

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**  
**NEW DELHI**

PRINCIPAL BENCH-COURT NO. 1

**CUSTOMS APPEAL NO. 51192 OF 2019**

[Arising out of Order-in-Original NO. 20/2018-19/VIS/COMMR.(IMPORT) dated 28.02.2019 passed by the Commissioner of Customs, New Delhi]

**Commissioner of Customs,**  
ACC Import Commissionerate  
New Customs House,  
New Delhi-110037

**Appellant**

**Versus**

**Shri Joginder Kumar**  
Director of M/s K R Express Pvt Ltd.  
L-74/284, Gali No. 07, Mahipalpur  
New Delhi

**Respondent**

**With**

**CUSTOMS APPEAL NO. 51193 OF 2019**

[Arising out of Order-in-Original NO. 20/2018-19/VIS/COMMR.(IMPORT) dated 28.02.2019 passed by the Commissioner of Customs, New Delhi]

**Commissioner of Customs,**  
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**Appellant**

**Versus**

**Shri Surinder Kumar**  
Director of M/s K R Express Pvt Ltd.  
L-74/284, Gali No. 07, Mahipalpur  
New Delhi

**Respondent**

**Appearance:**

Present for the Appellant (Department) : Shri Rakesh Kumar,  
Authorised Representative  
Present for the Respondent: Shri Sansar Chand and Shri  
Mohinder Singh, Consultants

**With**

**CUSTOMS APPEAL NO. 51309 OF 2019**

[Arising out of Order-in-Original NO. 20/2018-19/VS/COMMR.(IMPORT) dated 28.02.2019 passed by the Commissioner of Customs, New Delhi]

**Shri Joginder Kumar**

Director of M/s K R Express Pvt Ltd.  
L-74/284, Gali No. 07, Mahipalpur  
New Delhi

**Appellant**

**Versus**

**Commissioner of Customs, (Import)**

New Customs House,  
Near IGI Airport, New Delhi-110037

**Respondent**

**With**

**CUSTOMS APPEAL NO. 51310 OF 2019**

[Arising out of Order-in-Original NO. 20/2018-19/VS/COMMR.(IMPORT) dated 28.02.2019 passed by the Commissioner of Customs, New Delhi]

**Shri Surinder Kumar**

Director of M/s K R Express Pvt Ltd.  
L-74/284, Gali No. 07, Mahipalpur  
New Delhi

**Appellant**

**Versus**

**Commissioner of Customs, (Import)**

New Customs House,  
Near IGI Airport, New Delhi-110037

**Respondent**

**With**

**CUSTOMS APPEAL NO. 52152 OF 2019**

[Arising out of Order-in-Original NO. 20/2018-19/VS/COMMR.(IMPORT) dated 28.02.2019 passed by the Commissioner of Customs, New Delhi]

**M/s K R Express Pvt Ltd.**  
L-74/284, Gali No. 07, Mahipalpur  
New Delhi-110037

**Appellant**

**Versus**

**Commissioner of Customs, (Import)**  
New Customs House,  
Near IGI Airport, New Delhi-110037

**Respondent**

**And**

**CUSTOMS APPEAL NO. 52153 OF 2019**

[Arising out of Order-in-Original NO. 20/2018-19/VIS/COMMR.(IMPORT) dated 28.02.2019 passed by the Commissioner of Customs, New Delhi]

**Pradeep Kumar,**  
S/o Shri Rati Ram,  
Village Fazilpur, Sonipat  
Haryana

**Appellant**

**Versus**

**Commissioner of Customs, (Import)**  
New Customs House,  
Near IGI Airport, New Delhi-110037

**Respondent**

**Appearance:.**

Present for the Appellant : Shri Sansar Chand and Shri Mohinder Singh, Consultants

