



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/48-03/ADJ./ADC/MP&SEZ/2017-18
B	Order-in-Original No.	MCH/ADC/BKS/072/2017-18
C	Passed by	Shri B.K.Singh Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra
D	Date of Order	09.11.2017
E	Date of Issue	15.11.2017
F	SCN NO. & Date	F.No.VIII/48-994/Misc/DRI matter/Gr.II/ MCH/ 15-16 Dated 18.04.2016
G	Noticee / Party / Importer / Exporter	1. M/s. Goyal Timbers Store Imambara, Sadar Bazar, Haryana-132001. 2. Shri Avinash Jindal, Bunglow No. -12, Plot No. 291/292, Near Gurukul, Gandhidham-370201.

OFFICE OF THE PRINCIPAL
COMMISSIONER OF CUSTOMS
16 NOV 2017
Custom House, Mundra
P.O.
17.11.17

- 01 This Order-in-Original is granted to the concerned free of charge.
- 02 Any person aggrieved by this Order-in-Original may file an appeal under Section 128 of the Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C.A. 1 to :
“THE COMMISSIONER OF CUSTOMS (APPEALS), MUNDRA”
having his office at 7th floor, Mridul Tower, Near Times of India Building, Ashram Road, Ahmedabad – 380 009.
- 03 Appeal shall be filed within sixty days from the date of communication of this order.
- 04 The appeal should bear Court Fee Stamp of Rs.5/- (Rupees five only) under Court Fee Act and it must be accompanied by –
- 05 A copy of the appeal , and
- 06 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 Court Fees Act, 1870.
- 07 An appeal against this order shall lie before the Commissioner (Appeals) 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.
- 08 Proof payment of duty/interest/fine/penalty etc. should be attached with the appeal memo.
- 09 While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

Subject: – SCN No. F.No.VIII/48-994/Misc/DRI matter/Gr.II/MCH//15-16 Dated 18.04.2016 issued by Additional Commissioner, Custom House, Mundra in case of Goyal Timbers Store Imambara, Sadar Bazar, Haryana-132001.

Brief facts of the case:

M/s. Goyal Timber Store, Imambara, Sadar Bazar, Karnal, Haryana-132001 (hereinafter referred to as 'the importer'), holders of IEC No. 3394002931, are the importers of various types of timber at the ports of Kandla and Mundra. The timber imported is in log, rough square and sawn forms and classified under Chapter Heading 44 of Customs Tariff Act (CTA), 1975. Timber in logs and rough square forms falling under Chapter Sub-heading 4403 of CTA, 1975 are charged Basic Customs Duty (BCD) at the rate of 5% Adv and the timber in sawn form falling under Chapter Sub-heading 4407 of CTA, 1975 attracts BCD of 10% Adv. The Countervailing Duty (CVD) is nil in respect of all these types of timber.

2. During the course of investigation (by DRI, Zonal Unit Hyderabad) of cases against various importers for undervaluation of timber imported from various countries, evidences of undervaluation in timber imports made by the importers were found in the emails of India based middleman/supplier Shri Avinash Jindal as per letter F. No. DRI/HZU/VRU/26/Timber/2015/2037 dated 11-12-2015 received from DRI, Zonal Unit Hyderabad.
3. While investigating the case of undervaluation in respect of M/s. Batra Timber (P) Ltd., Karnal (the third party), the DRI (Zonal Unit Hyderabad) had found the evidences of undervaluation in the e-mails of Gandhidham based middleman / supplier Shri Avinash Jindal; which are also being linked to imports made by M/s. Goyal Timber Store, Karnal.
4. The DRI has stated, vide the above said letter dated 11-12-2015, that on the basis of container numbers, quantity and other details mentioned in the e-mails of Shri Avinash Jindal (the middleman / supplier); the evidences were matched with the respective imports made by M/s. Goyal Timber Store, Karnal. A Work Sheet has been enclosed; wherein the differential duty of Rs. 2,93,485/- has been shown in respect of Bills of Entry Nos. 3267826 /20-04-2011, 4015043 /07-07-2011 and 4015047 /07-07-2011 pertaining to M/s. Goyal Timber Store, Karnal.
5. In the statement dated 16-02-2015 recorded by DRI, under Section 108 of the Customs Act, 1962, Shri Rajesh Kumar Batra, Director of M/s. Batra Timber (P) Ltd., inter-alia, deposed that as regards to e-mails of Shri Avinash Jindal (at Page nos. 516 & 517, 473 & 474), these pages are the emails received by him (Shri Rajesh Kumar Batra) which contain packing and account details of various containers of Sudan Timber. Shri Rajesh Kumar Batra further stated that he believe that these consignments were not imported by them and the same might have been imported by some other party through them. He further submitted that the details of rates and values mentioned in the e-mails

