of interest between the importer and exporter cannot be blindly assumed in order to hold that the price paid or payable is influenced by such mutuality of interest. The Hon'ble Bench in the case of Collector of Customs Bombay Vs. Maruti Udyog Limited, Gurgaon as reported in 1987 (28) E.L.T. 390 (Tribunal) also maintained by the Hon'ble Supreme Court in 1989 (41) ELT A61 (Supreme Court) further also approved by Hon'ble Supreme Court in 2001 (134) ELT 321 (Supreme Court) has held that Valuation - Mere acquisition of right and technical know-how by Maruti to manufacture cars to Suzuki specifications on payment of royalty not amounting to interest of Maruti in Suzuki business - Hence value of goods imported from Suzuki assessable under Section 14(1)(a) of the Customs Act, 1962 corresponding to Section 4(1)(a) of the Central Excises and Salt Act, 1944 - Rule 8 of the Customs Valuation Rules, 1963 corresponding to Rule 7 of the Central Excise (Valuation Rules, 1975 inapplicable).

XII. That in support of the case law referred supra we wish to reiterate that any transaction under mutuality of interest between two organizations cannot be simply assumed to be influenced by such mutuality of interest. Whereas the present subject SCN in absence of any evidence in this respect solely on grounds of mutuality of interest between the noticee and M/s. MMEF has re-valued the transaction value adopted by them. On this ground itself the subject SCN deserves to be quashed and set aside.

XIII. That notwithstanding and without prejudice to the contentions raised above on assuming that the valuation under the present transaction was influenced hence transaction value under Section 14 cannot be adopted but without accepting we wish to submit that the subject SCN while enhancing the value of the re-imported goods has relied upon Rule 5 of the CVR 2007 which ex facie cannot be invoked under the present dispute. That in support of the said contention we wish to rely upon the case of Roches Watches Pvt. Ltd. Vs. CC Ex., Jaipur as reported in 2015 (327) E.L.T. 125 (Tri-Delhi) whereby the Hon'ble

Bench has held that once transaction value is rejected under Rule 4 of Customs Valuation Rule the value must be re-determined by sequential proceeding through Rule 5,6,7 & 8 ibid applicable at the relevant period.

XIV. Similarly the Hon'ble Bench in the case of Commissioner of Customs (Export) Mumbai Vs. Radhey Shyam Ratanlal as reported in 2006 (202) E.L.T. 500 (Tri-Mumbai) maintained in Supreme Court- 2007 (210) E.L.T. A72 (Supreme Court) has held that only when transaction value under Rules 4 of customs valuation Rules is rejected the recourse can be made to Rules 5 to 8 ibid.

XV. That the subject SCN on the contrary has simply relied upon Rule 5 of the Customs Valuation Rules in order to come to the present reassessed value. Whereas in light of the case laws referred supra the subject SCN was first required to assess the values under Rule 4 and only then the said valuation was rejected the assessing authority could resort to Rule 5. Be that as it may, Rule 4 deals with transaction value of identical goods whereas Rule 5 deals with transaction value of similar goods. That having adopted wrong basis for valuation, the proceedings are anyway vitiated and must be set aside.

XVI. Be that as it may, the Hon'ble Apex Court as also the Hon'ble CESTAT have already put the entire controversy to rest, wherein similar view as above was taken. We crave leave to refer to and rely upon the following decisions in support of this contention:

- SANJIVANI NON-FERROUS TRADING PVT. LTD.2019 (365) E.L.T. 3 (S.C.)
- TINI INTERNATIONAL2018 (364) E.L.T. 436 (Tri. - Mumbai)
- SHARU STEELS PVT. LTD.2018 (362) E.L.T. 497 (Tri. - Chennai)
- SEDNA IMPEX INDIA PVT. LTD.2017 (347) E.L.T. 317 (Tri. - Chennai)

XVII. Further the Hon'ble Principal Bench in the case of Commissioner of Customs, New Delhi Vs. Shankar Merchant Pvt. Ltd. as reported in 2008 (227) E.L.T. 228 (Tri-Delhi) has held that Rule 5 of Customs Valuation Rule are applicable only when value of goods sought to be compared with value of other imported goods comparable to goods under assessment subject to adjustments for variation in commercial level, quantum of import etc. as envisaged therein. That the revenue authorities in the present case have grossly failed to prove this aspect. On the contrary, no basis of brought on record at all to show how such

price is adopted by revenue authorities and such unreasoned approach and findings therefore cannot be allowed to be sustained.