Present for the Respondent: Shri Rakesh Kumar, Authorised Representative

**COARM:**

**HON'BLE MR. JUSTICE DILIP GUPTA , PRESIDENT**  
**HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)**

**FINAL ORDER NOS. 50797-50802/2022**

**DATE OF HEARING: 08.08.2022**  
**DATE OF DECISION: 01.09.2022**

**P V SUBBA RAO:**

1. We have heard Shri Sansar Chand, learned consultant assisted by Shri Mohinder Singh, learned consultant representing Shri Joginder Kumar, Shri Surinder Kumar, M/s KR Express and Shri Pradeep Kumar and learned authorised representative Shri Rakesh Kumar representing the Revenue and perused the records.
2. All these appeals arise out of the same impugned order and hence are being disposed of together.
3. Customs Appeal No. 51192 of 2019 is filed by the Revenue assailing the non-imposition of penalty under section 112 on Shri Joginder Kumar. Customs Appeal No. 51193 of 2019 is filed by the Revenue assailing the non-imposition of penalty under Section 112 on Shri Surinder Kumar. Customs Appeal No. 52152 of 2019 is filed by M/s K R Express Pvt Ltd. assailing the entire impugned order. Customs Appeal No. 51309 of 2019 is filed by Shri Joginder Kumar assailing the imposition of penalty upon him. Customs Appeal No. 51310 of 2019 is filed by Shri Surinder Kumar assailing the imposition of penalty upon him. Customs Appeal No. 52153 of 2019 is filed by Shri Pradeep Kumar assailing the imposition of penalty upon him and also assailing the order of recovery of differential duty along with interest from him.

4. The facts of the case are that the eighteen (18) bills of entry were filed by M/s K R Express Pvt Ltd.<sup>1</sup> who is a licensed customs broker in the name of M/s Samay International, New Delhi whose IEC is 0511069324. All the documents such as bills of lading, invoices, Import General Manifest<sup>2</sup> were in the name of M/s Samay International. The goods were cleared after assessment by the assessing officers.

5. The Delhi unit of Directorate Revenue of Intelligence<sup>3</sup> received intelligence that some syndicates were operating to make remittances to Hong Kong based entities for under-invoiced imports by various importers, using banking channels in the name of front/bogus firms including M/s Samay International. According to the intelligence, the modus operandi was to submit bogus import proforma invoices in order to remit advance payments against supposedly future imports. No imports were thereafter actually made and the remittances so made by the syndicates were adjusted against the payments due for under-valued imports made by other importers. Usually, when goods are imported, payment is made through letters of credit. In some cases advance payments are made to the overseas exporters. In such cases, the importer approaches a bank and submits proforma invoices and other documents and necessary foreign exchange is released by the bank and remittance is made in advance which

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**1** K R Express  
**2** IGM  
**3** DRI

must be adjusted against any future remittance towards the full and final payment for the imports which will be known once the import is completed. In this case, intelligence of DRI indicated that no imports were being made at all after remittances and no bills of entry were also filed. The money so remitted abroad was being adjusted against the undervalued imports by other importers. Investigations were initiated and statement of Shri Mukesh Arora, the alleged king pin was recorded who, in his statement under section 108 of the Customs Act, confirmed that they would use bogus firms to transfer money abroad and one such firm is M/s Samay International which has a bank account in ICICI Bank, Karol Bagh branch. He further confirmed that the M/s Samay International was created by him along with his partner Shri Bobby in the name of one Shri Anil Kumar and importer exporter code<sup>4</sup> was obtained. He is paying Rs. 20,000/- to 25,000/- per month to Shri Anil Kumar for using his name. Shri Preet Mohinder Singh Talwar @Bobby also made a statement of 16.01.2013 confirming this modus operandi.

6. Shri Anil Kumar, proprietor of M/s Samay International gave a statement before the Officers confirming that he was in the business of purchasing mobile phones in cash and selling them in remote areas and that Shri Mohinder Singh and @ Bobby had approached him to create a firm in his name for import of mobile phones and offered to pay Rs. 15,000 to

Rs. 20,000/- per month for agreeing to the proposal. He had provided his bank card using which they created a firm in the name of M/s Raj International and thereafter they opened a new firm in the name of M/s Samay International. They would get blank papers signed by him but he was not aware of their purpose. He neither signed the cheque book of his firm nor had visited the ICICI bank where these firms had their accounts.

7. Officers searched the office of M/s Samay International and K R Express and resumed documents and hard disks along with cash of Rs. 10,60,000/- under a panchanama dated 05.1.2013. The hard disks were examined under a panchanama on 29.03.2014 and they had several formats of invoices and packing lists related to imports created in word and Excel formats with missing details. The officers of DRI inferred that these were meant to create bogus documents. The statement of accounts and the remittances showed that Rs. 102 crores were remitted abroad using the account of M/s Samay International. These remittances in the name of M/s Samay International are not in question in the present proceedings. Under dispute in these proceedings are the imports actually made in the name of M/s Samay International. Shri Anil Kumar, Proprietor of M/s Samay International sent a letter dated 31.03.2013 to DRI stating that his IEC was misused by K R Express for importing goods and that he had not authorised K R Express to import goods on his behalf and

that he had not imported any goods nor has paid any customs duty. He further stated that he has filed a police complaint on 17.01.2013 against K R Express and prayed that strict action may be taken against them.