"I have already admitted my guilt in earlier statements. The e-mails submitted by me earlier and documents recovered by you from my office and residence contain details of imported timber of various countries sold to various importers in India at the rates (mostly seen in US Dollars) mentioned therein. I have explained the aspect of undervaluation of timber imports made through me in my previous statements. I agree that apart from the importers as discussed in the documents shown above, there are many importers to whom I had supplied the imported timber at suppressed rates and the details of the same could be available in the e-mails submitted and documents recovered. The percentage of suppression of values varied based on the type of timber and country of origin".

8. From the analysis of the documents submitted and the statements of the supplier / middleman, it is revealed that-
- I. The timber bought from supplier Shri Avinash Jindal was that of African countries and the same was bought at rates higher than the rates declared at the time of import in order to avoid paying more duties.
 - II. The details of containers of material mentioned at page no. 473 & 516 of the copies of sent emails of Shri Avinash Jindal was cross-checked with the import documents wherein it was found that this material was imported by the importer M/s. Goyal Timber Store, Karnal vide Bill of Entry No. 4015047 dated 07.07.2011 at Mundra port (discussed in the duty calculation Worksheet to the notice) as the container numbers, quantity and other details were matching. Here, the rate declared at \$ 400 per CBM in the invoice submitted at the time of import was found to be much lower than the actual rates (i.e. 651 USD/CBM for 4 containers and 621 USD/CBM for 5 containers) as seen in the above copies of emails. The middleman / supplier in their depositions had admitted to the suppression of the values at the time of import for avoiding paying more duties.
 - III. The details of containers of material mentioned at page no. 494 & 596 of the copies of sent emails of Shri Avinash Jindal was cross-checked with the import documents wherein it was found that this material was imported by the importer M/s. Goyal Timber Store, Karnal vide Bill of Entry No. 4015043 dated 07.07.2011 at Mundra port (discussed in the duty calculation Worksheet to the notice) as the container numbers, quantity and other details were matching. Here, the rate declared at \$ 400 per CBM in the invoice submitted at the time of import was found to be much lower than the actual rates (i.e. 611 USD/CBM for 6 containers and 621 USD/CBM for 3 containers) as seen in the above copies of emails. The middleman / supplier in their depositions had admitted to the suppression of the values at the time of import for avoiding paying more duties.
 - IV. The details of containers of material mentioned at page no. 436 of the copies of

documents submitted and as arrived at on the basis of the depositions made by the persons concerned, as discussed above, are the true values and constitute the correct transaction value of the timber imported from time to time and the same is to be adopted for the purpose of payment of necessary Customs duties.

11. In all the cases of imports of timber from Sudan, evidence of the actual value is available and the same can be considered as true transactional values as required under Section 14(1) read with Rule 3(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as the case may be. The evidences of undervaluation in the import of timber were found in the copies of sent emails submitted by supplier Shri Avinash Jindal. The evidences were linked to the respective Bills of Entry (as mentioned in the Work Sheet i.e. Annexure-1) on the basis of the container numbers, quantities, sometimes, also the number of pieces in a container. The values arrived at on the basis of the oral evidences were found to be consistent with the values of the documentary evidences discussed supra.

12. In view of the facts mentioned in the foregoing paragraphs, it appears that the importer is liable to pay the duties of Customs short paid on the import of timber from African countries. As per the evidences found in various documents as well as the oral submissions of the importer, the differential duty calculations have been made as per worksheet, mentioning the evidences in the Evidence column of the worksheet.