XVIII. That moreover the Hon'ble Bench in the case of Jindal Poly Films Ltd Vs. Commissioner of Customs (Imports) Mumbai as reported in 2012 (286) E.L.T. 423 (Tri-Mumbai) has held that in case of contemporaneous import condition of machinery is relevant. Where machine is imported on "as is where is basis" without reconditioning has to be compared with the machine in the similar condition. For that purpose make, model, year of manufacture, and residual life is relevant. If these particulars are not available comparisons would be like chalk with cheese. Similarly under the present dispute all the parameters regarding the characteristics of the goods reimported has to be considered while reassessing the value of the goods as admittedly the noticee under the present dispute had reimported used and old goods hence even while reassessing the value the assessing authorities should resort to values of such identical/similar old and used goods only.

XIX. Whereas under the present dispute the subject SCN has failed to produce any such value of other imported goods comparable to goods under assessment, and also in absence of any evidence produced in support of the said contention as already detailed above Rule 5 cannot be invoked under the present dispute.

XX. That moreover the Show Cause Notice has relied upon certain figures as re-determined value under Rule 5 of CVR, 2007 but in absence of any supporting documents for the basis of arrival at the said value. Even if one assumes that the said figures are based on standard international prices the said assumption will still not hold goods for two reasons.

XXI. The first being that the sale price charged to a customer in India cannot be considered as price in course of international trade as held by the Hon'ble Supreme Court in the case of CC Ex., Nagpur Vs. Morarjee Brembana Ltd as reported in 2015 (318) E.L.T. 600 (S.C.).

XXII. The second reason is that the noticee had admittedly reimported old and used goods accordingly the goods shall be assessed at a lower value and not at the value at which the identical goods are available in the market for sale for the first time. In support of the said contention

we wish to rely upon the case of Volvo India Pvt. Ltd. Vs. Comm. of Cus. as reported in 2005 (180) E.L.T. 489 (Tri-Bang.) which factually may be different but very well establishes the Principle of Law that value of the original goods cannot be brought at par with the value of the spare goods. The Hon'ble Bench in the said case had held that merely because the assesse and the exporter are related person there exist no reason for enhancement of price of original equipment supplied to the level of price of spare parts unless through investigation the department comes out with the evidence to show that relationship has influenced the price.

XXIII. Similarly the Hon'ble Bench in the case of Volkswagen India Pvt. Ltd. Vs. Comm. of Cus. (Imports) Mumbai 2014 (299) E.L.T. 209 (Tri-Mumbai) has held that transaction price cannot be enhanced unless established by the department that relationship between importer and supplier influence transaction price or said transaction value was higher that of the contemporaneous imports.

XXIV. In order to bring further clarity to the said legal position we crave leave to refer and rely upon the case of Comm. Of Customs, Calcutta Vs. South India Television Pvt. Ltd. as reported in 2007 (214) E.L.T. (S.C.) has clearly held that value in export declaration may be relied upon for ascertainment of assessable value under Customs Valuation Rules and not for determining the price at which goods are ordinarily sold at the time and place of importation.

XXV. Further the Hon'ble Bench in the case of Rashesh & Company Vs. Commr. Of Cus. (I) Mumbai as reported in 2008 (227) E.L.T. 573 (Tri-Mumbai) has held that transaction value cannot be rejected solely on the basis of contemporaneous import.

XXVI. That notwithstanding and without prejudice to all the contentions raised above the onus of proof to establish the transaction value is on the department and not on the Appellant. If at all the department is of this view that any contemporaneous import is priced at an influenced price then the onus lies on the department to put on records all the relevant documents/evidence in this regard and not ask the Our client to prove the case otherwise. That the Hon'ble Supreme Court in the case of Comm. Of Customs, Mumbai Vs. J.D. Orgochem Ltd. as reported in 2008 (226) E.L.T. 9 (S.C.) has held that transaction value

declared not binding on customs authorities but contemporaneous evidence are required to reject the invoice value. Subject SCN passed wrongly based on premise that onus of proof lies on the importer. Contemporaneous evidence to the contrary not produced by the Revenue burden of proof not discharged.