8. Statement of Shri Joginder Kumar, Director of K R Express was recorded on 05.01.2013, who confirmed that he and Shri Surinder Kumar were the directors of K R Express and that they had cleared the goods through customs for various firms including M/s Samay International. Shri Surinder Kumar, in his statement dated 05.01.2013 also confirmed these facts. However, he also confirmed that in respect of the disputed 18 bills of entry they had not received the KYC documents from M/s Samay International from its proprietor Shri Anil Kumar, but had received them through one Shri Pradeep Kumar of Sonapat Haryana, who came with documents of M/s Samay International for import clearance and accordingly they filed bills of entry. He further stated that he never met Shri Anil Kumar, the proprietor of M/s Samay International and that Shri Pradeep Kumar would pay them cash and they would deposit it towards customs duty in the name of M/s Samay International and obtain delivery of the goods and hand them over to Shri Pradeep Kumar at the exit gate of Air Cargo Complex.

9. Shri Pradeep Kumar, in his statement dated 17.05.2013 under the Customs Act, confirmed the aforesaid modus



operandi. He further stated that since he does not have any bank account in the name of M/s Samay International, he would pay cash to Shri Joginder Kumar and Shri Surinder Kumar who would deposit the customs duty. He further said that one, Shri Manoj Kumar Aggarwal of China, provided him invoices of lower value so that less customs duty has to be paid and that he himself would keep only kachha record of the imported goods and sell them in cash and destroy the import documents thereafter. He had given Shri Joginder Kumar Rs. 10.60 lakhs in cash for the incoming import. He confessed that it was his mistake to import goods in the name of another person and that too undervaluing them and that he was ready to pay the differential duty short paid on the import of goods in the name of M/s Samay International. In a subsequent statement, Shri Pradeep Kumar stated that K R Express and Shri Joginder Kumar were also equal earners in the imports made in the name of M/s Samay International.

10. Conclusions drawn from the above investigation by DRI were that M/s Samay International was not the importer of the goods at all. The goods were imported in the name of M/s Samay International by Shri Pradeep Kumar, K R Express and Shri Joginder Kumar and Shri Surinder Kumar by undervaluing the goods with an intent to evade the payment of duty. The extent of under valuation was assessed by the investigating agency.

11. Of the 18 bills of entry 7 are listed in Annexure A to the show cause notice. In respect of three bills of entry, viz, 6118312 dated 28.02.2012, 6288714 dated 19.03.2012 and 6089748 dated 24.02.2012 the statement of Shri Pradeep Kumar that these goods were under-valued to the extent of three to four times was relied upon and accordingly values were enhanced by 3.5 times. In respect of the remaining four bills of entry, the values were correspondently assessed at double declared valued based on the statements of Shri Pradeep Kumar.

12. In respect of 11 bills of entry mentioned in the Annexure B to the show cause notice, the transaction values were rejected and they were re-determined on the basis of "lower contemporaneous prices" declared by similar goods in terms of Rule 5 of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007<sup>5</sup>. Thus, the differential duty table was worked out as follows:

Sr. No	No of Bills of Entry	Declared Assessable Value (Rs)	Duty paid (Rs.)	Re-determined Assessable Value (Rs)	Duty Payable (Rs)	Duty Short Paid (Rs)	Remarks
1	7	23,48,350/-	5,11,192	68,86,559	15,00,025	9,88,833	As per Annx-A
2	11	3,05,19,204	83,31,539	6,20,24,310	1,70,98,013	87,66,474	As per Annx-B
To tal	18	3,28,67,554	88,42,731	6,89,10,869	1,85,98,038	97,55,307	

13. A Show cause notice dated 07.04.2016 was issued by the DRI to KR Express and Shri Joginder Kumar, Surinder Kumar and Shri Pradeep Kumar. Shri Anil Kumar (the IEC holder of M/s Samay International), Shri Mukesh Arora and Shri Bobby, the alleged master mind who were said to have been transferring money abroad using bogus proforma invoices are not noticees to the show cause notice.

