

	अपर आयुक्त का कार्यालय, सीमा शुल्क Office of the Additional Commissioner of Customs आई.सी.डी. - तुम्ब Inland Container Depot (ICD) - Tumb सर्वे.न.: ४४/१/पी.के.२, गाँव - तुम्ब, तालुका-उमरगाँव, जिला - वलसाड, गुजरातः -३९६१५० (S. No. 44/1/P.K. 2, Village-Tumb, Tal.: Umbergaon, Dist.: Valsad, Gujarat-396150) e-mail: cusicd-tumb@gov.in
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Date: 07.02.2025

F. No.	:	CUS/SHED/MISC/274/2025-ICD-UMGN-CUS-COMMRTE-AHMEDABAD
Name and Address of the Importer/ Noticee	:	<ol style="list-style-type: none"> 1. M/s Momentum Solutions Pvt. Ltd., Gala 7, F Wing, Zakarta Industrial Estate, Marol, Maroshi Road, Andheri East, Mumbai 400059. 2. Shri Vishal H. Khanna, Director of M/s Momentum Solutions Pvt. Ltd, Gala 7, F Wing, Zakarta Industrial Estate, Marol, Maroshi Road, Andheri East, Mumbai 400059.
Order – in – Original No.	:	08/AR/ADC/TUMB/2024-25
CESTAT Order	:	Final Order No. 10872-10873/2024 dated 15.04.2024
DIN	:	20250271MN000000E921
Passed by	:	ARUN RICHARD Commissioner in situ
Date of Order	:	07.02.2025
Date of Issue	:	07.02.2025

(1) जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके /उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

(1) This copy is granted free of charge for the use of the person, to whom it is issued.

(2) इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरुद्ध अपील, इसकी प्रति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), सीमाशुल्क, चौथा तल, हुड़को भवन, स्टेडियम के पास, आश्रम रोड, नवरांगपुरा, अहमदाबाद, **380009** में दाखिल कर सकता है।

(2) Any person deeming himself aggrieved by this order may appeal against the order to the Commissioner of Customs (Appeal), 4th Floor, HUDCO Bhawan, Near Stadium, Navarangpura, Ahmedabad – 380 009 within sixty (60) days from the date of receipt of the order.

(3) इस अपील पर रु. 2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

1. उक्त अपील की प्रति।

2. निर्णय की प्रतियाँ अथवा जिस आदेश के विरुद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिस पर रु. 2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

(3) The appeal should bear a Court fee stamp of Rupees Two only (Rs. 2.00/), and it must be accompanied by:

i. A copy of the appeal and

ii. This copy or any copy of this order will must bear a Court fee Stamp of Rupees Two only (Rs. 2.00/-).

(4) इस आदेश के विरुद्ध आयुक्त (अपील), सीमाशुल्क, में शुल्क के 7.5% जहां शुल्क अथवा शुल्क एवं जुरमाना का विवाद है अथवा जुरमाना जहां शीर्फ जुरमाना के बामे विवाद है उसका भुकतान करके अपील की जा शकती है। ऐसा न करने पर ये अपील सीमाशुल्क अधिनियम, 1962 की धारा 129 के प्रावधारों के तहत अस्वीकार कर दिया जा सकता है।

(5) An appeal against this order shall lie before the Commissioner of Customs (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" and failing which, the appeal is liable to be rejected for non-compliance of the provisions of Section 129 of the Customs Act, 1962.

Brief facts of the Case

M/s Momentum Solutions Pvt. Ltd., Gala 7, F Wing, Zakarta Industrial Estate, Marol, Maroshi Road, Andheri East, Mumbai 400059 (hereinafter referred to as the noticee/importer) having Import Export Code 0312070730 filed a bill of entry No. 4649801 dated 02.01.2018 declaring the following goods:

- i.** Small Fidget Spinner Blue Complan 2017-01 (Toy) B.C. No. ACT170001 T.R. No. MUM-76319/2017-18 dated 28.11.2017 120000 units (Unit price - 0.11 USD).
- ii.** Small Fidget Spinner White Complan -2017-04 (Toy) B.C. No. ACT170004 T.R. No. MUM-76319/2017-18 dated 28.11.2017 60000 units (Unit price -0.11 USD).
- iii.** Small Fidget Spinner Yellow Complan -2017-04 (Toy) B.C. No. ACT170003 T.R. No. MUM-76319/2017-18 dated 28.11.2017 60000 units (Unit price - 0.11 USD).

2. The aforesaid goods are of China origin and falls under CTH 95030090. The said BOE was marked as "first check". The goods covered under bill of entry No. 4649801 dated 02.01.2018 were examined by the Inspector of Customs in the presence of Deputy Commissioner and Superintendent and authorised representative of the Customs House Agent i.e. M/s Polar Shipping Services and authorized representative of the importer. The aforesaid goods were stuffed in Container No. FCIU4898412.

3. During examination of the imported goods lying in the above-mentioned container, the batch and colour of the goods were found as under:

- i.** Fidget Green Colour B.C. No. ACT170002-80400 units.
- ii.** Fidget Yellow Colour B.C. No. ACT170003 - 158100 units.
- iii.** Fidget Green/Yellow Colour B.C. No. ACT170004 - 1500 units.

3.1. Whereas the batch and colour of the goods declared under the BOE was as mentioned in para-1 above, hence, it appears that there is difference of Batch/colour noticed physically during examination of goods which was declared in the BOE.

3.2. On perusal of the BOE and test certificate of the test laboratory M/s. Testtex India Laboratory Pvt. Ltd., it was found that in the test report, the batch no is mentioned as B.C. No. ACT170001, B.C. No. ACT170004 and B.C. No. ACT170003 whereas on physical examination of the goods, the batch no. was mentioned as C. No. ACT170002, B.C. No. ACT170003 and B.C. No. ACT170004 which is required in terms of Noti. No DGFT Noti. No. 26/2017 dated

1.9.2017. Hence, there is difference between the details of batch no. and qty. of particular batch mentioned in the BOE from the batch no. and qty. found physically.

3.3. It also appears that, on examination of the imported goods i.e. Fidget Spinners, it was seen that the fidget spinners imported by M/s Momentum is a normal spinner quite similar to the spinners of good quality generally available in the market and having dimension, material, pattern, design, colour etc. similar to any other good quality locally traded/available in open market. The spinner had a very small sticker in its centre part on which word "complan" was written but the sticker was easily removable. The Fidget spinner did not have any embossment/mark/logo/symbol in the name of "complan" which could make the word "complan" an integral part of the spinner. Thus, apart from the small sticker (which is also easily removable), the fidget spinner did not have anything due to which it can be attributed/associated to Complan and considered just a promotional free gift. It appears that stickers of "Complan" were affixed on the spinners in such a way is just an eyewash so as to evade the genuine value of the imported goods and as such it appears that there is an attempt for undervaluing of the imported goods under the guise of labelling the stickers of "Complan".

3.4. It was noticed that the importer has not submitted the BIS certificate which is required for import of toys in terms of DGFT Noti. No. 26/2017 dated 1.9.2017. Thus, the spinners imported are under the restricted category.

4. In view of the above, it appeared that the goods appeared mis-declared and of restricted nature and appeared being improper import, the goods were placed under seizure through Panchnama and handed over to the Custodian (ICD Tumb) under Supratnama dated 04.01.2018, on the reasonable belief that the same appeared mis-declared/undeclared goods liable to be confiscated under Section 111 (m) of Customs Act, 1962, which reads as under:

"Section 111[(m) - Any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 [in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the provise to sub-section (1) of Section 54]"

5. A statement of Shri Vishal H. Khanna, Director of M/s Momentum Solutions Pvt. Ltd. was recorded under Section 108 of Customs Act, 1962 before the Superintendent of Customs, ICD Tumb on 08.01.2018 wherein he, interalia, while accepting the mistake of mismatch of the imported goods with regard to import documents stated that this may be treated as his Bonafide mistake as the same had occurred due to erroneous supply and mistake on the part of their suppliers packing department and that they would provide a

clarification letter with regard to the same.

6. The importer agreed in his statement to pay the duty, fine and penalty, if any is involved with the goods of subject Bill of Entry. The importer also requested for provisional release of the seized goods at the earliest possible. The importer submitted the following documents through their official email:
 - i. Letter from Supplier stating reason of "Mismatching colour packing list."
 - ii. Corrected Packing list from Supplier.
 - iii. Correct Test Report incorporating 'Correct Batch Nos. upon rectifying Typographical Bona fide Mistakes.
 - iv. Sales Contract Agreement between MSPL & Craft Heinz.
 - v. Letter of authorization from Craft Heinz .in favour of MAPL.
 - vi. Swift Copy as "Statement of Remittance of Foreign Exchange to Overseas Supplier".
7. Whereas, as per letter No. VAL/TECH/21/2017 (Toys) dated 17.08.2017 of DG of Valuation, CBEC, Mumbai the valuation trend of "Toy hand spinner/top spinner" in Indian market (as per amazon) is Rs. 135 min. to up to Rs. 20000. The Customs Officers also gone through the sale price of the product declared by the importer on many major online sites and it appeared that the said goods are priced at considerably higher price than that has been declared by the importer. The Customs Officers also verified sale price of similar goods in bulk quantity from Indian manufacturers, which is also at around Rs. 50. Quotes from online site www.alibaba.com for supply of similar goods i.e. "2017 Newest promotional gifts fidget spinner toys for kids" for a quantity of more than 11111 pieces were obtained, which comes to USD 0.36. The Appraising Officer accordingly, inclined to accept this value as the most appropriate value of the imported goods in this case looking at the quality of the fidget spinners. Duty computation on the basis of this value obtained from [alibaba.com](http://www.alibaba.com) for the goods imported under Bill of Entry is as under:

Value of 2,40,000 pieces = 0.36*240000*64.9 Rs.
56,07,360/-

Value after Abatement of 43% = Rs. 3196195

Customs Duty @10% = Rs. 319620

Ed. Cess = Rs. 6392

S&H Ed Cess = Rs. 3196

IGST = Rs. 712388

Total Duty Payable = Rs. 10,41,596/-

8. Whereas, the value of the seized goods in this case as per the Appraising Officer is Rs 56,07,360/-, the said goods were ordered to be released provisionally by the Additional Commissioner, Customs in-charge Surat, on execution of Bond of an amount of Rs 56,07,360/- and on furnishing a Bank Guarantee/Cash Security of Rs. 18,82,700/- and on payment of appropriate duty. Accordingly, the said importer has produced required Bond for Rs.56,07,360/- along with Bank Guarantee no. 316201GL0000618 dated 17.01.2018 for Rs.18,82,700/- on 19.01.2018 and goods were provisionally released on 19.01.2018.
9. M/s Momentum Solutions Pvt. Ltd., vide their letter dated 11.05.2018, have submitted their written submission and requested for waiver the requirement of issue of Show Cause Notice and requested for granting them a 'personal hearing.

The importer submitted that there were three grounds of seizure i.e. (i) non-compliance of goods with DGFT Not. No. 26/2017(2015- 2020) dated 01.09.2017 as the batch numbers were not matching with physical goods, (ii) not matching of quantity vis-à-vis each colour of the goods, and (iii) undervaluation of goods. The importer submitted that amended test report (typographical mistake) from the Testing Laboratory and amended packing list (typographical mistake from the overseas supplier) have removed the first two grounds of seizure and hence only the third ground of seizure is required to be examined.

With regard to mis-declaration of unit price (under valuation), the importer has submitted that the goods were not meant for retail sale and the same were manufactured with 'Customized format' and bearing logo 'complan' and hence occurrence of identical goods anywhere in the Indian market in retail shopping or on online portals is impossible. They however claimed that 'similar goods' available in Indian Market, if any, can be compared considering the following mandatory parameters:

- i. Previous ports of similar items happened within 90 days,
- ii. Dimensions must be comparable.
- iii. Composition Material must be comparable.
- iv. Country origin must be comparable.
- v. Quantity of import or trade must be comparable.