XXVII. The revenue authorities have nowhere justified as to how and which special circumstances exists in the present case, to ignore the declared transaction value and assess the goods at higher rate. We crave leave to refer too and rely upon the following decisions in support of the contention that in the given circumstances, declared transaction value cannot be issued and by passed and a higher value to be adopted on basis of NIDB or any other contemporaneous basis.

a. CC, Vishakhapattnam V/s. Aggarwal Industries Ltd. 2011(272) ELT 641(SC)

Held: Valuation (Customs) - Contemporaneous imports - Contract price - Goods shipped after expiry of shipping period but at contract price - Same goods imported on same dates and sold to other parties at higher prices - Product having volatile fluctuations in its prices in International market - Different prices for same commodity contracted to be supplied under different contracts entered into at different points of time acceptable, though goods imported on same dates - No allegation of collusion, undervaluation and misdeclaration - Transaction not covered under Rule 4(2) of Customs (Valuation Determination of Price of Imported Goods) Rules, 1988 -Transaction value not rejectable merely because there is increase in International prices of product after entering the contract and by the time goods are shipped - Time gap of one month between the two contracts, goods under two contracts not contemporaneous goods - Section 14 of Customs Act, 1962. [para 13]

Valuation (Customs) - Transaction value - Reason to doubt about truth or accuracy of declared value under Rule 10A of Customs Valuation (Determination of Price of Imported goods) Rules, 1988 does not mean "reason to suspect" - Mere suspicion upon the correctness of the invoice produced by an importer is not sufficient to reject it as evidence of the value of imported goods. [para 11]

b. Rabindra Chandra Paul 2007(209) ELT 326(SC)

Held: Valuation (Customs) - Computed value - Rule 7A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 - Invocation of - No allegation made by Department that transaction was tainted - No evidence before Department to show that price was pegged at a lower level on account of circumstances mentioned in Rule 4(2) ibid - No allegation that on account of discounts price stood pegged at a lower level - No finding that buyer and seller are related - No finding that exporter has not followed accounting system of that country - Assistant Commissioner rejected cost of raw materials and, at same time, accepted value of processing charges - Even if Rule 7A ibid was to be applied, which is not attracted, still computation made under Rule 7A ibid by Assistant Commissioner was erroneous - Tribunal's order set aside - Section 14 of Customs Act, 1962. [paras 8, 9]

c. Topsia Estates P. Ltd. 2015(330) ELT 799(T-Chennai)

Held: Valuation (Customs) - Enhancement of value - PU Coated fabric imported from China - Enhancement on basis of NIDB data - HELD : Settled law that declared value cannot be enhanced merely on basis of NIDB data - Value of impugned goods varies widely on basis of quality, size, etc., and same goods accepted by Department at Kolkata port - 'Special circumstances' for rejecting assessable value statutorily prescribed in Customs Valuation (Determination of Value of Imported Goods) Rules,2007 and in absence of such exceptions, mandatory for Customs to accept price actually paid as assessable value - Enhancement of value of impugned goods on basis of NIDB data set aside as not acceptable - Rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules 2007. [paras 11, 12]

d. CC, New Delhi V/s. DM International 2013(289) ELT 169(T-Delhi)

Held: Customs (Valuation) - Transaction value - Assessee imported different type of fabrics - Department loaded the value without giving the reason - HELD: Customs has power to reject the transaction value and enhance the assessable value - Such rejection has to be on the basis of evidence on record - Contemporaneous imports to be considered with reference to quality, quantity and country of origin - Section 14 of Customs Act, 1962. [paras 3, 5]

Valuation (Customs) - Transaction value - Contemporaneous imports - Enhancement of value - HELD : NIDB data cannot be made basis for enhancement of value - Transaction value has to be first rejected

based on legal permissible ground as indicated in the Valuation Rules - Transaction value cannot be rejected without clear and cogent evidence produced by the department with regard to quality, import of origin and place and time of import - No evidence for rejection of transaction value produced by the authority - Section 14 of Customs Act, 1962. [paras 5, 6]

e. CC, Rohtak V/s. Sai Sales Corporation 2012(278) ELT 197(T-Del)