14. The impugned order was passed by the Commissioner and the operative part is as follows:

“(i) I, hereby, reject the declared values of Rs. 3,28,67,554 /- for goods, imported by them vide 18 Bills of Entry in terms of provisions of Section 14 of the Customs Act, 1962 read with Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and confirm the re-determined value of imported goods at Rs. 6,89,10,869/-, in terms of provisions of Section 14 of the Customs Act, 1962 read with the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, and order for reassessment of the Customs Duties accordingly;

(ii) I, hereby, order for confiscation of imported goods of re-determined value at Rs. 6,89,10,869/- under Sections 111(d) and 111(m) of Customs Act, 1962, for the reasons discussed in paras above and since the said goods are not available for confiscation, fine in lieu of confiscation is refrained on the aforesaid goods under Section 125 of the Customs Act, 1962;

(iii) I, hereby, order and confirm the demand of differential Customs duties amounting to Rs. 97,55,307/- (Rs. Ninety Seven Lakh Fifty Five Thousand Three Hundred Seven Only) as detailed in Annexure A and B to the said SCN evaded/shortpaid by them and order for recovery of the said Customs duties from Noticee No. 01 (M/s K.R. Express Pvt. Ltd.) and Noticee No. 04 (Shri Pradeep Kumar) under Section 28(4) of the Customs Act, 1962;

(iv) I, hereby, order and confirm for recovery of interest under Section 28AA of the Customs Act, 1962 at the applicable rates on the above said duty as mentioned in para ) above from Noticee No. 01 (M/s KR. Express Pvt Ltd.) and Noticee No. 04 (Shri Pradeep Kumar).

(v), hereby, order for appropriation of Rs. 10,60,000/- deposited by them during investigation towards their duty liabilities i.e. Noticee No. 01 (M/s K.R. Express Pvt. Ltd.) and Noticee No. 04 (Shri Pradeep Kumar);

(vi) I, hereby, impose Penalty amounting to Rs. 97,55,307/- (Rs. Ninety Seven Lakh Fifty Five Thousand Three Hundred Seven Only) under Section 114A of the Customs Act, 1962 on Noticee No. 01 (M/s K.R. Express Pvt. Ltd.) and Noticee No. 04 (Shri Pradeep Kumar) for their acts of omission and commission as discussed in foregoing paras.

(vii) I hereby, impose Penalty amounting to Rs. 1,00,00,000/- (Rs. One Crore only) under Section 114AA of the Customs Act, 1962 on Noticee No. 01 (M/s K.R. Express Pvt. Ltd.) for their acts of omission and commission as discussed in foregoing paras.

(viii) I, hereby, impose Penalty amounting to Rs. 1,00,00,000/- (Rs. One Crore only) under Section 114AA of the Customs Act, 1962 on Noticee No. 04

(Shri Pradeep Kumar) for his acts of omission and commission as discussed in foregoing paras.

(x) I impose Penalty amounting to Rs. 1,00,00,000/- (Rs. One Crore only) under Section 114AA of the Customs Act, 1962 on Noticee No. 02 (Shri Joginder Kumar) for his acts of omission and commission as discussed in foregoing paras

(x) I impose Penalty amounting to Rs. 1,00,00,000/- (Rs. One Crore only) under Section 114AA of the Customs Act, 1962 on Noticee No. 03 (Shri Surinder Kumar) for his acts of omission and commission as discussed in foregoing paras.”

15. Learned consultants for the appellants submitted as follows:

- (i) The impugned order speaks of fake firms being used for sending advance remittances to counter-balance undervalued imports in the name of other firms;
- (ii) The IEC holders and persons who helped in obtaining multiple IECs for use by others were not made parties to show cause notice despite being directly involved and being the beneficiaries;
- (iii) Enhancing the value of goods of the impugned goods is unsustainable and the imposition of penalty on this ground is also maintainable;

- (iv) Voluntary deposit of Rs. 10.6 lakhs cannot be held against the appellants.
- (v) Duty demand cannot be fastened upon the appellants contrary to the legal provisions as there is no evidence that the appellants had any in the import of the goods.
- (vi) Duty demand on K R Express, Shri Joginder Kumar and Shri Pradeep Kumar and Shri Surinder Kumar cannot be sustained;
- (vii) There is no evidence on record to establish that K R Express, Shri Joginder Kumar and Shri Surinder Singh had prior knowledge that the impugned goods were undervalued and hence penalties imposed under section 114 A, 114AA is not sustainable.
- (viii) The goods not liable confiscation under Section 114A and 114 AA of the Customs Act. K R Express has followed the KYC norms and other requirement stipulated under the Board Circular and Circular & Customs Brokers Licensing Regulations, 2013.
- (ix) Invocation of penalty under Section 114AA is not sustainable.

- (x) Penalty not impossible on the appellant company and the penalty already imposed on both the directors of the appellant firms.

16. Although the judgment of Supreme Court in **Canon India vs. Commissioner of Customs in Customs Appeal No. 187 of 2018** in which the Supreme Court held that DRI officers are not proper officers to show cause under Section 28 was relied upon earlier, but during the hearing, learned consultant said that he was not pressing this submission as the matter is pending before the Supreme Court in Review petition filed by the Revenue and also certain amendments were made in the Finance Act, 2022. He argued only on merits.