13. From the foregoing, it appears that:-

- a. The importer has deliberately undervalued the timber imported from Sudan in order to evade payment of Customs Duties to the tune of Rs. 2,93,485 in respect of imports made at the port of Mundra. The importer has willfully and fraudulently suppressed the values of the timber imported by them in order to evade the payment of duties. The fact of values of the timber imported having been suppressed has come to light only upon search, seizure and investigation by the department/DRI. Hence, this appears to be a fit case for invoking the provisions under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962 for demanding the differential duties amounting to Rs. 2,93,485/- for the extended period. Further, they also appear to be liable to pay interest under Section 28AA [erstwhile Section 28AB) of the Customs Act, 1962.
- b. The timber imported is also liable *for* confiscation under Section 111(m) of the Customs Act, 1962 inasmuch as the value declared in the import documents is not true and correct.
- c. For their acts of omissions and commissions in the matter of suppression of values for evading customs duties, the importer is also liable for penalties under Section

- The differential duties of Rs. 2,93,485/- as detailed in Worksheet i.e. Annexure-1 to the notice should not be demanded from them under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962;
- Interest on the differential duties should not be demanded from them under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962;
- The goods of a value of Rs. 1,01,72,470/- imported against the three Bills of Entry as detailed in Worksheet i.e. Annexure-1 to the notice should not be held liable for confiscation under Section 111 (m) of the Customs Act, 1962 ;
- Penalties should not be imposed on them under Section 112(a)/114A of the Customs Act, 1962.

15.2. Also Show Cause Notice bearing F.No. VIII/48—994/Misc/DRI Matter/Gr.II/MCH/15-16 dated 18.04.2016 issued Shri Avinash Jindal by the Additional Commissioner of Customs, Custom House, Mundra as to why penalties under 112(a) and Section 114AA of the Customs Act, 1962 should not be imposed on him for his omissions and commissions, as discussed above.

16. Defence reply and personal hearing:

The noticee(s), vide letter dated 09.06.2016 and 15.12.2016 submitted written submission. This reply is being filed on behalf of M/S Goyal Timber Store Imambara, Sadar Bazar, Karnal, Haryana-132001 wherein they have, *inter alia*, submitted as under:

16.1 They deny all charges alleged in show cause Notice. They have not done any under valuation because no record or document was recovered or seized from their possession. All documents based on which SCN was issued were recovered from other persons and the premises, over which they have no control. Shri Avinash Jindal what he has entered in his records is not known to them. They are also not in a position to explain his intention for what they have done and for whom he has done. They purchased the goods in question from M/S Vinayak Impex (U) Ltd and also made payment directly to them through Bank. They submitted that to avail benefit of lower penalty they have paid Rs.5,53,917/- (Rs.2,93,485/- duty; Rs.2,16,409/- interest upto 15.05.2016 and Rs.44023/- 15% penalty under Challan No. 175 dated 05.05.2016 and Challan No. 198 dated 05.05.2016 within one month of receipt of Show Cause Notice and informed to the Department vide their letter dated 11.05.2016.

16.2 They submitted that the demand of duty alleging under valuation of timber from Sudan, is based on some emails submitted by some Shri Avinash Jindal and his statement recorded under Sec. 108 of Customs Act 1962. They submitted that they have not purchased the goods in question from him. Even in S.C.N. also nowhere it is alleged that

transaction and that importers have actually paid only that amount which was invoiced to them.

16.4 The established law requires to take value of goods in accordance with section 14 of Customs Act 1962 read with Customs Valuation Rules, which clearly provide that for the purpose of assessment, value of goods shall be deemed to be price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, **in course of international trade**, where seller and buyer have no interest in the business of each other and price is the sole consideration **for sale or offer for sale** and that such price shall be determined in accordance with Customs Valuation Rules 2007 which clearly shows that value of imported goods shall be transaction value adjusted in accordance with provisions of the said Rules. The Revenue have adduced any evidence of such international trade to reject the declared "Transaction Value". They rely upon following decisions:

- Eicher Tractors Pvt. Ltd. V/s Commissioner of Customs, [2000(122)ELT321 (S.C.)]
- Supreme court of Indian in case of Commission V/s BC trading Co. [2008 (223) ELT & 133 (SC)]
- Commissioner V/s Venus Insulation Product Mfg Co [2003 (153) ELT A 172 (SC)].
- CESTST's order in case of PNP Poltex Pvt Ltd V/s Commissioner of Customs Nhava Sheva.