Held: Valuation (Customs) - Enhancement of value - Declared transaction value rejected on the basis of NIDB data regarding import of similar/identical goods without considering whether the imported goods are similar/identical goods and the difference between the quantity of imported goods and NIDB data - Difference between declared price and price based on NIDB data may be due to normal trade discounts depending upon quantity purchased and terms of payment - There is no evidence to show that difference cannot be accounted for by normal trade discounts - No evidence that appellant had paid some amount to supplier over and above declared transaction value or there were some other reasons to doubt the declared transaction value - No justification for rejecting declared transaction value - Revenue's appeals dismissed - Section 14 of Customs Act, 1962 - Rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. [paras 6.2, 7, 8]

f. PDM Impex 2005(191) ELKT 1121(T-Kolkata)

Held: Valuation (Customs) - Undervaluation - Contemporaneous import - No finding of any relationship between buyer and supplier hence price between two is acceptable especially when there is no contemporaneous price of quantity imported in the case - Quantity imported in present case being much higher than given in DOV data, cannot be called contemporaneous import - Section 14 of Customs Act, 1962. [paras 19, 20]

g. Omex International 2015(328) ELT 579(Tri-Del)

Held: Valuation (Customs) - Enhancement of transaction value - Import of old and used photocopiers - Department rejecting declared value of ` 10,13,256 on basis of NIDB data - Transaction value enhanced on basis of third certificate procured from a Chartered Engineer determining value at ` 20,13,120 after rejecting first certificate giving value at ` 13,51,080 and second certificate giving as ` 16,18,920 by Chartered Engineer of appellant - *HELD :*

For determining value of old, used and obsolete models of goods, NIDB data not relevant - No two consignments of second hand goods comparable as value of any such consignment to depend upon condition and usage of said goods - As imported models obsolete, profit margin nominal if any - As per Section 14 of Customs Act, 1962, price actually paid or payable is transaction value where buyer and seller not related persons - No allegation of foreign supplier and appellant being related person - As per Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, rejection of declared value only after inquiry by proper officer and after giving reasonable opportunity given to importer of being heard - No such inquiry done in this case - Payment of duty on enhanced value by importer under protest to avoid detention and demurrage charges only - Enhancement of transaction value on basis of NIDB data and in absence of evidence of incorrectness of declared value not sustainable - Section 14 of Customs Act, 1962 [Majority per : Ms. Archana Wadhwa, Member (J) and Shri Rakesh Kumar, Member (T)]. *[paras 9, 10, 11, 12, 35, 36]*

Confiscation - Redemption fine and penalty - Quantum of - Import of old and used photocopiers without license - *HELD:* Goods imported without license liable for confiscation but redemption fine and penalty reduced to 10% and 5% respectively in view of various decisions of Tribunal where fine and penalty imposed in said terms even in cases of repeated violations of EXIM Policy provisions - Sections 111(d), 111(m) and 112(a) of Customs Act, 1962. [Majority per: Ms. Archana Wadhwa, Member (J) and Shri Rakesh Kumar, Member (T)]. *[paras 14, 37]*

XXVIII. Further, it is also settled legal position that when the contemporaneous import is not of comparable quantity, the same cannot be adopted for assessing the imported goods and the transaction value cannot be ignored under such circumstances. It is also pertinent to note that the importer and the supplier who neither related parties (other than equity interest) nor any further consideration is paid by the importer over and above what is declared and in such cases, the transaction value cannot be disturbed. In any case the plethora of evidences as well as the detailed explanation given by the Importer as well supplier have been simply ignored and not dealt with in the subject SCN.

XXIX. That in case of enhancement of value on basis of contemporaneous import of similar quantities is held as unsustainable in the following cases :

a. Makers Laboratories Ltd. 2002(148) ELT 780(T-Mumbai)

Held: Valuation (Customs) - Enhancement of transaction value on the basis of comparable goods of different quantity - Comparable price not of the same quantity and origin of compared goods explicitly silent - Show cause notice not being based on the parameters provided under Rule 4(2) of Customs (Valuation) Rules, 1988 and relying on grounds laid down by Apex Court in 2000 (122) E.L.T. *321 (S.C.) forchange in transaction value, appeal allowed - Section 14 of Customs Act, 1962. - Transaction value of Ketoconazole USP XXII enhanced to US $ 425 per kg. CIF from US $ 278 per kg.on the basis of import of comparable goods of different quantity. The appellants mentioned about existence of comparable price of three transactions in grounds of appeal filed before Collector (Appeals), but he did not even consider the same [2000 (122)* E.L.T. *321 (S.C.) relied on]. [para 5]*

b. A.D. JayaveerapandiaNadar & Sons 2002(148) ELT 1190(T-Chennai)