17. Learned consultant for the appellants submitted that there is no relationship between the alleged modus operandi discovered by the DRI that remittances were being made using various accounts including that of M/s Samay International but no imports were being made at all and the present show cause notice which alleges that imports have been made in the name of M/s Samay International but through undervaluation. He further submitted that there is no evidence or even allegation that any amounts have been transferred to the suppliers of the goods over and above the invoice value. Therefore, the allegation in the show cause notice and its confirmation in the impugned order of undervaluation are not sustainable.

18. He further submitted that the IEC holder in whose name the goods have been imported and other persons who are said to have obtained multiple IEC in the name of others have not been made parties to the show cause notice despite their direct involvement and despite being the beneficiaries. Apart from the statement of the IEC holder Shri Anil Kumar that he had not imported the goods there is no evidence to show that he was not the importer. He further submitted that the demand of duty and penalty for short levy on account of undervaluation cannot be fastened on the customs broker as the duty liability is on the importer and not the customs broker. He also submitted that loading of value of the impugned goods merely based on the statement of Shri Pradeep Kumar that they were undervalued to the extent of two times for some goods and three to four times in some other cases is not sustainable. Further, re-assessment of the value in respect of 11 bills of entry mentioned in Annexure B to the M/s Samay International based on the so called contemporaneous values of imports is also not sustainable for the reason that during the same period there were imports by other parties of similar goods whose values were much lower than the values taken for the determination of duty in the show cause notice. As a sample he submitted bills of entry No. 6588418 dated 19.04.2012 filed by Shri Shiva Trade Link, New Delhi, Bill of entry No. 6159079 dated 03.03.2012 filed by M/s Simran India incorporated, New Delhi, Bill of Entry



5832457 dated 25.01.2012 filed by M/s Harpreet International New Delhi. Bill of Entry No. 6532301 filed by M/s Unisys Overseas, New Delhi. Bill of Entry No. 6603638 dated 20.04.2012 filed by M/s Hafees Kangan Stores. Bill of Entry No. 6512461 dated 11.04.2012 filed by M/s Simran India Incorporated.

19. He further submitted that there is no evidence on record to establish that the appellants K R Express had prior knowledge that the impugned goods were undervalued. He further submits that K R Express scrupulously followed the KYC norms and other stipulated in the Board circular and the Customs Brokers Licensing Regulations, 2013.

20. Further, learned consultant for the appellant drew attention of the bench of the fact that the goods were confiscated in the impugned order under section 111 (d) and 111(m) of the Customs Act but no redemption fine was imposed. In other words, the goods were absolutely confiscated. Once the goods are confiscated, the goods vest in the Government of India and so no duty is payable by them. For this reason also, the impugned order is not sustainable. He, therefore, prays that the impugned order may be set aside and appeals may be allowed and Revenue's appeals may be rejected.

21. Learned Authorised Representative for the Revenue vehemently supported the impugned order. He points out

that although the goods were imported in the name of M/s Samay International, as evident from the statement of Shri Anil Kumar, its proprietor, the goods were imported without his knowledge and all documents were prepared in the name of M/s Samay International and Bills of entry were filed by M/s K R Express in the name of M/s Samay International. However, duty could not have been paid through its bank account. Therefore, Shri Pradeep Kumar paid cash to K R Express who deposited the same as duty through a TR-6 challan in the name of M/s Samay International. M/s Samay International was, therefore, oblivious of these imports and hence was not made a party to these proceedings. For these reasons Shri Anil Kumar its proprietor was also not made a party to the show cause notice. With respect to the original information regarding remittances abroad through various firms including M/s Samay International by the syndicates amounting to Rs. 102 crores, he submits that such remittances are not the subject matter of the present show cause notice. They deal with those cases where remittances were made and no goods were imported, thus siphoning off foreign currency abroad and using it to set off against undervalued imports. However, during the course of the investigation into such remittances these 18 bills of entry under which the goods were actually imported in name of M/s Samay International came to light. Shri Anil Kumar, the owner of M/s Samay International confirmed that he had nothing to do with these imports and

these were made without his knowledge. He gave a letter to this effect to the DRI and had also filed a FIR for cheating with the Police. Therefore, undervaluation in these imports is a matter to be examined in itself and duty has to be demanded against the actual importers Shri Pradeep Kumar M/s K R Express Pvt Ltd., Shri Surinder Kumar and Shri Joginder Kumar.