They relied upon the following decisions applicable in this case, wherein it was held that transaction value is not to be rejected.

- 2011 (272) E.L.T. 641 (S.C.) – CCE v/s AGGARWAL INDUSTRIES LTD.
- 2010 (253) E.L.T. 353 (S.C.) – CCE v/s PRABHU DAYAL PREM CHAND
- 2009 (244) E.L.T. 4 (S.C.) -MOTOR INDUSTRIES CO. LTD. V/s CC
- 2008 (226) E.L.T. 9 (S.C.) – CC v/s J.D. ORGOCHEM LTD.
- 2008 (224) E.L.T. 343 (S.C.) – CC V/S Initiating Explosives Systems (I) Ltd.
- 2007 (214) E.L.T. 3 (S.C.)- CC v/s SOUTH INDIA TELEVISION (P) LTD.
- 2005 (181) E.L.T. 3 (S.C.)- CC v/s BUREAU VERITAS
- 2000 (122) E.L.T. 321 (S.C.) - EICHER TRACTORS LTD.
- 2009 (239) E.L.T. 468 (Tri. - Bang.) – CC v/s MISRI APPARELS PVT. LTD.
- 2006 (202) E.L.T. 530 (Tri. - Mumbai)- Neha Intercontinental (P) Ltd.
- 2005 (184) E.L.T. 65 (Tri. - Del.) – CC v/s MODERN OVERSEAS
- 2005 (184) E.L.T. 65 (Tri. - Del.) – CC, New Delhi v/s MODERN OVERSEAS
- 2006 (202) E.L.T. 530 (Tri. - Mumbai)- Neha Intercontinental (P) Ltd. v/s CC
- 2009 (246) E.L.T. 340 (Tri. - Ahmd.) - APAR INDUSTRIES LTD.
- 1996 (81) E.L.T. 195 (S.C.) - BASANT INDUSTRIES Vs CC, Customs

16.5. They submitted that there is no under valuation of the goods in question differential duty cannot be demanded as proposed in the SCN question of payment of interest does not arise.

16.6 They further submitted that under para 15(e) of the SCN confiscation of goods is proposed. Since these goods are not offending goods , therefore cannot be confiscated.

- Non-RUDs have not been supplied to for making proper and effective defence submissions.
- DRI has no power or jurisdiction to assess/re-assess the goods which were already been examined, assessed and cleared by the proper officer of Customs.
- Role of the noticee has been misconstrued by the investigating agency as his role is limited to facilitate the exporter/supplier in lieu of getting commission from supplier. No role of the noticee in alleged undervaluation.
- No pecuniary transection between importer and Shri. Avinash Jindal has been performed as per available records and hence penalty under Section 112(a) and Section 114(aa) of Customs Act, 1962 cannot be imposed.

18.1. Personal Hearing of the said SCN was fixed on 05.10.2016 and subsequently on 27.10.2016 vide this office letter F.No. VIII/48-03/Adj/ADC/MP&SEZ/16-17 dated 19.09.2016 and 07.10.2016 respectively. However, in both the instance the assessee did not appear.

18.2. Subsequently personal hearing was held on 03.11.2016 wherein Shri Sanjiv Kumar, Consultant appeared on behalf of Shri. Avinash Jindal. He submitted written reply and reiterated grounds mentioned in his reply. He submitted that the DRI has no power to assess/re-assess the goods which were already been examined, assessed and cleared by the proper officer of Customs. He further submitted that the role of Shri. Avinash Jindal and has been mis-constructed in the present SCN as supplier or agent of supplier. Whereas his role is limited to identify the prospective buyers of wood in lieu of getting commission from supplier. He further stated that no pecuniary transection between importer and Shri. Avinash Jindal has been performed as per available records and hence penalty under Section 112(a) and Section 114(aa) of Customs Act, 1962 cannot be imposed. He refer case of Rajinder Arora vs. Union of India (2016 (339) E.L.T. 370 (P&H)) and Mangali Impex Ltd V/s Union of India and Ors (W.P (C) 441/2013).