Held: Valuation (Customs) - Contemporaneous import relied on by Revenue relates to import in small quantity at an earlier date whereas import made by appellant in bulk after one month from date of import compared by Revenue - Value not to be enhanced on basis of price in contemporaneous import relied on by Revenue - Transaction value acceptable - Section 14 of Customs Act, 1962 read with Rule 4 of Customs (Valuation) Rules, 1988. [2000 (122) E.L.T. *321 (S.C.); 1998 (98)* E.L.T. *3 (S.C.); 1996 (81)* E.L.T. *195 (S.C.); 1998 (104)* E.L.T. *665 relied on] [paras 5, 10]*

XXX. Be that as it may, the subject SCN wrongly invokes provisions of Section 111(m) of the CA, 1962 against the noticee, under the pretext that factum of imports from related party was not brought on record. In fact, such provision can be invoked only when value declared is not correct, whereas in the present case, such value for used second hand goods was very much legal and proper and does not require any

change at all. As such, neither Section 111(m) nor Section 112(a) are invokable in the facts and circumstances of the present case.

XXXI. While the subject SCN does not quantify any duty, however, the noticee vehemently disputes the enhancement of value and all consequences therefrom including differential duty, interest and penal liability including confiscation and RF.

XXXII. Be that as it may, since the revenue authorities had chosen to sit over the issue for substantial period of time, while the goods are in the nature of live consignment, and since the matter was not adjudicated till date despite being remanded vide OIA dated 15.03.2018 for over one year, and since the directions contained in said OIA dated15.03.2018 is still not complied with by revenue authorities inasmuch as the basis of arriving at enhanced value has not been shared with our client, the goods originally imported somewhere in July 15, which were already in used condition, have become absolutely useless to noticee.

XXXIII. That inasmuch as the goods are within Customs premises and the OIO dated 25.01.2017 stands quashed and set aside, at this stage, our client desires to abandon the goods, which are already in constrictive possession of the Customs department, in terms of Section 22 read with Section 23 of the CA, 1962. That such request is legitimate and in line with the judgment of the Karnataka High Court in the case of Symphony Services Corporation India Ltd.2012(275) ELT 369 (Kar). We also crave leave to refer to and rely upon the decision in the case of Ankit Pulps & Boards P. Ltd. 2007 (209) E.L.T. 135 (Tri. – Mumbai) in support of this contention. It is reiterated that as on date there is no Order existing against noticee for home clearance or imposing penalty or RF.

XXXIV. Under the circumstances, such subject SCN cannot be allowed to be sustained. The subject SCN accordingly deserves to be quashed and set aside.

DISCUSSION AND FINDINGS:

8. I have gone through the Bill of Entry No. 9847485/09.07.2015 (all 32 pages) very carefully and also the relied upon documents RUD-1, RUD-2, RUD-3. I have also gone through the Show Cause Notice dated 30.10.2015, the

Order-in-Original dated 30.01.2017 and the Order-in-Appeal dated 15.03.2018 and the directions given by Commissioner (Appeals) while remanding the matter. I have also carefully gone through the written submissions, the record of personal hearing and also the voluminous case laws submitted along with the written submissions.

9. In the Bill of Entry No. 9847485/09.07.2015 the country of origin is U.A.E. and supplier is M/s. Mapana Middle East FZCO office no.TPOFCB522, Techno Park, PO Box. 18728, Jebel Ali, Dubai. I find that no where it is mentioned that goods are old and used and reimported which were is earlier exported. The total assessable value is mentioned as Rs. 6,91,197.26/- and total duty payable is Rs. 1,95,431/-. The goods have been examined on first check examination basis and in the examination report it is mentioned that:-

"Inspected Container no & Seal nos. and verified seal was intact. The 10% of cargo of each Container was examined. The description and quantity/weight with respect to invoice and packing list and Bill of lading. The examination was carried out under supervision of Superintendent (DE) in presence of Custom Broker."