The importer also stated that market enquiry should be the last resort for valuation as per Customs Valuation (Import) Rules and has drawn attention to the fact that the goods imported by them are in large number i.e. 10,00,000 Pcs and hence market enquiry should be done only in major metro cities only where such bulk trading takes place. The importer has also submitted to accept transaction value. The importer on the basis of their own ascertainment of market value of similar products and after

excluding Basic Customs duty. whole seller's profit and overhead charges has submitted that highest possible Assessable value can be Rs. 8.748 only and thus requested to accept their transaction value.

On the abovementioned grounds, the importer has requested for waiver issue of Show Cause Notice and requested for personal hearing.

10. Whereas for arriving at appropriate value of the subject goods in terms of Section 14 of the Customs Act, 1962, investigations were carried out by the Customs Officers by referring to the bank of the importer to verify details of the payments made by the importer to their overseas supplier, also reference was made with the intended purchaser i.e. M/s Kraft Heinz to verify the intended purpose of the import; references were also made to the manufacturers of similar goods to ascertain market value of similar goods; in addition online survey with respect to value of similar goods was also done. It was noted that the goods imported by M/s Momentum weighed 55gms and had aluminum base and proper ball bearings whereas the goods available in the open market are of various nature such as only of plastic items, lighter or heavier items. Details of investigation are as under:
 - i. From the copy of Purchase Order No. 2700015992 dated 01.09.2017 issued by M/s Heinz India Pvt. Ltd. to the importer revealed the intention purchase of 10,00,000 fidget spinner to be supplied as a free gift with pack of Complan. Though, the importer has not submitted any contract/agreement entered by them with M/s Heinz. however, from an e-mail of the intended purchaser i.e. M/s Heinz from email ID- arun.sharma@kraftheinz.comit revealed that the purchase order submitted by the importer is genuine.
 - ii. Price quotes received from M/s Brandstik showing price of similar goods of similar specification and weight for 1 million pcs @Rs. 11.48 per unit with GST extra@12%.

However, it appears that none of the above value is appropriate in terms of Section 14 of the Customs Act, 1962. Therefore, it appears that it shall be appropriate to take resort of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for determining appropriate value of the subject goods.

10.1. Whereas Rule 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 reads as under-

"Rule 5. Transaction value of similar goods - (1) Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of similar goods sold for export to India and imported at or about the same time as the goods being valued.

Provided that such transaction value shall not be the value of the

goods provisionally assessed under section 18 of the Customs Act, 1962.

(2) The provisions of clauses (b) and (c) of sub-rule (1), sub-rule (2) and sub-rule (3), of rule 4 shall, mutatis mutandis, also apply in respect of similar good".

Further, Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 reads as under-

"RULE 4. Transaction value of identical goods. (1) (a) Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued:

Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

(b) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods.

(c) Where no sale referred to in clause (b) of sub-rule (1), is found, the transaction value of identical goods sold at a different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustment leads to an increase or decrease in the value.

(2) where the costs and charges referred to in sub-rule (2) of rule 10 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.

(3) In applying this rule, if more than one transaction value of identical goods is found, lowest such value shall be used to determine the value of imported goods".

10.2. Whereas, in view of the above provisions, the contemporaneous prices of similar goods, imported by different importers may be relied upon. Most appropriate data for contemporaneous price of goods are the data available in NIDB, however, no data were found available in NIDB corresponding to the similar/same/identical goods to the goods under dispute in this

case. Therefore, for ascertaining the comparative value, online survey was conducted as per letter No. VAL/TECH/21/2017(Toys) dated 17.08.2017 of DG of Valuation, CBEC, Mumbai received through letter No. VIII/48-01/PI/HQ/2015 dtd 29.08.2017 of the Pr. Commissioner of Customs, Ahmedabad. Quotes from online site www.alibaba.com for supply of similar goods i.e. "2017 Newest promotional gifts fidget spinner toys for kids for a quantity of more than 11111 pieces were obtained, which comes to USD 0.36 (Rs 23.36). Therefore, the most appropriate value of the imported goods in this case appears to be @ Rs. 23.36 per unit. In view of this, it appears that the value obtained online in terms of letter No. VAL/TECH/21/2017(Toys) dated 17.08.2017 of DG of Valuation, CBEC, comes to Rs. 23.36 Per piece.

10.3. Therefore, it appeared that M/s Momentum Solutions Pvt. Ltd had imported the goods i.e. Fidget Spinners, from their overseas supplier by suppressing the actual transaction value with an intent to evade Customs Duty and Thus, the value declared by the aforesaid firm before the Customs Authorities as mentioned in the import documents did not appear to reflect the correct transaction value in terms of the provisions of Section 14 of the Customs Act, 1962 read with Customs Valuation (Determination of value of the imported goods) Rules, 2007 and the same is liable for rejection in terms of Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 ibid.

10.4. After the rejection of the declared value, the assessable value for the consignments needs to be re-determined by taking recourse to provisions of Section 14 of the Customs Act, 1962 read with Rule 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 Accordingly, the assessable value of the goods appears re-determinable to USD 0.36 (Rs. 23.36) per piece as mentioned above. Therefore, it appeared that the total value of the subject consignment comes to Rs. 56,07,360/- as mentioned above involving Customs duty of Rs. 10,41,596/-, being inclusive of basic Customs Duty of Rs. 3,29,208/- (including Cess) as levied under Section 12 of Customs Act, 1962 and IGST of Rs. 7,12,388/- as levied under Section 5 of IGST Act, 2017 read with Section 12 of Customs Act, 1962'.

11. Whereas, it appears that by adopting modus operandi of under valuation, the said importer attempted to clear the subject consignment. It appears that they deliberately suppressed the same from the Customs Authorities and thereby appears to have contravened the provisions of Section 46 (4) of the Customs Act, 1962 read with Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 and Rule 11 & 14 of the Foreign Trade (Regulation) Rules, 1993, in as much as they appeared to have intentionally mis declared the value of the goods imported by suppressing the correct and true value of the goods while filing the declaration seeking clearance at the time of the importation of the goods. The appeared mis-declaration of true and correct value by mis-statement and suppression of facts by the above said importing firm is in

contravention of the provisions of the Customs Act, 1962 and Rules made there under as discussed herein above, with an intent to evade payment of the Customs duty of Rs. 10,41,596/- . Thus, the importer appears to have mis declared the correct value of the subject good by resort to under valuation thereby contravening the provisions of Section 14 of the Customs Act, 1962 read with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 while filing the declaration in Bill of Entry at the time of seeking clearance and at the time of the importation of goods. Further, the self-assessment of duty has been completed as per the entry of electronic declaration in the Indian Customs Electronic Data Interchange System and accordingly Bill of Entry No. 4649801 was generated on 02.01.2018. The appeared mis- declaration of the value of the goods by wilful mis-statement and suppression of facts by the above said importer is in contravention of the provisions of the Customs Act, 1962 and Rules made there under, with an intent to evade payment of Customs duty amounting to Rs. 10,41,596/- (on the basis of re-determined value).

12. Therefore, it appears, the import of the subject restricted goods by the importer, by resorting to undervaluation before the designated customs authority, appears to fall under the category of "illegal Imports" as per Section 11A (a) of the Customs Act, 1962 and the said act on their part constitutes "smuggling" as defined in Section 2(39) of the Customs Act, 1962. Further, all these acts on the part of the subject Importer appears to have rendered the subject goods viz. Fidget Spinners (2,40,000 pieces), valued at Rs. 56,07,360/- (re-determined value), liable to confiscation under the provisions of Section 111(d) and Section 111(m) of the Customs Act, 1962 read with the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, however the goods are not physically available for confiscation, fine in lieu of the confiscation is liable to be imposed under Section 125 of the Custoins Act, 1962. It appears that the importing firm had deliberately mis-declared the actual value of the goods Imported by willful mis-statement and suppression of facts, in contravention to the various provisions of the Customs Act and Rules made there under as discussed above with an intent to evade payment of Customs duty of Rs. 10,41,596/- . Therefore, the Customs duty amounting to Rs. 10,41,596/- as detailed above, being inclusive of basic Customs Duty of Rs.3,29,208/- (including Cess) as levied under Section 12 of Customs Act, 1962 and IGST of Rs. 7,12,388/- as levied under Section 5 of IGST Act, 2017 read with Section 12 of Customs Act, 1962, appears liable to be recovered from M/s Momentum Solutions Pvt. Ltd. under Section 28(4) of the Customs Act 1962 along with applicable interest under Section 28AA of the Customs Act 1962. Further, the contravention of above-mentioned provisions of Customs Act, 1962, on the part of M/s Momentum Solutions Pvt. Ltd., appears to constitute an offence of the nature as described under Section 112(a) & 114A of the Customs Act, 1962 and hence appears rendered themselves liable to penal action under the said Sections of the Act ibid.

13. Further, Shri Vishal H. Khanna, Director of M/s Momentum Solutions Pvt. Ltd., Mumbai was looking after the day-to-day work of the unit including Customs related affairs, appeared to be the person who had masterminded the entire modus of under valuation of the said goods

imported by them and appeared to be actively involved in evading the actual Customs duty payable thereon. It appeared he managed such transaction by opting mis-declaration. Shri Vishal H. Khanna appeared to have knowingly and deliberately indulged in mis-declaration of value of the imported goods i.e. Fidget Spinners, thereby contravened the provisions of Section 46(4) of the Customs Act, 1962 in as much as they have failed to declare as to the truth of the contents while presenting Bills of Entry before the proper officer of Customs, read with Section 14 of Customs Act, 1962 and Customs Valuation (Determination of the Value of the Imported Goods) Rules, 2007. He appeared to have been personally instrumental in manipulating and furnishing incorrect information with regard to description and value of the said goods imported by their firm and mis-declaring the same in the Bills of Entry filed by them ICD Customs, Tumb. Shri Vishal H. Khanna, Director of M/s Momentum Solutions Pvt. Ltd., Mumbai has, therefore, appears to have suppressed the true value of the goods, from the department, with malafide intention to evade payment of the Customs duty amounting to Rs. 10,41,596/- All these acts on the part of Shri Vishal H. Khanna appears to constitute an offence for the violations of Rule 11 & 14 of the Foreign Trade (Regulation) Rules, 1993 and Section 46(4) of the Customs Act, 1962 and tantamount to smuggling within the meaning of Section 2(39) of the Customs Act, 1962. He, therefore, appears knowingly indulged himself in the act of receiving, removing, depositing, keeping, concealing, selling or purchasing or in any other manner dealing with the abovementioned goods for which he knew or had reasons to believe that the same were liable to confiscation under Section 111 of the Customs Act, 1962 and thereby appears to have rendered himself liable for penal action under Section 112(a) and 112(b) of the Customs Act, 1962.