22. He submitted that so far as the valuation is concerned, transaction value can be rejected under Rule 12 of the Valuation Rules if there is large variation between the declared transaction value and other contemporaneous values for some other reasons. In this case, it is an admitted fact that goods were imported at very low declared prices and the actual value being two times the declared value in some cases and three to four times the declared value in some other cases. This is the statement by Shri Pradeep Kumar who admitted to being the importer. Therefore, there is no reason to accept the transaction value in this case. He further submitted that what is admitted need not be proved. In this case, under valuation was not only admitted to by Shri Pradeep Kumar himself but its extent was further explained. Therefore, the value was re-determined in respect of the bill of entry in Annexure A to the show cause notice. So far as the other bills of entry are mentioned in Annexure B are concerned, he submits that these goods were re-valued based on the contemporaneous data of imports. Therefore, there is no infirmity in re-assessment of

duty and demand of duty under section 28 (4) of the Customs Act along with interest.

23. As far as the confiscation of the goods under section 111(d) and Section 111 (m) are concerned, he submits that Section 111(m) provides for confiscation of goods imported into India which do not correspond in value or in any the particular with the entry made (i.e. bills of entry) under the Act. A true declaration in the bill of entry is a requirement under the Customs Act as well as under the Foreign Trade Development and Regulation Act, 1992<sup>6</sup>. The imports were made without making a true declaration and hence they have also become liable to confiscation under section 111(d). Regarding the redemption of the goods, he submits that while the goods were liable to confiscation under Section 111, no redemption fine were imposed by the Commissioner for the reason that they were no longer available and had already been cleared and disposed of by the appellants. He, therefore, asserts that the impugned order needs to be upheld except to the extent to non imposition of penalty on the appellants under Section 112 of the Customs Act.

24. He further points out that none of the statements made have ever been retracted by the persons who made them.

25. We have considered the arguments of both the sides and have perused the records.

26. The question to be answered by us are as follows:
- (a) When the goods were imported in the name of M/s Samay International as the importer can, K R Express Pvt Ltd., Shri Joginder Kumar, Shri Surinder Kumar and Shri Pradeep Kumar be held to be the importers when all the documents were filed in the name of M/s Samay International?
  - (b) When the duty was originally assessed in the bills of entry and paid in the name of M/s Samay International can the differential duty under section 28 be demanded from different persons?
  - (c) As per the law applicable during the relevant period can the term 'importer' be expanded to include persons who are the beneficial owners of the import?
  - (d) If the goods are confiscated under section 111(d) and 111(m) and no redemption has been allowed and also no redemption fine has been imposed, will the duty liability be on the Government of India in whom the goods vest or will it pass on to Shri Pradeep Kumar, Shri Joginder Kumar, Shri Surinder Kumar and K R Express?

- (e) Is imposition of penalties on Shri Joginder Kumar, Shri Surinder Kumar, Shri Pradeep Kumar and K R Express sustainable?
- (f) Is the Commissioner correct in refraining from imposition penalties under section 112 of the Customs Act on Shri Joginder Kumar and Shri Surinder Kumar?

27. The term 'importer' has been defined under section 2(26) and as applicable during the period is as follows:

"importer", in relation to any goods at any time between their importation and the time when they are declared for home consumption, includes any owner or any person holding himself out to be the importer."

28. In 2017, for the words 'any owner' the words 'any owner, beneficial owner' were substituted. Therefore, from 2017 the concept of 'beneficial owner' was introduced in the Customs Act. The terms 'beneficial owner' is defined as follows.

**Section 2(3A)** 'beneficial owner' means any person on whose behalf the goods are being imported or exported or who exercises effective control over the goods being imported or exported;

29. During the relevant period there was no concept of beneficial owner as there was only one importer in respect to the goods. Admittedly in this case, the bill of entry was filed with M/s Samay International as the importer. The bills of

lading, IGM etc., were in the name of M/s Samay International and the duty was assessed in the name of M/s Samay International and it was paid in the name of M/s Samay International. However, subsequent statements of Shri Pradeep Kumar, Shri Surinder Kumar, Shri Joginder Kumar and the owner of M/s Samay International show that duty was paid in cash by Shri Pradeep Kumar to K R Express who deposited it through TR-6 challans in the name of M/s Samay International. Shri Anil Kumar the proprietor of M/s Samay International claimed that he had no knowledge of the imports. Shri Pradeep Kumar confessed to being the importer of the goods. Shri Surinder Kumar and Shri Joginder Kumar have admitted that they had not met the owner of M/s Samay International Shri Anil Kumar and had collected all the KYC documents from Shri Pradeep Kumar and had even received the duty amount in cash from Shri Pradeep Kumar and deposited the same through TR-6 challans in the name of M/s Samay International.