Thus, it is seen that no objection as regards description, weight, quantity has been taken by the Customs Officers who have examined the cargo on 1st check basis.

10. Whereas, on going through the Show Cause Notice dated 30.10.2015, it is seen that the objection taken is that the total declared value of Electrical appliances, Home appliances, Shoes & other misc. articles is Rs. 6,91,197.26/- and that it is highly undervalued and is liable for rejection under Sub Rule 3(a) of the Rule 3 of the Customs Valuation (Determination of value of imported goods) Rule, 2007(hereinafter called as "CVR, 2007"). It is mentioned that assessing officer had enhanced the value from Rs.6,91,197.26/- to Rs. 32,31,897/-involving duty of Rs. 8,02,530/- on 04.08.2015 under CVR, 2007. However, later through a letter dated 14.08.2015 (Relied upon document-1) the importer reveled that:-

(i) M/s. Mapana Middle East FZCO registered in Jebel Ali Free Zone, UAE, is a 80% owned entity of Tosiba Appliances Co. (P) Ltd. since the year 2011. The copy of share certificate of M/s. Mapana Middle East FZCO, UAE is enclosed as relied upon document-3. The importer also had disclosed that imported goods were earlier exported vide Shipping Bills 9124914, 9125740, 4143514, 4296120 & 4296127 with the exception of the office furniture & few sample products. The relied upon document-2 has two Annexures. The

Annexure-I has 21 items of import like Ceiling fans, Rice Cooker, Induction Cooker, Slice Sandwich maker, Oven, Shoes etc. The Annexure-II contains the article imported from related supplier M/s. Mapana Middle East FZCO, UAE. The Total number of items covered in Annexure-II is 42 and there also contains Rice Cooker, Slow Cooker, Hair Dryer, Slice Toaster, Air purifier, Air Filter Parts, Sandwich Maker, Stand of Fan, Table Fan, Spare parts, etc. The Show Cause list out all the 63 items.

11. The stand taken by the Department in this Show Cause Notice is that since buyer and seller are related, the Bill of Entry cannot be assessed at declared transaction value under Rule 4 of CVR, 2007 and if value cannot be determined under Rule 4 of CVR, 2007, then as per Rule 3(4) of CVR, 2007 the value shall be determined by proceeding sequentially through Rule 4 to 9 of CVR, 2007. In a Table in SCN, Para-9, apart from description of reimported goods the quantity of reimport as per Bill of Entry and assessable Value as per Rule 5 of CVR, 2007 has been given. No basis for re-determining of the assessable value of 63 types of good valued at Rs. 6,91,197.26/- to Rs. 32,31,897.44/- is disclosed.

12. The Para 10 of the Show Cause is reproduced below to understand the allegation made in Show Cause Notice

> *"10. The relation with supplier was not declared as required under Section 46 of Customs Act, 1962 read with Customs Valuation (Determination of Value of Imported Goods), Rules, 2007 at the time filing of Bill of Entry. Thus the importer has violated the Section 111(m) of Customs Act, 1962 and hence goods imported by the importer are liable for confiscation under Section 111(m) of the Customs Act, 1962. Moreover, this act makes him liable for penalty under Section 112(a) of the Customs Act, 1962."*

12.1 I find that there is no mention explicitly and categorically that there is mis-declaration of Value. Further, I find that there is nowhere any evidence disclosed as to the basis for enhancing the value under Rule 5 of the CVR, 2007. The only allegation made is relation with the supplier is not mentioned and hence there is violation of section 111(m) of the Customs Act, 1962. I find further anomaly in the para 6 of the Show Cause Notice where it is mentioned that the goods imported were earlier exported under various Shipping Bills (Annexure-I/ RUD-2) filed at ICD-Tughlakabad, New Delhi which pertains to other than Mundra Port. Therefore, it is not possible to co-relate the imported items with exported items. Having concluded this in para 6 of the SCN, the Table in para 9 of the SCN still accept that goods are reimported goods, whereas the Bill of Entry nowhere discloses the goods to be reimported.