14. Accordingly, a Show Cause Notice F.No. VIII/10-04/ICD-Tumb/O&A/2018 dated 26.12.2019 was issued to M/s Momentum Solutions Pvt. Ltd., Gala 7, F Wing, Zakarta Industrial Estate, Marol, Maroshi Road, Andheri East, Mumbai 400059 requiring them to show cause to the Joint Commissioner of Customs, Surat having his office situated at 2nd Floor, Urmil Complex, B/h Centre Point, Ring Road, Sangrampura, Surat, as to why:

i. the transaction value of Rs.17,13,360/- (Rs. Seventeen Lakh Thirteen Thousand Three Hundreds & Sixty Only) declared by them in respect of imported goods viz. Fidget Spinners, should not be rejected under Rule 12 of Customs Valuation Rules 2007 and re-determined & the said goods be assessed at Rs. 56,07,360/- (Rs. Fifty-Six Lakh Seven Thousand Three Hundreds & Sixty only) as mentioned above, under Section 14 of the Customs Act, 1962 read with Rule 5 of Customs Valuation (Determination of prices of the imported goods) Rules, 2007.

ii. total Customs duty amounting to Rs. 10,41,596/- (Rs Ten Lakh Forty-One Thousand Five Hundreds & Ninety-Six Only), (being inclusive of Basic Customs Duty of Rs.3,29,208/- (including Cess) as levied under Section 12 of Customs Act, 1962 and IGST of Rs 7,12,388/- as levied under Section 5 of IGST Act, 2017 read with

Section 12 of Customs Act, 1962), should not be demanded and recovered from them under Section 28(4) of Customs Act, 1962. However, as the importer has paid Customs duty amounting to Rs 3,18,266/- vide Challan No. 2021258113 dated 02.01.2018, the same should not be appropriated against the outstanding Customs duty amount of Rs. 10,41,596/-.

iii. the interest at applicable rates on the above customs duty mentioned at (ii) above, should not be recovered from them under Section 28AA of Customs Act, 1962,

iv. the goods under reference viz. Fidget Spinners (2,40,000 pieces), valued at Rs. 56,07,360/-, should not be held liable to confiscation under Section 111(d) and Section 111(m) of the Customs Act, 1962; However, since the said goods have been released provisionally on execution of Bond and Bank Guarantee and are not physically available for confiscation, why fine in lieu of confiscation should not be imposed on them under Section 125 of the Customs Act, 1962.

v. the penalty should not be imposed on them for contraventions stated above under provisions of Section 112 (a) and Section 114A of the Customs Act, 1962, separately.

14.1. Accordingly, a Show Cause Notice F.No. VIII/10-04/ICD-Tumb/O&A/2018 dated 26.12.2019 was also issued to Shri Vishal H. Khanna, Director of M/s Momentum Solutions Pvt. Ltd., Gala 7, F Wing, Zakaria Industrial Estate, Marol, Maroshi Road, Andheri East, Mumbai 400059 requiring him to show cause to the Joint Commissioner of Customs, Ahmedabad having his office situated at 2nd Floor, Urmil Complex, B/h Centre Point, Ring Road, Sangrampura, Surat, as to why:

i. the penalty should not be imposed upon him in terms of Section 112 (a) and 112(b) of the Customs Act, 1962.

RECORD OF PERSONAL HEARING AND WRITTEN SUBMISSION OF THE NOTICEE

15. The Noticees have submitted written submissions on 26.02.2020, and 01.08.2024.

i. Submission dated 26.02.2020:

“We, M/s Momentum Solutions Pvt Ltd, the importer (for brevity - hereinafter be called as MSPL), received the referred Show Cause Notice (for brevity - hereinafter be called as SCN) along with ‘Relied Upon Documents’ (for brevity - hereinafter be called as RUD) as listed in {Appendix-A} on 26th December, 2019.

2. Vide referred SCN, we, M/s Momentum Solutions Pvt Ltd, the importer bearer of IEC No. 0312070730, having our registered office located at: Gala 7, F Wing, Zakaria Industrial Estate, Marol-Maroshi Road, Andheri (East), Mumbai - 400059, were called upon to show cause to the Additional/Joint Commissioner of Customs, 2nd Floor, Urmi Complex, Behind Centre Point,

Ring Road, Sangrampura, Surat – 395002, as to why:

- i. The transaction value of Rs. 17,13,360/- (Rs. Seventeen Lakh Thirteen Thousand Three Hundreds & Sixty Only) declared by them (MSPL) in respect of imported goods viz. Fidget Spinners, should not be rejected under Rule 12 of Customs Valuation Rules, 2007 and be re-determined & the said goods be assessed at Rs. 56,07,360/- (Rs. Fifty-Six Lakh Seven Thousand Three Hundreds & Sixty Only) as mentioned above, under Section 14 of the Customs Act, 1962 read with Rule 5 Customs Valuation (Determination of Prices of the Imported Goods) Rules, 2007;*
- ii. Total Customs duty amounting Rs. 10,41,596/- (Rs. Ten Lakh Forty-One Thousand Five Hundreds & Ninety-Six Only), {being inclusive of Basic Customs Duty Rs. 3,29,208/- (including Cess) as levied under Section 12 of the Customs Act, 1962 and IGST of Rs. 7,12,388/- as levied under Section 5 of IGST Act, 2017 read with Section 12 of the Customs Act, 1962 should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962. However, as the importer has paid Customs duty amounting Rs. 3,18,266/- vide Challan No. 2021258113 dated 02.01.2018, the same should not be appropriated against the outstanding Customs duty amount Rs. 10,41,596/-;*
- iii. The interest at applicable rates on the above customs duty mentioned at (ii) above, should not be recovered from them Section 28AA of the Customs Act, 1962;*
- iv. The goods under reference viz. Fidget Spinners (2,40,000 Pieces), valued at Rs. 56,07,360/-, should not be held liable to confiscation under Section 111(d) and Section 111(m) of the Customs Act, 1962; However, since goods have been released provisionally on execution of Bond and Bank Guarantee and are not physically available for confiscation, why fine in lieu of confiscation should not be imposed on them under Section 125 of the Customs Act, 1962;*
- v. The penalty should not be imposed on them for contraventions stated above under provisions of Section 112(a) and Section 114A of the Customs Act, 1962.*

A. Summarised Allegations Made in SCN:

3. The Investigating Officers of Ahmedabad Customs {for brevity - hereinafter be called as INVST} launched allegations/charges vide the instant SCN upon ourselves as summarized as under:

A-1. Whereas, MSPL appears to have mis-declared 'DESCRIPTION' of the Imported Impugned Goods vide Bill of Entry No. 4649801 Dated 2nd January, 2018, as the 'Representative Samples failed to Qualitative TEST', carried out by 'NABL Accredited Laboratory' M/s. Testtex Laboratory Pvt Ltd, Mumbai.

A-2. Whereas, MSPL appears to have mis-declared 'DESCRIPTION & QUANTITY' of the Imported Impugned Goods vide Bill of Entry No. 4649801 Dated 2nd January, 2018, as the impugned goods failed in matching Batch Numbers and did not bear a permanent logo of COMPLAN embossed on those.

A-3. Whereas, MSPL appears to have violated the Provisions of BIS while importing the impugned goods vide Bill of Entry No. 4649801 Dated 2nd January, 2018.

A-4. Whereas, MSPL appears to have mis-declared 'VALUE of the Imported Impugned Goods' vides Bill of Entry No. 4649801 Dated 2nd January, 2018.

B. Grounds of Allegations Made in SCN:

4. The INVST launched allegations/charges vide the instant SCN upon ourselves based upon the following summarised Grounds:

4.1. The 'Examination Report' revealed that 'Colours of Some Batches' of the impugned goods did not match the declarations made vide Invoice & Packing List and 'Fidget Spinners' were not found with Embossed Logo of COMPLAN, hence appear to be 'Mis-declared for Description'.

{Ref: Para 3(ii) & (iii) of SCN}

4.2. The 'Examination Report' revealed that 'Quantity of Some Batches' of the impugned goods did not match the declarations made vide Invoice & Packing List, hence appear to be 'Mis-declared for Quantity'.

{Ref: Para 3(ii) & (iii) of SCN}

4.3. The 'Investigation' revealed that the impugned goods were not accompanied with BIS Certificate as required in terms of the DGFT Notification No. 26/2017 dated 01.09.2017, hence appear to be 'Mis-declared for BIS Certification' and rendered as 'Restricted'.

{Ref: Para 3(iv) of SCN}

4.4. The 'Investigation' revealed that 'Declared Assessable Value of the Impugned Goods' did not resonate with 'Contemporaneous Import Price' as observed through 'Online Portals i.e. Amazon, Flipkart etc.' and the advisory observations made in DGOV's Letter dated 29.08.2017, hence appear to be 'Misdeclared forValue'.

{Ref: Para 7 & 8 of SCN}

C. Brief Facts of the Case:

We are submitting 'Brief Facts of the Case' to build up a 'Legally Admissible Reply in Defence' to the instant SCN.

5. Importer - An Introduction:

5.1. We, M/s Momentum Solutions Pvt Ltd, the importer bearer of IEC No. 0312070730, have our registered office located at Gala-7, F-Wing, Zakaria Industrial Estate, Marol-Maroshi Road, Andheri (East), Mumbai - 400059.

5.2. The importing company M/s Momentum Solutions Pvt Ltd came into existence on 9th December, 2004, vide Corporate Identification Number (CIN) U92100MH2004PTC14990, as being ably led by her TWO Directors, namely Vishal Harichand Khanna (DIN 02087071) and Mrs. Karishma Vishal Khanna (DIN 02087050).

5.3. We, MSPL, are pioneer, premium & recognized Importers of 'Licensed Characterized Party Products and Promotional Goods' for various FMCG companies like Marico, Heinz, Abbott, etc., in India.

5.4. We, MSPL, cater to almost 60% of this segment of trade & industry in India.

5.5. We, MSPL, are also the approved and authorized company for Walt Disney

5.6. We, MSPL, are not dealing in direct retail trading of any goods.

5.7. Our 'Official Bankers' are INDIAN BANK, bearing 'Authorized Dealer (AD) Code 0260776'.

6. Importer's Bulk Sale Contract with M/s Kraft Heinz (I):

6.1. We, MSPL, were assigned 'Contractual Purchase Order' bearing No. 2700015992 dated 1st September 2017, by one of the leading FMCG companies of India, M/s Kraft Heinz India Pvt Ltd (for brevity - hereinafter be called as HEINZ), having their office at Unit 1901 & 1902, 19th Floor, E&G Wing, Lotus Corporate Park, Off Western Express Highway, Goregaon East, Mumbai - 400065, seeking supply of FIDGET SPINNERS branded with their logo/brand "COMPLAN".

6.2. The said Purchase Order had the details as given in the table below:

Purchase Order No	2700015992
Signed Date	01.09.2017
Description	Momentum Fidget Spinner - M7
Quantity Ordered	10,00,000 (Ten Lakhs)
Unit Price (INR) Excl. GST	12.60/-
Date of Delivery	30.12.2017

6.3. The said goods were meant for their 'Promotional Activity' and were for 'Free Promotional Distribution' to their prospective consumers along with their principal items of 'Complan'.

6.4. Thus, we, MSPL, imported the said goods meant for 'Institutional Sale' and 'NOT MEANT FOR RETAIL SALES'.

6.5. Each 'Unit' was supposed to bear the logo of 'COMPLAN' as under:



6.6. The advertisements of the same were aired on 'Prominent TV Channels in India' during the period, wherein the information of being 'Free Promotional Supply of Fidget Spinner' was published, which in itself was a

verifiable fact.



6.7. The consignment imported at ICD TUMB was meant for 'Free Promotional Distribution' in the West Zone of India – Gujarat & Rajasthan.

7. Manufacturer-Supplier-Exporter:

7.1. The Manufacturer cum Supplier, M/s S.L. Promotions Co., having their office located at 2nd Floor, BD-63, Taxiazhou-B, Jiulian, Yiwu City, Zhejiang Province, China, are proficient and established manufacturers of 'Toys including Fidget Spinners'.

7.2. We, MSPL, placed an 'Order of Supply' to M/s S.L. Promotions Co., 2nd Floor, BD-63, Taxiazhou-B, Jiulian, Yiwu City, Zhejiang Province, China.

7.3. As per the requirement of our 'Principal Buyer M/s. Kraft Heinz, India', we placed an order for the supply of 'Fidget Spinners' of FIVE Colours in equal quantity from M/s S.L. Promotions Co..

7.4. In compliance with DGFT's Notification No. 26/2017 (2015-2020) dated 1st September, 2017, we called for the 'Representative Samples of Each Colour of Fidget Spinners' from our supplier to carry out the 'Mandatory Test', which the supplier obliged.