30. In one of the statements, Shri Pradeep Kumar said that Shri Joginder Kumar and Shri Surinder Kumar and K R Express were equal partners. We do not find that either Shri Surinder Kumar or Shri Joginder Kumar or K R Express have held themselves to being the 'importers'. Shri Anil Kumar, the IEC holder, has consistently maintained that he had nothing to do with the imports. Thus, in this case, according to all the documents such as Bill of Entry, Bill of Lading, invoice, IGM, the importer is M/s Samay International. According to

statement of Shri Pradeep Kumar, he was the importer. Further, according to another statement of Shri Pradeep Kumar, Shri Joginder Kumar and Shri Surinder Kumar are also the importers being equal beneficiaries in the imports. According to the statements of Shri Joginder Kumar and Shri Surinder Kumar they obtained the KYC documents of M/s Samay International, the importer, through Shri Pradeep Kumar. According to the proprietor of M/s Samay International, Shri Anil Kumar, he never imported the goods in dispute. The question is whether the documents should be trusted based on which M/s Samay International is the importer or the statements should be trusted according to which Shri Pradeep Kumar and/ or K R Express, Shri Joginder Kumar and Shri Surinder Kumar are the importers. Section 138B of the Customs Act explains the circumstances under which the statements made before the customs officer are relevant. It reads as follows:

**"Section 138B in the Customs Act, 1962**

138B. Relevancy of statements under certain circumstances.—

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the



circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.”

31. In this case, the Commissioner has not followed the above process and hence the statements are not relevant, let alone admissible in this case. This becomes even more important in this case because of the contradictions between the statements of Shri Pradeep Kumar on the one hand and Shri Joginder Kumar and Shri Surinder Kumar on the other. Since the statements are not relevant, the importer is the one which all the documents state to be the importer viz, M/s Samay International.

32. As far as the demand of differential duty is concerned, it can be recovered if duty is not levied, short levied or erroneously refunded, from the person chargeable to duty. In this case the goods were in the name of M/s Samay International which is the importer according to all the documents. Therefore, differential duty, if any, can be demanded from it only. The duty was originally also paid in the name of M/s Samay International.

33. It is evident from the order that the goods have been confiscated under Section 111 (d) and section 111(m) by the Commissioner but since the goods were not available fine in view of confiscation was not imposed. We note that a fine in lieu of confiscation can be imposed under section 125 of the Customs Act which reads as follows:

“ 125. Option to pay fine in lieu of confiscation.—

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit: Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

Where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.”

34. As can be seen, redemption can only be given to the owner of the goods or the person from whom the goods are

seized. It may be given in some cases it may not be given in some cases. If the option is given, the person may exercise the option or not exercise the option. If option of redemption is not given or if the owner chooses not to redeem the goods in terms of Section 126 such goods shall vest in the Central Government. It reads as follows:

“ 126. On confiscation, property to vest in Central Government.—

(1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government.

(2) The officer adjudging confiscation shall take and hold possession of the confiscated goods.”

35. It is responsibility of the adjudicating officer to take and hold possession of the confiscated goods. This takes us to the next question about the dutibility of the goods. Section 12 of the Customs Act reads as follows:

12. Dutiable goods.—

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.”

36. As may be seen duties of customs are charged on the goods imported into or exported to India and this charge will apply to all goods belonging to Government as they apply to all goods not belonging to Government. This applies not only where goods were imported by the Government but also to cases where title of the goods gets transferred to the Government for any reason. For instance, where the goods are confiscated under the Customs Act and are not redeemed, the goods vest in the Central Government and duty liability on such goods flows along with it. The officer who is ordering confiscation is responsible to take possession of the confiscated goods. It is a matter of practice when the goods which were confiscated are subsequently auctioned or sold by the Government the sale proceeds of such goods are taken as cum-duty price and the amount of duty is calculated backwards and to that extent it is credited to the consolidated fund of India as customs duties and the rest as sale proceeds of the goods.

37. Similarly, if the goods are not cleared within thirty days of unloading or if the title to any goods is relinquished by the importer, in terms of section 48, the custodian of the goods can, with the permission of the proper officer, sell the goods. In such a case the buyer of the goods will have to pay the duty of such goods as per section 150. If the goods are confiscated and are allowed to be redeemed, the person redeeming the

goods will have to pay the duty, if any, leviable on the goods in terms of section 125(2). Thus, in all cases the liability of the duty flows with the goods. If the goods are confiscated and are not redeemed there is no duty liability on the owner of the goods. In this case, since the goods have been confiscated and no redemption was allowed, the duty liability cannot pass on to anyone but to the Government of India in whom the property vests. For this reason, no differential duty can be chargeable on the goods confiscated without allowing any redemption.