Moreover, even if the goods covered Annexure-I of RUD-2 are treated as re-import, the importer/noticee themselves state in RUD-2 that articles under Annexure-II are imported from related supplier and this means not earlier exported under a Shipping Bills, but still the 42 types of goods which are merely imported and admittedly not reimported find the place in table under para 9 of the SCN and have been called as "reimported" goods. This is abinitio incorrect and flawed. However, the Section 111(m) mentions the liability of confiscation can be fastened only if any goods which do not correspond to the value or in any other particular with the entry made under this Act which as per definition under section 2(16) of the Customs Act, 1962, now entry made in a Bill of Entry, Shipping Bill, Bill of Export or entry made in post/courier mode. The importer has nowhere mentioned goods as old and used in Bill of Entry and on examination also the goods have been found as described. Thus, no cognizance is taken of the past assessment declaration of goods being old and used. As regards the importer and exporter/ shipper/supplier being admittedly a related party, I find that the noticee has in written submission given the following case laws:

(a) The mutuality of interest between importer and exporter cannot be blindly assumed in order hold that the price paid or payable is influenced by such mutuality interest The Hon'ble Bench in case of Collector of Customs Bombay Vs. Maruti Udyog Limited, Gurgaon [1987 (28) ELT 390 (Tribunal)] has held that mere acquisition of right and technical know-how by Maruti to manufacture cars to Suzuki specification on payment of royalty not amounting to interest of Maruti in Suzuki business. Hence, value of goods imported from Suzuki assessable under Section 14(1)(a) of the Customs Act, 1962 and the Rule 8 of CVR, 1963 is inapplicable. This was maintained in Hon'ble Supreme Court [1989 (41) ELT A61(SC)].

(b) The Hon'ble Bench of Tribunal in the case of Volkswagen India Pvt. Ltd. Vs. Comm. of Cus. (Imports) Mumbai [2014 (299) E.L.T. 209 (Tri-Mumbai)] has held that transaction price cannot be enhanced unless established by the department that relationship between importer and supplier influence transaction price or said transaction value was higher that of the contemporaneous imports.

(c) The notice has also referred to the case of Volvo India Pvt. Ltd. Vs. Commr. of Cus. [2005 (180) E.L.T. 489 (Tri-Bang.)] has held that merely because the assesse and the exporter are related person there exist no reason for enhancement of price of original equipment supplied to the level of price of spare parts unless thorough investigation the department comes out with the evidence to show that relationship has influenced the price.

12.2 In the subject case I find that no investigation has been done to prove that the relation between the supplier M/s. Mapana Middle east FZCO, Dubai and importer M/s. Tosiba Appliances Co. (P) Ltd., New Delhi has any nexus with respect to value declared and whether the relation has affected the value detriment to the Customs duty. Hence, the assertion made in para 10 of the SCN that relationship with supplier was not declared as required in Section 46 of the Customs Act, 1962 read with CVR, 2007 and thus violated the section 111(m) of the Customs Act, 1962 and hence goods imported are liable for confiscation under Section 111(m) is erroneous and untrue.

13. The noticee has further referred to decision of Hon'ble Supreme Court in the case of Comm. of Customs, Mumbai Vs. J.D. Orgochem Ltd. as reported in [2008 (226) E.L.T. 9 (S.C.)] wherein it is held that transaction value declared not binding on customs authorities but contemporaneous evidence are required to reject the invoice value.

13.1 The noticee has also relied upon the case law cited at [2011(272) ELT 641(SC)] in case of CC, Vishakhapattnam V/s. Aggarwal Industries Ltd. wherein it is held that mere suspicion upon the correctness of the invoice produced by an importer is not sufficient to reject it as evidence of the value of imported goods.

13.2 The noticee has also relied upon the case law cited at CC, New Delhi V/s. DM International [2013(289) ELT 169(T-Delhi)] the Hon'ble Tribunal has held that Customs has power to reject the transaction value and enhance the assessable value. Such rejection has to be on the basis of evidence on record. The contemporaneous imports to be considered with reference to quality, quantity and country of origin. It is also significantly held that NIDB data cannot be made basis for enhancement of value. The transaction value has to be first rejected based on legal permissible ground as indicated in the Valuation Rules. Transaction value cannot be rejected without clear and cogent evidence produced by the department with regard to quality, import of origin and place and time of import.