8. Import of 'Fidget Spinners':

8.1. M/s S.L. Promotions Co sold and supplied the impugned goods to MSPL vide Invoice No. 8L171129 dated 29.11.2017.

8.2. The said consignment was composed of 2,40,000 Pieces of impugned goods, namely 'Small Fidget Spinners' of 'Chinese Origin' with declared Unit Price USD 0.11/Pc {Exchange Rate 1 USD = INR 64.90}, resulting in INR 6.561/Pc.

8.3. The Invoice & Packing List revealed the following details as in the table below:

Description	Colour	Batch No	Quantity (Nos.)
Small Fidget Spinner Complan	Blue	ACT170001	1,20,000
Small Fidget Spinner Complan	White	ACT170004	60,000
Small Fidget Spinner	-		

Complan	Yellow	ACT170003	60,000
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8.4. The impugned goods were shipped out, packed in 800 Cartons and stuffed in Container No. FCIU 489841-2.

8.5. The impugned goods were shipped out from Port of Ningbo (Republic of China) vide Bill of Lading No. HDMUMXAY1517405 dated 29.11.2017, and landed at ICD Tumb through JNCH Port vide IGM No. 2181791 dated 14.12.2017.

9. Testing of Samples by NABL Accredited Laboratory:

9.1. We, MSPL, got the said representative samples received from the supplier tested by 'NABL Accredited Laboratory' M/s Testtex Laboratory Pvt Ltd, Mumbai.

9.2. M/s Testtex Laboratory Pvt Ltd, Mumbai, an 'NABL Accredited Laboratory', issued Test Report No. MUM-76319/2017-18 Dated 28.11.2017, the findings of which read as:

Batch Nos. ACT {170001, 170002, 170003, 170004, 170005}

Colours Red, Blue, Green, Yellow & White

Inference PASS

The Test Report declared the subject goods as 'PASS on Standard Qualities' as per IS (required).

10. Remittance to Supplier:

10.1. We, MSPL, have remitted the 'Full Payment (Forex)' of 'Entire Contracted Quantity (Ten Lakh Pieces)' to our supplier M/s S.L. Promotions Co. through our authorized banker, Indian Bank.

10.2. The said payment has been completely paid in advance prior to the loading of the said shipment from China.

Part Import Prior to the Instant Import Clearance:

10.3. One consignment comprising of 4.35 lacs pcs 'Part Consignment of the aforesaid Sale Contract' has already been imported and cleared through JNCH vide B.E. 4285106 dated 6th December, 2017.

11. Assessment & Examination of the Impugned Goods:

11.1. We, MSPL, in order to clear the impugned goods for 'Home Consumption', filed Bill of Entry No. 4649801 Dated 2nd January, 2018 with 'Ahmedabad Customs' at 'ICD Tumb' through our authorised customs broker M/s Polar Shipping, Surat.

11.2. We, MSPL, filed the said Bill of Entry on a 'First Check Basis' as we wished to compare the 'Description, COMPLAN Logo & Quantity' of the impugned goods.

11.3. The goods were examined under Panchanama in the presence of Inspector (Customs), Superintendent (Customs), Deputy Commissioner of Customs i/c ICD Tumb, Shri Rakesh Bhanushali, the representative of Customs Broker M/s Polar Shipping, Surat, and TWO Panchas (Independent Witnesses).

11.4. The examination team compared the physically observed details with declared details in the packing list/invoice, all the details as scribed in Para 8 above, and consequently recorded findings in the Panchanama.

12. Seizure of the 'Impugned Goods':

12. Seizure of the 'Impugned Goods':

12.1. The aforesaid 'Examination Observations' pointing to some discrepancies (Ref. 12.2 ahead) led the jurisdictional Customs Officers to detain the impugned goods. As a result, the impugned goods were kept under seizure under Section 110 of the Customs Act, 1962.

Grounds of Seizure:

12.2. In view of the following THREE 'Preliminary Findings', the impugned goods were seized under Section 110 of the Customs Act, 1962:

- i. The impugned goods were not accompanied by a 'Proper Test Report' issued by an 'NABL Accredited Laboratory', in compliance with the instructions in DGFT's Notification No. 26/2017 (2015-2020) dated 1st September, 2017, as the 'Batch Numbers were not matching with Physical Goods'.
- ii. Though the total quantity tallied with declarations made under the invoice & packing list, the 'Quantity vis-a-vis each colour was not tallied'.
- iii. The declared unit price appeared to be low compared to the contemporary price of similar goods available on 'Online Commerce Portals'.

13. Statement of Vishal Khanna:

13.1. Shri Vishal H. Khanna, Director of MSPL, recorded his voluntary statement before the Superintendent of Customs, ICD Tumb on 8th January, 2018, in terms of the provisions of Section 108 of the Customs Act, 1962.

14. Corrected Test Report:

14.1. We, MSPL, deliberated on the issue of a 'Typographical Error' in the Test Report No. MUM-76319/2017-18 Dated 28.11.2017 (observed by the Customs Officer during the examination) to M/s Testtex Laboratory Pvt Ltd, Mumbai, an 'NABL Accredited Laboratory', diligently and immediately.

14.2. M/s Testtex Laboratory Pvt Ltd, Mumbai, immediately forwarded the 'Corrected Test Report' to the office of the Deputy Commissioner of Customs i/c ICD Tumb.

14.3. Thus, the issue of 'Mismatching Batch Numbers' in the Test Report

was resolved.

15. Request & Order for Provisional Release of Goods:

15.1. We, MSPL, humbly made a request before the jurisdictional Additional Commissioner of Customs, Ahmedabad via our written letter dated 9th January, 2018, seeking the provisional release of the impugned goods. We urged the Commissioner to pass an order to the Deputy Commissioner of Customs, ICD Tumb to 'Assess & Release the goods' at the earliest, as the insufficiency of supplying the subject goods, i.e., Fidget Spinners, was resulting in a 'Breakage in Supply' of principal items of Kraft Heinz 'Complan Chocolate', bringing grave loss to the brand and goodwill of both Kraft Heinz and Momentum Solutions Pvt Ltd.

15.2. The jurisdictional Additional Commissioner of Customs, Ahmedabad, upon consideration of our written request, passed an 'Order of Provisional Release' vide F.No. VIII/ 10-05/ICD-Tumb/O&A/2018 dated 12.01.2018, which reads as:

The Additional Commissioner of Customs, i/c Surat, has ordered the provisional release of the seized imported goods, lying at ICD, Tumb, on execution of a bond of amount Rs. 56,07,360/- and furnishing a Bank Guarantee/Cash Security of Rs. 18,82,700/-.

Appropriate duty shall be paid at the time of clearance.

16. Furnishing Bank Guarantee & Bond:

16.1. In compliance with the aforesaid 'Order of Provisional Release', we, MSPL, furnished a Bank Guarantee of amount Rs. 18,82,700/- bearing No. 31620IGL0000618 dated 17.01.2018 issued by Union Bank of India and a Bond of amount Rs. 56,07,360/- to the Deputy Commissioner of Customs, Tumb.

17. Out of Charge of Goods for Home Consumption:

17.1. Consequent to the furnishing of the aforesaid 'Bank Guarantee' and 'Bond', the Deputy Commissioner of Customs, Tumb assessed the impugned goods provisionally but as declared.

17.2. The impugned goods were assessed at 'Provisional Duty INR 3,18,266/-'.

17.3. We, MSPL, paid the Duty INR 3,18,266/-.

17.4. Consequently, the impugned goods were given 'Out of Charge' by Shed Superintendent (Customs), Tumb, on 19.01.2018.

18. Request to ADC for Closure & Returning of Bond BG:

18.1. We, MSPL, submitted a letter dated 10.05.2018 to the Additional Commissioner of Customs, Ahmedabad, requesting to 'Conclude the entire case' by holding our submissions, declarations, intent, and acts as Bonafide.

19. Request for Compliance of Board's Circular:

19.1. We, MSPL, submitted a letter dated 10.03.2019 to the Additional Commissioner of Customs, Ahmedabad, requesting to 'Conclude the entire case' as Declared & Bonafide in compliance with Board's Instructions contained in Para 16 of CBEC (CBIC) Instruction No. 1/2017-Cus. (F.No. 591/04/2016-Cus. (AS)), dated 8-2-2017.

19.2. We humbly requested the Hon'ble Adjudicating Authority to drop the case, and therefore, the authority was requested to 'Pass an Order of Closure as Declared'.

19.3. We requested the Additional Commissioner of Customs, Ahmedabad, to pass an order of 'Return of PD Bond & Bank Guarantee' as not executed or appropriated.

19.4. We had further submitted several Reminder Letters on successive dates to the Additional Commissioner of Customs, Ahmedabad.

D. Evaluation of RUDs:

20. Examination Panchanamas:

20.1. We, MSPL, in order to clear the impugned goods for 'Home Consumption', filed Bill of Entry No. 4649801 Dated 2nd January, 2018 with 'Ahmedabad Customs' at 'ICD Tumb' through our authorised Customs Broker M/s Polar Shipping, Surat.

20.2. We, MSPL, filed the said Bill of Entry on 'First Check Basis' as we wished to compare the 'Description, COMPLAN Logo & Quantity' of the impugned goods.

20.3. The goods were examined under Panchanama in the presence of Inspector (Customs), Superintendent (Customs), Deputy Commissioner of Customs i/c ICD Tumb, Shri Rakesh Bhanushali, the representative of Customs Broker M/s Polar Shipping, Surat and TWO Panchas (Independent Witnesses).

{Ref: RUD 2 of (Page 6-8) SCN}

20.4. We, MSPL, declared all the details as scribed in Para 8 above.

20.5. The Competent officers of Customs upon thorough examination recorded their observations in Panchanama.

20.6. The Competent officers of Customs, upon thorough examination, observed that:

- i. The impugned item, namely 'Fidget Spinners', were not found with 'Embossed Logo of Complan'; instead, they were found stuck with Complan Stickers.
- ii. The Quantity of each Declared Colours and Batch Numbers, were found to be mismatched.
- iii. The Unit Price appeared to be misdeclared as observed at a lower side compared to the unit price of contemporaneous & identical/similar imports.

21. Statement of Vishal Khanna:

21.1. *Shri Vishal H. Khanna, Director MSPL, recorded his voluntary statement before the Superintendent of Customs, ICD Tumb on 8th January, 2018, in terms of the provisions of Section 108 of the Customs Act, 1962, wherein he inter-alia stated:*

- i. He recorded his primary introduction and role in the company MSPL*
- ii. They had imported the said consignment and have filed the said Bill of Entry for clearing the same.*
- iii. They had imported a consignment of 'Fidget Spinners' at ICD Tumb, bearing specific brand 'Complan' against an order received from M/s Kraft Heinz India Pvt Ltd - Unit 1901 & 1902, 19th Floor, E&G Wing, Lotus Corporate Park, Off Western Express Highway, Goregaon East, Mumbai-400063.*
- iv. Those goods were meant for their promotional activity and are for 'Free Distribution' to institutional sales and are 'Not Meant for Retail Sales'.*
- v. He had gone through Panchanama dated 04.01.2018, drawn at ICD Tumb, and he agreed to the contents of Panchanama.*
- vi. He claimed that the impugned goods belonged to them.*
- vii. He did not supervise the 'Loading of Impugned Goods' in China.*
- viii. The 'differing & deviated batch no and colour' were a result of a bonafide mistake at the end of the supplier.*
- ix. He has not paid any other amount/differential amount to any other person or to the foreign supplier for procuring the above-stated goods.*
- x. Those goods were promotional free giveaways. They had never done outside trading for any such goods, and hence, they did not know the market value for the same.*
- xi. The laboratory M/s TESTEX had already issued the 'Corrected Report'.*
- xii. He admitted to pay duty, fine, penalty if any arises.*
- xiii. He accepted the mismatching of colours and owned responsibility too.*
{Ref: RUD 4 of (Page 10-13) SCN}

21.2. *The statement only highlighted the facts that:*

- i. The mismatch of batch no & colour occurred due to a mistake at the end of the supplier, in which the importer did not have any intentional or unintentional role to play.*
- ii. He did not cognize the claim of 'Mis-declaration of Value' as claimed by Customs or oppose the same, as he was not involved in the trading of any commodity in the domestic retail market and hence was not conversant about the 'Retail Market Price of Fidget Spinner'.*
- iii. The 'Error' observed in the Test Report of TESTEX was duly corrected by the same laboratory before the assessment of the goods, which settles the issue to NULL.*

22. DG Valuation's Letter:

22.1. The Director General of Valuation, Mumbai (CBIC) (for brevity-hereinafter be called as DGoV) issued 'Advisory Letter' No. VAL/TECH/21/217/(Toys) dated 17.08.2017 on the issue of 'Valuation of Imported Toys'

22.2. The governing features of the 'Letter' are produced for kind reference and consideration as under:

a. DGoV has undertaken a study on the valuation trend of imported 'Toys' covered under CTH-9503. The study has been carried out for the period 01.02.2017 to 31.07.2017.