38. We find that the differential duty has been demanded in this case from the customs broker, KR Express and Shri Pradeep Kumar along with interest. We find it impermissible to charge duty from 2 or 3 persons without first identifying as to who the importer is. As per the documents, M/s Samay International is the importer. The statements made before the officer by various persons have not been subjected to Section 138 B and hence are not relevant.

39. So far as the redemption of the value itself is concerned, we find that in respect of three bills of entry listed at serial no 1 to 3 of Annexure A to the show cause notice, the values were enhanced on a statements by Shri Pradeep Kumar that the actual values of the goods was three to four times the declared value. Hence, the declared value was multiplied by 3.5 times.

We do not find any provision in the Valuation Rules which permit enhancement values based on a statement and taking the averages. Similarly, in respect of Bill of Entry at serial no. 4 to 7 of Annexure A to the show cause notice the transaction values were multiplied by two which is again based on a statement of Shri Pradeep Kumar which also has no place in Valuation Rules. It is true that if there is a reason to doubt the transaction values, they can be rejected and then valuation has to be done sequentially as per the Valuation Rules. In this case rule 9 of the Valuation Rules has been adopted ignoring the previous rules and without discussing the as to why the previous rules are not applicable. Further, the statements of Shri Pradeep Kumar, based on which the value was re-determined, is not relevant as the procedure under Section 138 B was not followed.

40. In so far as the 11 bills of entry mentioned in Annexure B to show cause notice are concerned, the declared prices were enhanced on the basis of lowest of the contemporaneous prices declared of similar goods imported during the relevant period as mentioned in Tables A, B, C and D or paragraph X of paragraph 13 of the show cause notice. Learned consultant for the appellants produced before us bills of entry for the same periods filed by certain other importers claiming that there were other lower prices of importer at that time. Therefore, we are not satisfied that the values indicated in the show cause

notice were lowest values of the similar goods imported at that time. We also find that NIDB data was equally available to the assessing officers at that time. The goods, having been assessed and cleared during the period by the assessing officer, we do not find sufficient reason to enhance the value as per impugned order. At any rate, since we have found that the importer, as per the documents was M/s Samay International and the statements before officer to the contrary were not relevant in view of section 138 B, the demand of duty under section 28, if any, has to be made on the importer. The importer is not a noticee in this case.

41. For these reasons we find that enhancement of value and determination of duty is not sustainable. Consequently the penalties imposed upon the appellants are also not sustainable. To sum-up we answer the questions raised in paragraph 26 above as follows:

- (a) As per all the relevant documents, M/s Samay International is the importer and the statements contradicting this are not relevant in view of section 138B.
- (b) Differential duty can only be demanded from the importer and not from others.
- (c) The term "beneficial owner" has been defined in the Customs Act and the term "importer" was enlarged to include "beneficial owner" only from 2017 and not during the relevant period.
- (d) If the goods are confiscated and are either not allowed to be redeemed or are not redeemed despite an offer, the goods vest in the Central Government

and the duty liability similarly vests in the Central Government. However, in this case, we find that even the confiscation itself is not sustainable as the allegation of under-valuation itself is not sustainable.

- (e) The penalties imposed on all are not sustainable and need to be set aside.
- (f) The Commissioner is correct in refraining from imposition of penalties under section 112 of the Customs Act on Shri Joginder Kumar and Shri Surinder Kumar.

42. Accordingly the appeals are disposed of as follows :

- (a) Customs Appeal No. 51192 of 2019 filed by the Revenue and Customs Appeal No. 51193 of 2019 filed by the Revenue are dismissed and the impugned order to the extent it has been assailed by the Department is upheld.
- (b) Customs Appeal No. 51309 of 2019 filed by Shri Joginder Kumar and Customs Appeal No. 51310 of 2019 filed by Shri Surinder Kumar and Customs Appeal No. 52152 of 2019 filed by M/s K R Express and Customs Appeal No. 52153 of 2019 filed by Shri Pradeep Kumar are allowed with consequential relief, if any, to the appellants. The impugned order to the extent it has been assailed by the appellants is set aside.

[Order pronounced on **01.09.2022**]

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(P V SUBBA RAO)**  
**MEMBER (TECHNICAL)**