13.3 The importer has also referred to the case law cited at PDM Impex [2005 (191) ELT 1121(Tri-Kolkata)] wherein it is held that no finding of any relationship between buyer and supplier hence price between two is acceptable especially when there is no contemporaneous price of quantity imported in the case. Quantity imported in present case being much higher than given in DOV

data, cannot be called contemporaneous import and value enhancement unsustainable.

13.4 The noticee has contended that revenue authorities have nowhere justified as to how and which special circumstances existed in the subject case to ignore the declared transaction value and assess the goods at higher rate. The order of Commissioner (Appeals) states that original authority has the data details and basis of redetermination and enhancement of assessable value and since the appellant had argued that the basis of arriving of contemporaneous value and the evidence for loading the value has not been showed with them, the Commissioner (Appeals) has remitted matter for denovo adjudication.

14. In view of the above, the Deputy Commissioner, Group was asked to submit the physical & tangible evidence on the basis of which the assessable value was loaded from Rs. 6,91,197/- to Rs. 32,31,897/- under Rule 5 of CVR, 2007. It was also asked to submit documentary evidence as to how the relationship between seller and buyer had influenced the price of goods. The Deputy Commissioner (Group V & VI), Mundra Custom House vide letter F. No. VIII/48-447/Misc./Import/MCH/Gr.V/15-16 dated 24.04.2019 addressed to Deputy Commissioner (Adjudication), Custom House, Mundra has replied as follows "In this regard, it is to submit that on going through the documents available with this Section it appears that the enhancement of the value has been done by the group without any tangible evidence."

14.1 The letter from the Deputy Commissioner of the Assessing Group clearly makes it evident that:-

(a) There was no evidence to suggest that the relationship between supplier M/s. Mapana Middle East FZCO, U.A.E. and importer M/s. Tosiba Appliances Co. (P) Ltd. had affected the transaction value/price of the goods.

(b) There was no contemporaneous physical visible, tangle evidence on the basis of which the declared transaction value under Rule 4 of CVR, 2007 can be rejected and the value can be enhanced on basis of Rule 5 of the CVR, 2007.

14.2 In view of the candid and forthright confession by the assessing Group, I hold that though the importer may have not declared the relationship between them (importer) and the supplier in U.A.E., it has not lead to any revelation which will negate the declared value of goods of Rs. 6,91,197/- in Bill of Entry no. 9847485 dated 09.07.2015. Hence, the question of re-determination of value under Rule 5 of CVR, 2007 to Rs. 32,31,897/- does not arise and has been done arbitrarily and without even an iota of tangible evidence for the same. Hence, I hold that there is no question of confiscation of impugned goods in terms of section 111(m) of the Customs Act, 1962 and hence there is no

question of imposition of any penalty. In effect, I am constrained to drop the proceedings under SCN dated 30.10.2015. As regards, question of some goods being old and used and reimported, I hold that in the Bill of Entry no such description of old and used reimported goods appear and the para 6 of the SCN itself states that it is not possible to correlate the imported items with exported items. Thus, I hold that description as made under Section 2(16) of Customs Act, 1962, viz., description in entry made under Custom Act, 1962 is taken as the valid description for purpose of assessment and duty and interest due if any has been paid goods need to be released.

14. In view of the above, I pass the following order

ORDER

I drop the proceeding under Show Cause Notice F. No. VIII/48-447/Misc./ Import/MCH/Gr.-V/15-16 dated 30.10.2015. The goods may be released to importer on payment of duty assessed and interest if any.

20/5/2019

(PRASHANT KADUSKAR)
Additional Commissioner
Custom House, Mundra.

F.No. VIII/48-48/Adj/ADC/MCH/2017-18 Date: 20.05.2019
By Registered post
To

M/s. Tosiba Appliances Co.(P) Ltd.,
44, 15(A), Shahbad Daulatpur,
Bawana Road, New Delhi

Copy to:
(i) The Principal Commissioner, Custom House, Mundra
(ii) The Deputy Commissioner (RRA), Custom House, Mundra.
(iii) The Deputy Commissioner (Gr-V), Custom House, Mundra.
(iv) The Deputy Commissioner (TRC), Custom House, Mundra.
(v) The Deputy Commissioner (EDI), Custom House, Mundra.
(vi) Guard File.