{Ref: Opening Para of Letter}

b. One of the items described as 'Toy Hand Spinner/Top Spinner' is one of the most popular, recently touched the domestic markets. The Valuation trend of these 'Spinners' is observed as under:

Description	Minimum Assessable Value (TV) in Rs/Piece	Unit	Maximum Assessable Value (TV) in Rs/Piece	Unit	Variation	in India as per Amazon	Retail Sale Price in India as per Amazon
Toy Hand Spinner/Top Spinner	1.33		118400%		88922%		RSP Rs 135/Pc to Rs 20,000/Piece

{Ref: Para 5 of Letter}

c. The high-end 'Spinner-Toys' are available in the domestic markets, though the import of such description has not been observed in the last six months.

d. Para 12 of letter reads as:

i. In view of the above analysis of import data of 'Toys':

The concerned appraising group should conduct market enquiry periodically or as and when felt necessary, to ascertain the relationship between declared prices and market retail prices. In cases where the assessing officer has doubt on the declared Transaction Value of the imported goods, the officer shall take necessary steps consistent with Section 14 of the Customs Act, 1962 read with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

ii. The physical examination of consignments should also be specifically aimed at the checking of goods with respect to the declared description, specifications, and any mis-declaration of the same.

iii. Each case should be examined on its merits for acceptance or otherwise of the declared Transaction Value.

e. Retail Sale prices mentioned in the above paragraphs are the prices available on e-commerce platforms for comparison, and the import data is on actual basis. These prices and values are for illustration purposes for comparison of import prices and actual retail prices in the market. The

above-mentioned prices should not be used to derive any minimum/floor price of these goods for use mechanically without application of prescribed valuation rules, as sometimes the price may be much more than that mentioned in the above paragraphs or less, depending on some other specifications and brand value.

23. Communication between Customs & Our Bank:

23.1. The competent officer of Prabha Devi, Mumbai Branch of Indian Bank, upon being requested, intimated to the Deputy Commissioner of Customs, Tumb, via their letter dated 11th May, 2018, which reads as:

M/s Momentum Solutions Pvt Ltd, bearer of Account Number 6505435979, made payment of USD 1,52,350/- to M/s S.L. Promotions Gift Co. Ltd, China during 2017-2018.

23.2. M/s Momentum Solutions Pvt Ltd explained to the 'Investigating Officer of Tumb Customs' that the differential amount was transferred to M/s S.L. Promotions Gift Co. Ltd, China, against the import/supply of other goods.

23.3. We, MSPL, submitted all the necessary and relevant documents to the 'Investigating Officer of Tumb Customs'.

23.4. The SCN also endorses the facts above, and these submissions satisfied the 'Investigating Officer of Tumb Customs'.

{Ref: RUD 9 of (Page 33) SCN}

24. Communication between Customs & Kraft Heinz:

24.1. The competent officer of M/s Kraft Heinz India Pvt Ltd, upon being requested, intimated to the Deputy Commissioner of Customs, Tumb, via their letter via e-mail, which reads as:

"We hereby declare that 10,00,000 units of the goods bearing the description of 'Fidget Spinner', imported from China, via PO number 2700015992 from Momentum bearing Company's trademark 'Complan', has been imported by the Company as part of a promotional offer with our Company's product, and we hereby represent that these items are not for retail sales. Our packing for the said items shall declare that the items are promotional, not for sale, and will not be sold separately. Please find annexed the customs/import duty paid receipt for your records. Company's logos are for promotional purposes only and are not for retail sales."

24.2. M/s Momentum Solutions Pvt Ltd explained to the 'Investigating Officer of Tumb Customs' the details of their Sales Contract with M/s Kraft Heinz India Pvt Ltd.

24.3. We, MSPL, submitted all the necessary and relevant documents to the 'Investigating Officer of Tumb Customs'.

24.4. The SCN also endorses the facts above, and these submissions satisfied the 'Investigating Officer of Tumb Customs'.

{Ref: RUD 10 of (Page 34-35) SCN}

25. Online Quotation of Similar Goods:

25.1. The SCN vide Para 10.2(ii) and RUD No.6 (Page 20-24 of SCN) cited an online reference retrieved from 'alibaba.com'.

25.2. The portal 'alibaba.com' exhibited the 'Product' with limited

information, such as:

Description: 2017 Newest Promotional Gifts Fidget Spinner Toys for Kids

Quantity: 11,111 Units

Unit Price: USD 0.36 per Piece

25.3. The portal 'alibaba.com' failed to display important product information, such as: Construction Material: Not Shown
Size Dimensions: Not Shown Unit Net Weight: Not Shown
Manufacturers Name: Not Shown Country of Origin: Not Shown

25.4. The absence of the information mentioned above does not allow analysts to carry out a comparative study for valuation.

{Ref: RUD 7 of (Page 25-28) SCN}

26. Value Evidence Received from BrandSTIK:

26.1. The SCN vide Para 10.1(iii) and RUD No.11 (Page 36 of SCN) cited value evidence gathered via price quotation invoice dated 16.04.2018 from M/s BrandSTIK Solutions Pvt Ltd, located at 406, Antariksh, Marol-Makwana Road, Andheri (East), Mumbai 400059.

26.2. The RUD reveals that M/s BrandSTIK Solutions Pvt Ltd has huge exposure in the field of 'Merchandising of Like Products,' with experience in 5,000 projects in the last five years (Ref Year: 2018).

26.3. The cited price quotation invoice dated 16.04.2018 exhibited the 'Product' with information such as:

Description: Fidget Spinner (Assorted Colours)

Tri Spinners (3-12 Years) 55 Grams

Quantity: One Million Units

Unit Price: INR 11.48 per Piece (GST Extra @ 12%)

26.4. The following characteristic information of the product are crucial components determining the unit price of the product such as:

Unit Net Weight: 55 Grams

No of Legs: Tri Legs

Age Group: 3 to 12 Years

26.5. The availability of the information mentioned above would allow analysts to make an informed valuation comparison to carry out 'Comparative Study for Valuation' in judicious manner.

E. Analysis & Findings For Defence:

27.1. We analysed the substance scribed in the subject Show Cause Notice (SCN), contents of relied upon documents (RUDs), contents of additional defence documentary evidences (DEFDOCs) in the light of pertinent provisions of applicable laws, acts, rules, regulations, etc., in a 'just & fair manner'.

27.2. This analysis resulted in a 'judicious & justified defence of the case', favouring our bonafide, innocence, and sincerity.

27.3. We would construct our 'defence in reply' through forthcoming paragraphs in a segmented manner with respect to each issue separately. This sectionised reply in defence shall enable the 'Hon'ble Adjudicating Authority' to understand our bonafide & humble submission in a just & fair manner.

27.4. Further, in the forthcoming 'Analysis & Defence Statement', various

terms will be used in brevity, and the same are produced hereunder for your kind reference and consideration in the table below:

Sr No	Full Term/ Name	Abbreviation/ Brevity
1	Show Cause Notice	SCN
2	Relied Upon Documents	RUD
3	Reply in Defence	REPD
4	Defence Documents	DEFDOC
5	Brief Facts	BRFCT
6	Importer	MSPL
7	Supplier	SLPGC
8	Testing Laboratory TESTEX	TESTEX

27.5. We have analysed 'each of FOUR issues' in a 'legal & scientific manner'. The same analysis is produced hereunder for your kind consideration.

E. 1. Failing in Qualitative Test @ TESTEX Lab, Mumbai:

Per Se SCN:

28.1. Kindly refer to Para 9 & 14 above for detailed reference.

28.2. SCN vide Para 3(ii) & (iv) alleged that the impugned goods, namely 'Fidget Spinners', failed the qualitative test, which was carried out by the 'NABL Accredited Laboratory', M/s Testtex Laboratory Pvt Ltd, Mumbai.

Per Se Importer:

28.3. M/s Testtex Laboratory Pvt Ltd, Mumbai, an 'NABL Accredited Laboratory', issued Test Report No. MUM-76319/2017-18, dated 28.11.2017, the findings of which read as:

Batch Nos: ACT170001, 170002, 170003, 170004, 170005

Colours: Red, Blue, Green, Yellow & White

Inference: PASS

The test report declared the subject goods as 'PASS on standard qualities' as per IS (required).

28.4. M/s Testtex Laboratory Pvt Ltd, Mumbai, upon our deliberation, removed the 'typographical error' and issued a duly 'corrected test report' and forwarded the same to the office of the Deputy Commissioner of Customs at ICD Tumb.

Inference:

28.5. These analytical submissions substantially established that all 'Batch Numbers' were matched with declarations made in the invoice & packing list in this regard.

28.6. Hence, the SCN fails to stand with the 'test of legality' for the allegation that the impugned goods violated 'testing norms & standards.

E.2. Misdeclaration of 'Description & Quantity':

Per Se SCN:

29.1. Kindly refer to Para 12 above for detailed reference.

29.2. SCN vide Para 3(i) alleged that the impugned goods, namely 'Fidget Spinners', were found with 'mis-declared batch numbers & respective quantities. The comparative study of 'Declared & Found Batch Nos & their respective quantities' is produced in the table below:

Declared			Found on Examination			
Description	Colour	Batch No	Quantity (Nos)	Colour	Batch No	Quantity (Nos)
Small Fidget Spinner Complan	Blue	ACT170001	1,20,000			
Small Fidget Spinner Complan	White	ACT170004	60,000			
Small Fidget Spinner Complan	Yellow	ACT170003	60,000	Yellow	ACT170003	1,58,100
				Green	ACT170002	80400
				Y/G	ACT170004	1500
<i>Total</i>			<i>2,40,000</i>			<i>2,40,000</i>

29.3. SCN vide Para 3(iii) alleged that the impugned goods, namely 'Fidget Spinners', were quite similar to spinners of good quality generally available in the market and having dimensions, materials, patterns, designs, colours, etc., similar to any other good quality locally traded/available in the open market.

The spinner had a very small sticker in its centre part on which the word 'Complan' was written, but the sticker was easily removable. The Fidget Spinner did not have any embossment/mark/logo/symbol in the name of 'Complan', which could make the word 'Complan' an integral part of the spinner. Thus, apart from the easily removable small sticker, the Fidget Spinner did not have anything due to which it can be identified attributed/associated to Complan and considered just a promotional free gift. It appears that stickers Complan were affixed on the spinners in such a way is just an eye wash so as to evade the genuine value of the goods and as such it appears that there is an attempt for undervaluing of the imported goods under the guise of labeling the stickers of 'Complan'.