18.3. Subsequent personal hearing was held on 15.12.2016 wherein Shri D.R.Singh, authorized representative appeared on behalf of the M/s Goyal Timber Store and he submitted that two issues are involved (i) Under-Valuation, (ii) the issue of confiscation of the goods. He submitted written reply dated 15.12.2016 and reiterated grounds mentioned in his reply. Regarding valueation, Shri Singh claimed that there is no evidence of lading/undervaluation on the basis of contemporaneous evidence and the same cannot be done on the basis of third party evidence. He also submitted ruling from Hon'ble Supreme court of India No. [2008 (223) ELT A 133 (Supreme Court)] in case of Commissioner V/s BC trading Company in which it was pronounced by the Hon'ble Supreme Court that "in absence of any evidence that importer paid much more

21. I find that the Noticee No. 1 deny all the charges alleged in show cause Notice. They contended that they have not done any under valuation because no record or document was recovered or seized from their possession. All documents based on which SCN was issued were recovered from other persons and the premises, over which importer have no control. What Shri Avinash Jindal has entered in his records is not known to importer. Importer is also not in a position to explain the intention of Shri Avinash Jindal for such act. Importer purchased the goods in question from M/s Vinayak Impex (U) Ltd and also made payment directly to M/s Vinayak Impex (U) Ltd through Bank. The demand of duty alleging under valuation of timber from Sudan, is based on some emails submitted by some Shri Avinash Jindal and his statement recorded under Sec. 108 of Customs Act 1962 and nowhere the statement of importer has been recorded. The goods in question have neither purchased from Shri Avinash Jindal nor in the Show Cause Notice it is alleged that the goods in question were purchased from Shri Avinash Jindal. I also find that there are no sufficient evidences to prove undervaluation. The Noticee No.1 is independent identity and are not related to Noticee No.2 and the evidences relied upon are the **“evidences of third party”** for this case against Noticee No.1 for the imports. Also during investigation of the case, neither the premises of importer/noticee No. 1 was searched nor any statement was recorded to establish the undervaluation. I also find that the above said contention has been given at the time of personal hearing and agreed with the same. Therefore, evidence relied upon in proceedings are not sufficient to demand duty with interest and penalty.

22. I find that the present Show Cause Notice is issued on contents of page numbers 436, 473, 494, 516 and 596 of e-mails sent and submitted by the Shri Avinash Jindal and nowhere the same have been confirmed from the importer. Show Cause Notice issued on the basis of investigating the rate declared in the invoice submitted at the time of import was found to be much lower than the rates as seen in the aforementioned pages of emails. **As per Rule 4 (3) of Customs Valuation) Determination of Value of Imported Goods) Rules, 2007, if more than one transaction value of identical goods is found, the lowest such value shall be used to determine the value of imported goods.** Accordingly, in this case two rates i.e rate/value shown by Shri Avinash Jindal in their e mail and price/rate declared by the importer/noticee no. 1 are available wherein price/rate declared by the importer/noticee no. 1 are lowest and hence the same is required to be taken. I find that, since the transaction value is available with valid and reliable evidences, such value cannot be rejected merely on assumptions and presumptions based on evidences of third party.

23. I have also gone through various judgement quoted by the said importer in their defence and the judgment of Supreme court of India in case of Commissioner V/s B.C.

2. Shri Avinash Jindal,
Bungalow No.12, Plot No. 291/292,
Near Gurukul, Gandhidham -370201

Copy to:

- (1) The Additional Director General, DRI, Zonal Unit, H.No. 8-2-293/82/F/B/3, Plot No. B-3, Road No.7, Film Nagar, South Banjara Hills, Hyderabad- 500096.
- (2) Asstt./Dy. Commissioner(RRA), Customs House, Mundra.
- (3) Asstt./Dy. Commissioner(Recovery), Customs House, Mundra.
- ✓(4) Asstt./Dy. Commissioner(EDI), Customs House, Mundra.
- (5) Guard file.