Per Se Importer:

Batch Number and Quantity:

30.1. *The manufacturer/exporter allotted a batch number to each colour of the impugned goods, namely 'Fidget Spinners', solely for the purpose of identifying the unitary items.*

30.2. *The process of allotment of such batch numbers by the manufacturer is an internal and integral mechanism of the manufacturer. This process does not fall within the ambit of any regulatory provisions under laws or rules pertaining to either the manufacturing country (China) or the importing country (India).*

30.3. *Therefore, mismatching batch numbers does not violate any provision of the Customs Act, 1962, or any other laws currently in force.*

30.4. *Additionally, as referenced in Para 28.3 above, the impugned goods were tested as 'PASSED' through the test report issued by M/s Testtex Laboratory Pvt Ltd, Mumbai, an 'NABL Accredited Laboratory'. The findings of the test report, Test Report No. MUM-76319/2017-18, dated 28.11.2017, declared:*

- *Batch Nos.: ACT170001, 170002, 170003, 170004, 170005*
- *Colours: Red, Blue, Green, Yellow & White*
- *Inference: PASS*

The test report confirmed that the subject goods passed on standard qualities as per IS (required).

30.5. *The total quantity of the impugned goods, namely 'Fidget Spinners', quantified at 240,000 pieces, was found to be 'Declared' and the quality was appropriate.*

Logo Sticker & Bonafide Promotional Material:

31.1. *Kindly refer to Para 24 above for detailed reference.*

31.2. *It is substantiated with evidence that the impugned goods, namely 'Fidget Spinners', were found affixed with stickers bearing the logo of 'COMPLAN'.*

31.3. *The investigating officer, through the SCN, opined that since the impugned 'Fidget Spinners' did not bear a permanent (non-removable) logo of the principal receiving company 'COMPLAN', the impugned 'Fidget Spinners' could not be considered as 'Promotional Goods'.*

31.4. *We believe that the investigating officer drew this conclusion because he was not conversant with the process of large-scale manufacturing of any products*

31.5. *The 'Quantum Level of Manufacturing' directly proportionate to the 'Determination of Unit Price {Cost of Production & Sale Price}' which implies that,*

Larger Capacity of Production = Lower Unit Cost/Price.

31.6. *It is quite informed fact that, India does not host any Large-Scale Toy Manufacturing Company.*

31.7. *This submission draws strength from the Proposal of Indian Union Budget*

2020-21 imposing higher basic customs duty @ 60% enhancing from 20%.

The Government of India is witnessing that, No Large-Scale Indian company manufactures toys in India and government have intent to promote large scale manufacturing of toys indigenously.

31.8. The impugned item ‘Fidget Spinner’ is manufactured by many small-scale factories in India, with maximum production capacity 3 to 5 thousand units per day.

31.9. Besides, the impugned item ‘Fidget Spinner’ in ‘Generic Form, is manufactured by many Large-Scale Factories in China, with maximum production capacity 1 to 5 Lakhs units per day as ‘Mass Production’.

31.10. Thus, this inordinate difference in production capacity of Indian & Chinese manufacturers puts impact on pricing in highly significant manner.

31.11. The ‘Fidget Spinner’ manufactured/produced in ‘Generic Form, are ‘Labelled’ as per individual buyer’s requirement, by affixing the ‘required stickers (removable)’.

31.12. If the same item is manufactured bearing ‘Permanent Customised Design/Logo’, the process will require a Customized Mould, Embossing Enamel and Shielding Lacquer which invokes Higher Cost/Price. This cost/price lends at multiple times higher to the generic produced item.

31.13. The high cost of production escalates the procurement price of desired item to the ultimate buyer and residually does not remain Cost Effective.

31.14. Since, the Promotional Goods provides ‘NIL Direct Monetary Returns’ back to ‘Investor/Buyer’, therefore, they naturally tend to buy or procure ‘Promotional Item’ at ‘Lowest Price’.

31.15. The ‘Customised Item’ as discussed at Para 31.12 above, does not suit to the objective or motive of ‘Investor/Buyer’ to buy or procure as ‘Promotional Item’ at ‘Higher Price’.

31.16. That’s why ‘Investor/Buyer’, buys or procures ‘Promotional Item’ manufactured as generic production at ‘Lowest Price’ and get labelled as per their need.

Inference:

31.17. Hence, the affixing of Logo Sticker (Absence of Embossed Permanent Logo) does not mean that, the impugned goods were misdeclared for description.

E.3. Violation of BIS Rules & Provisions:

32.1. The operating para of DGFT’s Notification No.26 /2015-2020 Dated 1st September, 2017 governing ‘Quality Control of Toys Imported into India’ reads as:

Import of Toys (all items under EXIM Codes 95030010, 95030020, 95030030 and 95030090) shall be permitted freely when accompanied by the following certificates:

(i) A certificate that the toys being imported conform to the standards-

prescribed-by- Bureau of Indian-Standards(BIS):

a) IS:9873 (Part 1) - Safety of Toys; Part -1

Safety aspects related to mechanical and physical properties

b) IS:9873 (Part 2) - Safety of Toys; Part-2 Flammability

c) IS:9873 (Part 3) - Safety of Toys; Part - 3

Migration of certain elements

e) IS:9873 (Part 7) - Safety of Toys; Part - 7

Requirements and test methods for finger paints

f) IS: 9873 (Part 9) - Safety of Toys; Part - 9

Certain phthalates esters in toys and Children's products

g) IS:15644 - Safety of Electric Toys

(ii) A Certificate that the toys being imported conform to the standards prescribed in IS:

9873 Part - 1, Part - 2, Part - 3, Part - 4, Part- 7, Part - 9 and 15644:2006.

(iii) A Certificate of Conformance from the manufacturer that representative sample of the toys being imported have been tested by an independent laboratory which is accredited by NABL, India and found to meet the specifications indicated above. The Certificate would also link the toys in the consignment to the period of manufacture indicated in the Certificate of Conformity.

32.2. M/s Testtex Laboratory Pvt. Ltd, Mumbai an 'NABL Accredited Laboratory' issued Test Report No. MUM-76319/2017-18 Dated 28.11.2017, 'CONFORMED' that the Imported Goods have passed all the necessary tests as given in the TABLE below:

Summary of Test Results

Sr. No.	Test Parameters	Test Standards	Conclusion
1	<i>Mechanical and physical properties</i>	IS 9873-1:2017	PASS
2	<i>Flammability Test</i>	IS 9873-2:2017	PASS
3	<i>Migration of certain Elements</i>	IS 9873-3:2017	PASS
4	<i>Phthalates present in Toys & Children's product</i>	IS 9873-9:2017	PASS
5	<i>Labeline & Markina</i>	IS 9873-1:2017	NA
6	<i>Requirements and Test method for finger paints</i>	IS 9873-7:2017	NA
7	<i>Swings, slides and similar activity toys for Indoor and outdoor family domestic use</i>	IS 9873-4:2017	NA
8	<i>Safety of electric toys</i>	IS 15644 : 2006 (RA201I)	NA

Conformity: The submitted sample meets the compliance.

Notes: P = Pass. F= Fail. NA = Not Applicable. NC=No Comments (See Results)

Remark: At the request of the client, test(s) was conducted on the certain component(s) of the submitted samples(s)/ Submitted component(s)

Inference:

32.3. Hence, the impugned goods were imported in compliance of BIS provisions as discussed above.

32.4. No Violation of BIS is resulted.

E.4. Misdeclaration of 'Value':

a. *Valuation Rules and Section 14 of the Customs Act, 1962:*

33.1. *The imported goods are valued for duty assessment in terms of the provisions contained in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 {CVR, 2007} read with section 14 of the Customs Act, 1962.*

b. *SCN Allegations:*

33.2. *The investigating officer launched allegation of Misdeclaration of Value vide Para 7 to 9 of SCN, which are reproduced hereunder for kind reference:*

7. Whereas, as per letter No. VAL/TECH/21/2017(Toys) dated 17.08.2017 of DG of Valuation, CBEC, Mumbai, the valuation trend of "Toy hand spinner/top spinner" in Indian market (as per amazon) is Rs. 135 min. to up to Rs. 20000. The Customs Officers also gone through the sale price of the product declared by the importer on many major online sites and it appeared that the said goods are priced at considerably higher price than that has been declared by the importer. The Customs Officers also verified sale price of similar goods in bulk quantity from Indian manufacturers, which is also at around Rs. 50. Quotes from online site www.alibaba.com for supply of similar goods i.e. "2017 Newest promotional gifts fidget spinner toys for kids for a quantity of more than 11111 pieces were obtained, which comes to USD 0.36. The Appraising Officer accordingly, inclined to accept this value as the most appropriate value of the imported goods in this case looking at the quality of the fidget spinners. Duty computation on the basis of this value obtained from alibaba.com for the goods imported under Bill of Entry is as under:

Value of 2,40,000 pieces = 0.3624000064.9 = Rs. 56,07,360/-

Value after Abatement of 43% = Rs. 3196195

Customs Duty @10% = Rs. 319620

Ed.Cess = Rs. 6392

S&H Ed Cess = Rs. 3196

IGST = Rs. 712388

Total Duty Payable = Rs. 10,41,596/-

8. Whereas, the value of the seized goods in this case as per the Appraising Officer is Rs. 56,07,360/-, the said goods were ordered to be released provisionally by the Additional Commissioner, Customs in-charge Surat, on execution of Bond of an amount of Rs. 56,07,360/- and on furnishing a Bank Guarantee/Cash Security of Rs. 18,82,700/- and on payment of appropriate duty. Accordingly, the said importer has produced required

Bond for Rs.56,07,360/- alongwith Bank Guarantee no. 316201GL0000618 dated 17.01.2018 for Rs.18,82,700/- on 19.01.2018 and goods were provisionally released on 19.01.2018.

9. M/s Momentum Solutions Pvt. Ltd., vide their letter dated 11.05.2018, have submitted their written submission and in anticipation of acceptance of their written submission, requested for waiver the requirement of issue of Show Cause Notice and requested for granting them a 'personal hearing' towards imparting 'natural justice'.

The importer has mainly submitted that there were three grounds of seizure i.e. (i) non-compliance of goods with DGFT Not.No. 26/2017(2015-2020) dated 01.09.2017 as the batch numbers were not matching with physical goods, (ii) not matching of quantity vis-a-vis each colour of the goods, and (iii) undervaluation of goods. The importer has pleaded that amended test report (typographical mistake) from the Testing Laboratory and amended packing list (typographical mistake from the overseas supplier) have removed the first two grounds of seizure and hence only the third ground of seizure is required to be examined.

With regard to mis-declaration of unit price (under valuation), the importer has submitted that the goods were not meant for retail sale and the same were manufactured with 'Customized format and bearing logo 'complan' and hence occurrence of identical goods anywhere in the Indian market in retail shopping or on online portals is impossible. They however claimed that similar goods' available in Indian Market, if any, can be compared considering the following mandatory parameters:

- Previous imports of similar items happened within 90 days,
- Dimensions must be comparable,
- Composition Material must be comparable,
- Country of origin must be comparable,
- Quantity of import or trade must be comparable.

The importer also stated that market enquiry should be the last resort for valuation as per Customs Valuation (Import) Rules and has drawn attention to the fact that the goods imported by them are in large number i.e.

10,00,000 Pcs and hence market enquiry should be done only in major metro cities only where such bulk trading takes place. The importer has also submitted to accept transaction value. The importer on the basis of their own ascertainment of market value of similar products and after excluding Basic Customs duty, whole seller's profit and overhead charges has submitted that highest possible Assessable value can be Rs. 8.748 only and thus requested to accept their transaction value.

On the abovementioned grounds, the importer has requested for waiver issue of Show Cause Notice in anticipation of acceptance of their submission and has requested only for personal hearing towards imparting them 'Natural Justice'.

c. Evidence Cited (SCN) to Determine Proposed Assessable Value:

33.3. SCN proposed enhancement of Assessable Value (Unit Price) to USD 0.36 per piece from declared USD 0.11 per piece.

c.1. Value Evidence .1 – DGOV'S Letter:

33.4. Kindly refer Para 22 above whereby, SCN had relied upon the content of letter No. VAL/TECH/21/2017(Toys) dated 17.08.2017 of DG of Valuation (DGOV), CBIC, Mumbai, which indicated the valuation trend of 'Toy Hand Spinner/Top Spinner' in the Indian market (as per Amazon) between Rs. 135 and 20000.

33.5. Vide this letter, DGOV arrived at the said inference relying upon Online Market Value Reference pertaining to the period between 01.02.2017 and 31.07.2017.

c.2. Value Evidence .2 – Online Portal alibaba.com:

33.6. Kindly refer Para 25 above whereby, SCN had relied upon the content of Online Portal alibaba.com, which exhibited the 'Product' with 'Limited Information' such as:

- Description: 2017 Newest Promotional Gifts Fidget Spinner Toys for Kids
- Quantity: 11111 Units
- Unit Price: USD 0.36 per Piece

33.7. The portal 'alibaba.com' failed in displaying 'Information' about the 'Product' such as:

- Construction Material: Not Shown
- Size Dimensions: Not Shown
- Unit Net Weight: Not Shown
- Manufacturers Name: Not Shown
- Country of Origin: Not Shown

c.3. Value Evidence .3 – Received from BrandSTIK:

33.8. Kindly refer Para 26 above whereby, SCN had relied upon the Value

Evidence gathered vide Invoice dated 16.04.2018 issued by M/s BrandSTIK Pvt Ltd, Mumbai, exhibiting the 'Product' with 'Information' such as:

- *Description: Fidget Spinner (Assorted Colours)*
- *Tri Spinners {3-12 Years}*
- *Unit Net Weight: 55 Grams*
- *No of Legs: Tri Legs*
- *Age Group: 3 to 12 Years*
- *Quantity: ONE Million Units*
- *Unit Price: INR 11.48 per Piece {GST Extra @ 12%}*

c.4. Legal Incompatibility of Value Evidences c.1 & c.2:

33.9. *It is pertinent to note here that, DGOV's letter did not mention any Parameter detrimental to determine value such as: Quantum of Sale, Unit Size, Dimension, Unit Weight, Material, Age Group, Number of Legs, etc.*

33.10. *The 'Absence of the mandatory & Detrimental Elements of Comparison' as mentioned in Para 33 above does not make Analysts carry out 'Comparative Study for Determination of Assessable Value'.*

d. Rule 7 of CVR-2007: Contemporaneous Value - Interpretation:

33.11. *The SCN re-determined the proposed assessable value under Rule 7 of CVR-2007, which reads as:*

7. Deductive value:

(1) Subject to the provisions of rule 3, if the goods being valued or identical or similar imported goods are sold in India, in the condition as imported at or about the time at which the declaration for determination of value is presented, the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions:

(i) either the commission usually paid or agreed to be paid or the additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind;

(ii) the usual costs of transport and insurance and associated costs incurred within India;

(iii) the customs duties and other taxes payable in India by reason of importation or sale of the goods.

(2) If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, the value of imported goods shall, subject otherwise to the provisions of sub-rule (1), be based on the unit price at which the imported goods or identical or similar imported goods are sold in India, at the earliest date after importation but before the expiry of ninety days after such importation.

d.1. Applicability & eligibility of Rule 7 of CVR-2007:

33.12. *The 'Market Inquiry/Survey' is carried out to determine the 'Comparative Market Price in Indian Market' in terms of the provisions of Rule 7 of CVR-2007. The conditions of applicability of the RULE are:*

i. The 'Sample Goods in Domestic Market' must mandatorily be Identical or Similar.

ii. The Time of 'Market Inquiry/Survey' must be 'After Date of Importation' and at the Earliest Date After Importation but Before the Expiry of Ninety Days After Such Importation.

d.2. Testing of Applicability of Rule 7 of CVR-2007 in Instant Case:

33.13. Kindly refer Para 33.6 & 33.7 above whereby it has been substantiated that 'None of the Material Evidence' reveal 'Mandatory & Detrimental Elements of Comparison', hence, the 'Sample Goods' fails standing of eligibility of being either Identical or Similar goods to the impugned imported item.

33.14. Value Evidence cited by DGOV's letter pertains to the period much prior to import, therefore fail to stand merit of Rule 7 of CVR-2007 which prescribes that the evidence must pertain to the date after importation.

33.15. Value Evidence cited at alibaba.com does not show the date of inquiry, therefore fail to stand merit of Rule 7 of CVR 2007, which prescribes that the evidence must pertain to the date after importation and before ninety days.

Inference:

33.16. Hence, the 'Gathered & Cited Material Value Evidence' do not stand meritorious & legal in terms of the provisions of Rule 7 of CVR-2007. Thus, these TWO evidences {c.1 & c.2} fail the test of legal admissibility in terms of applicability of conditions of Rule 7 of CVR 2007.

d.3. Testing of Value Evidence Received from BrandSTIK:

33.17. The availability of the information as mentioned in Para 33.8 would make the Adjudicating Authority carry out a 'Comparative Study for Valuation' in a judicious manner.

Inference:

33.18. Since this Value Evidence is lead by 'Mandatory & Detrimental Elements of Comparison', hence, the 'Sample Goods' stands meritorious of eligibility of being either Identical or Similar goods to the impugned imported item, which pertains to the contemporary period too.

e. Rejection of Transaction Value:

34. The imported goods are assessed for 'Valuation' in consonance with the provisions of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter for brevity referred to as "CVR") read with section 14 of the Customs Act, 1962.

e.1. Corresponding & Applicable Rules of CVR:

34.1. Rule 3(g) - "transaction value" means the value referred to in sub-section (1) of section 14 of the Customs Act, 1962;

34.2. Rule 12. - Rejection of declared value:

(1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information, including documents or other evidence. If, after receiving such further information, or in the absence of a response from such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that

the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation

(1) For the removal of doubts, it is hereby declared that:

(i) This rule by itself does not provide a method for determination of value. It provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value. Where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons, which may include:

- *(a) The significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed.*
- *(b) The sale involves an abnormal discount or abnormal reduction from the ordinary competitive price.*
- *(c) The sale involves special discounts limited to exclusive agents.*
- *(d) The misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production.*
- *(e) The non-declaration of parameters such as brand, grade, specifications that have relevance to value.*
- *(f) The fraudulent or manipulated documents.*

e.2. Testing of Instant Case vis-à-vis Rules of CVR:

34.3. The SCN, as discussed through the foregoing Paras above, did not provide 'Any Value Evidence' of Contemporaneous Import of either Identical or Similar Goods.

34.4. The contents of the said SCN are 'Tested' through the lens/filter of SIX Testing Points (a to g) of Rule 12 of CVR. The findings of the test are in the table below:

<i>Explanation No.</i>	<i>Testing Parameter</i>	<i>Testing Observation</i>	<i>Results</i>
	<i>The significantly higher value at which identical</i>		

A	or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed.	SCN did not provide any such 'Evidence'.	SCN Fails
B	The sale involves an abnormal discount or abnormal reduction from the ordinary competitive price.	No Discount or Reduction of Price availed or awarded.	SCN Fails
C	The sale involves special discounts limited to exclusive agents.	No Special Discount availed or awarded	SCN Fails
D	the mis-declaration of goods in parameters such as descriptions, quality, quantity, Country of Origin, year of Manufacture or Production	No Mis declaration found w.r.t. any Parameters	SCN Fails
E	the non-declaration of parameters such as brand, grade, specifications that have relevance to value	SCN does not Notify for this	SCN Fails
F	the fraudulent or manipulated documents	SCN does not Notify for this	SCN Fails

34.5. The above analytical study substantiates that the instant case 'Failed to Test of Rule 12 of CVR'. Hence, the Declared Value shall not qualify for Rejection on Merit.

34.6. In the absence of any meritorious ground for rejection of the declared value, the 'Declared Value shall be accepted in terms of Rule 3 of CVR'.

f. *Price Actually Paid or Payable: Rule- 3 of CVR-2007*

35. *Rule- 3 of CVR-2007 - Determination of the method of valuation.*

(1) *Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10.*

(2) *Value of imported goods under sub-rule (1) shall be accepted:*

Note to Rule 3:

Price Actually Paid or Payable:

The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.

Activities undertaken by the buyer on his own account, other than those for which an adjustment is provided in rule 10, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the value of imported goods.

f.1. Price Actually Paid equal to Payable by M/s Kraft Heinz:

35.1. Kindly refer to Para 23 & 24 above, whereby it has been established that:

i. Our client/buyer M/s Kraft Heinz India Pvt Ltd had placed an order upon us (Importer) to supply 10 Lakh Units of Fidget Spinners bearing the COMPLAN logo.

ii. They had paid us the agreed procurement amount as specified in the Purchase Order.

iii. They had not paid us any extra amount other than the stated procurement amount, as agreed in the Purchase Order

f.2. Price Actually Paid equal to Payable by M/s Momentum:

35.2. Kindly refer to Para 23 & 24 above, whereby it has been established that:

i. We, M/s Momentum Solutions Pvt Ltd, the importer, in turn placed an order upon our supplier M/s S.L. Promotions Co, China, to supply 10 Lakh Units of Fidget Spinners bearing the COMPLAN logo at a unit price of USD 0.11/Pc (CIF).

ii. M/s S.L. Promotions Co sold & supplied the impugned goods to MSPL via Invoice No. 8L171129 dated 29.11.2017. Part of the consignment comprised 2,40,000 pieces of the impugned goods, namely the 'Small Fidget Spinner' of Chinese origin, with a declared unit price of USD 0.11/Pc (CIF) [Exchange Rate 1 USD = INR 64.90], resulting in INR 6.561/Pc.

iii. We had paid the supplier the agreed procurement amount as per the Purchase Order.

iv. The Bank Statement provided by the bank also confirms the same.

v. We have not paid any extra amount other than the stated procurement amount as agreed in the Purchase Order.

Inference:

35.3. In view of the above:

i. The declared transaction value of the impugned goods stands meritoriously true and fair.

ii. The declared transaction value of the impugned goods cannot be rejected.

iii. Hence, the declared transaction value of the impugned goods, namely the 'Small Fidget Spinner' at the unit price of USD 0.11/Pc (CIF) [Exchange Rate 1 USD = INR 64.90], converted into INR 6.561/Pc, stands true and fair and should meritoriously be accepted for assessment and all customs purposes.

g. Non-Applicability of Section 28(4) of the Customs Act, 1962:

36. Section 28 of the Customs Act, 1962 deals with cases of recovery of duties not levied, short-levied, or erroneously refunded.

36.1. In the instant case, the assessment was done provisionally, and has not been assessed finally, which implies that:

- "There is no question of non/ short levy of duty" and "No recovery of duty under section 28(4) of the Customs Act, 1962."

Inference:

36.2. The analysis above infers that the Show Cause Notice (SCN) has been drafted with a poor sense of legality.

F. Summarised Reply in Defence:

37. We have analyzed the substance of the Show Cause Notice (SCN), contents of relied-upon documents (RUDs), contents of additional defence documentary evidences (DEFDOCs) pertaining to the import of 2,40,000 pieces of impugned goods, namely the 'Small Fidget Spinner', imported via Bill of Entry No. 4649801 dated 2nd January 2018, imported by MSPL, Mumbai, and supplied by M/s S.L. Promotions, China, in the light of legitimate provisions of applicable laws, acts, rules, regulations, etc., in a scientific, just, and fair manner.

37.1. Through submissions made in Para 28 above, it has been logically and legally substantiated that the allegation of misdeclaration of the description of the impugned goods fails to stand meritoriously.

37.2. Through submissions made in Para 29 & 30 above, it has been logically and legally substantiated that the allegation of misdeclaration of the quantity (batch-wise) of the impugned goods fails to stand meritoriously.

37.3. Through submissions made in Para 31 above, it has been logically and legally substantiated that the allegation of not affixing the permanent logo, amounting to misdeclaration of the description of the impugned goods, fails to stand meritoriously.

37.4. Through submissions made in Para 32 above, it has been logically and legally substantiated that the allegation of failing the qualitative test through an NABL-accredited laboratory fails to stand meritoriously.

37.5. Through submissions made in the above paras, it has been logically and legally substantiated that the allegation of import of impugned goods in violation of BIS rules fails to stand meritoriously.

37.6. Through submissions made in the above paras, it has been logically and legally substantiated that the allegation of misdeclaration of the valuation of impugned goods fails to stand meritoriously.

G. Legality & Applicability of Circular:

38. The Board (CBIC) issued an Instruction No. 1/2017-Cus. (F.No.591/04/2016-Cus. (AS), dated 8-2-2017) to govern the subject - Passing of Order under Section 110 of the Customs Act, 1962.

38.1. Para 5 of the instruction states that:

- i. It has been brought to the notice of the Board that in cases where provisional release of seized goods is allowed under Section 110A of the Act, Show Cause Notices are not being issued within the stipulated time period on the grounds that the goods have been released to the owner of the goods.
- ii. The provisions of the Customs Act, 1962 are clear that, irrespective of whether goods remain seized or are provisionally released, once goods are seized, the time period (including extended time period) stipulated under Section 110(2) of the Act shall remain applicable and has to be strictly

adhered to.

38.2. The clear and categorical interpretation of the said instructions narrates that, in any case, the Show Cause Notice shall mandatorily be issued within SIX Months or a maximum of TWELVE Months.

38.3. Failing in issuance of the Show Cause Notice (SCN) within SIX Months or maximum TWELVE Months as the case may be, the 'Case & All Allegations become Null & Void', and the 'Case automatically merits to be Dropped'.

38.4. In this case, the goods were seized on 5th January 2018 under Section 110 of the Customs Act, 1962, but the Show Cause Notice was issued on 26th December 2019, after a lapse of Twenty Three Months.

38.5. This case stands judiciously merits to be dropped itself without going into any content, discussion, analysis, or findings.

Request to Compliance of Board's Circular:

39.1. We, MSPL, submitted a letter dated 10.03.2019 to the Additional Commissioner of Customs, Ahmedabad, requesting to 'Conclude the entire case' as declared and bona fide in compliance with the Board's Instructions contained in Para 16 of CBEC (CBIC) Instruction No. 1/2017-Cus. (F.No. 591/04/2016-Cus. (AS)), dated 8-2-2017.

39.2. We humbly requested the Hon'ble Adjudicating Authority to drop the case, therefore, the authority was requested to 'Pass an Order of Closure as Declared' and to pass an order of 'Return of PD Bond & Bank Guarantee as not executed or appropriated'.

39.3. We had further submitted several Reminder Letters on successive dates to the Additional Commissioner of Customs, Ahmedabad.

Inference:

40. Despite repeatedly notifying these instructions through our representation letters, the investigating officer conspicuously or arbitrarily did not discuss them in the instant SCN.

40.1. We humbly urge the authority to consider these instructions while passing the 'Adjudication Order', else failing to discuss these instructions would amount to 'Violation of Natural Justice'.

H. Director's Action not as an Individual:

41.1. Shri Vishal H Khanna, a co-noticee of the SCN, performed all the functions in the instant case as a 'Director of the Company'. He did not carry out any action in an individual capacity. Therefore, this reply merits to be his reply too.

I. Prayer:

42.1. We humbly request the Hon'ble Adjudicating Authority to accept our aforesaid 'True & Correct Submission'.

42.2. Since, as established in the paragraphs above, the instant SCN merits to be dropped as NIL, therefore, the authority is kindly requested to 'Pass an Order of Closure as Declared and to Assess Finally the Goods as Declared.

42.3. We request you to kindly pass an order of 'Return of PD Bond & Bank Guarantee as not executed or appropriated'.

42.4. In case the Hon'ble Adjudicating Authority does not agree with any foregoing submission, we humbly request to grant 'Personal Hearing' towards imparting 'Natural Justice'."

ii. Submission dated 01.08.2024:

"

- A. We, M/s Momentum Solutions Pvt Ltd (MSPL), Mumbai, the importer humbly submits that,
- ii. We, M/s. Momentum Solution Pvt. Ltd Mumbai (IEC No. 0312070730), imported a consignment sand to contain FIDGET SPINNER branded with the logo/brand COMPLAN on behalf of Owner of Logo' M/s Kraft Heinz India Pvt. Ltd Unit 1901 & 1902, 19th Floor, E&G Wing, Lotus Corporate Park, Off Western Express Highway, Goregaon (East), Mumbai-400065.
- iii. The Container No. FCIU 4898412 was landed in ICD Tumb on 22nd December, 2017, but could get permission to file Bill of Entry on 2nd January, 2018, on our request.
- iv. The goods were examined and taken up for assessment immediately.
- v. The Preliminary Examination lead to the observations made by officers under your charge that, the impugned goods were under-valued grossly, hence proposed to detain the same as Mis-declared and resultantly, the goods were kept under seizure under section 110 of the Customs Act, 1962.
- vi. In view of the above 'Preliminary Findings, the case was forwarded to Additional Commissioner of Customs, Ahmedabad.
- vii. Upon our request, the 'Jurisdictional Adjudicating Authority i.e. "Additional Commissioner of Customs, Ahmedabad ordered the goods to be released 'Provisionally' subject to furnishing 'Bank Guarantee of Rs 18,82,700/- and PD Bond.
- viii. We complied with the conditions and got the goods released upon furnishing BG, PD Bond and payment of declared duty on 19.01.2018.

B. Grounds of Seizure:

- ix. In view of the following THREE "Preliminary Findings", the goods were seized:
 - i. The goods were not accompanied with 'Proper Test Report' issued by 'NABL Accredited Laboratory complying the instructions contained in DGFT's Notification No. 26/2017 (2015-2020) dated 1 September, 2017, as the 'Batch

Numbers were not matching with Physical Goods,

- ii. *Though total quantity tallied with declarations made under invoice & packing list, but the 'Quantity vis-a-vis each colour was not tallied.*
- iii. *The declared unit price was appeared to be low in comparison with contemporary price of similar goods available on 'Online Commerce Portals'.*

In lieu of the above we had made an appeal to CESTAT-Ahmedabad and honorable bench was kind enough to pass the judgement in our favour in CUSTOMS Appeal No. 10115 of 2022- DB along with CUSTOMS Appeal No. 10116 of 2022-DB (Arising out of OIA-AHD-CUSTM-000-APP-1068-1069-21-22 dated 26/11/2021 passed by Commissioner of CUSTOMS-AHMEDABAD) dated. 15th April 2024.

Enclosed is the final order copy Final Order No. 10872-10873/2024 - passed by HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR HON'BLE MEMBER (TECHNICAL), MR. RAJU.

In lieu of the above said order our BG held with yourself having BG Number 316201GL0000618-Amount Rs. 18, 82,700/- dated 17th Jan 2018 stands cancelled and to be refunded. (Enclosed copy of BG) issued by Union Bank of India - Byculla Branch.

We also request you to please give us a PII of the earliest date to present you with the above order and get the BG release adjudication letter.

We further request you to kindly cancel the said BG withheld with you and refund the same at your earliest by instructing the bank to release the said amount back to us.

We thank you for your support and understanding and looking forward for the release of BG."

16. Shri Anil Balani, Advocate, appeared for the Personal Hearing on 28.10.2024, representing M/s. Momentum Solutions Pvt. Ltd. and Shri Vishal H. Khanna, Director of M/s. Momentum Solutions Pvt. Ltd. During the hearing, he reiterated the submissions previously made by the Noticees on 26.02.2020, and 01.08.2024. He submitted letter dated 28.10.2024, is reproduced below for reference.

“3. SUBMISSION: -

Rejection of Transaction value and enhancement of the same under Rule 5 of Customs Valuation 2017 based on price quote appearing on website www.alibaba.com, despite there being admittedly no contemporaneous imports at that price, is totally bad in law:

3.1 *The price payable and actually paid by the Noticee to the foreign supplier is US \$0.11 per piece. The said price is therefore the transaction value of the goods. There is no amount paid by the Noticee over and above the said price, nor is there any allegation and evidence of payment over and*

above the said price.

3.2 The SCN in Para 10.1 states that investigations were carried out to verify the details of payment made by the Noticee to the foreign supplier and it was found that no differential amount over and above the Invoice price was paid by the Noticee to the foreign supplier.

3.3 As laid down by the Hon'ble Supreme Court in the case of *Eicher Tractors* [2000 (122) ELT 321(SC)], the transaction value has to be accepted as mandated in Rule 4(2) of the Customs Valuation Rules 1988 (now Rule 3(2) of 2007 Rules) unless it is established by evidence that there is contravention of any of the clauses of the Proviso to Rule 4(2) (now Proviso to Rule 3(2) of 2007 Rules). In the present case, there is neither any allegation nor evidence of contravention of any of the clauses of the Proviso to Rule 3(2) and consequently the transaction value has to be accepted.

3.4 It is settled law that a mere price quotation appearing on a website on the Internet cannot be the basis for rejection of the transaction value or for enhancement of the value in absence of any contemporaneous imports of identical or similar goods at that price. In this behalf, reliance is placed on the following decisions:

- a. *Kuber India v CC* – 2016 (340) ELT 404 (Tri.-Del.)
- b. *B.C.Trading Co v CC* – 2006 (202) ELT 619(Tri.-Bang.)
- c. *CC v B.C.Trading Co*- 2008 (223) ELT A133 (SC)
- d. *CC v P.J.Network* – 2012 (277) ELT 104 (Tri.-Del.)
- e. *Suyog Extrusions v CC* – 2007 (213) ELT 524(Tri.-Mum)
- f. *Commissioner v Suyog Extrusions*- 2008 (228) ELT A29(SC).

3.5 The SCN in Para 10.2 (ii) categorically states that there is no data available of contemporaneous imports of identical or similar goods. Accordingly, the enhancement of value under Rule 5 of the Customs Valuation Rules 2007 is *ex-facie* bad in law.

3.6 A plain reading of Rule 5 would show that for re-determination of value under that Rule, there should be a transaction value of similar goods sold for export to India and imported at or about the same time as the goods being valued. There should therefore be an actual contemporary import and not a mere price quote on a website. In any event, the price quote on www.alibaba.com is for 11,111 pieces, whereas the Noticee has imported total 6,75,000 pieces at Nhava Sheva and ICD Tumb. In view of the much larger quantity of import by the Noticee, in any event, the said website price is not comparable and cannot be relied upon to reject the transaction value in the instant case.

3.7 It is further submitted that the price of US \$ 0.11 per piece has been accepted by Nhava Sheva Customs in respect of the 4.35 lakhs pieces which were imported in December 2017 at Nhava Sheva.

Confiscation of goods under Section 111(m) of the Customs Act 1962 on account of mismatch of colour, batch number and batch quantity which occurred due to supplier's mistake is untenable in law:

3.8 It is clear from the supplier's letter that the mismatch of colour, batch number and batch quantity occurred on account of mistake at the Supplier's end. It is settled law that when the importer files the Bill of Entry based on the documents received from the foreign supplier, and upon examination, some discrepancy is found between the actual goods and the documents provided by the supplier on account of mistake at the end of the supplier, that cannot render the goods liable to confiscation under Section 111(m) of the Customs Act 1962:

- a. *Shree Ganesh International v CC – 2004 (174) ELT 171*
- b. *Kirti Sales Corpn v CC – 2008 (232) ELT 151*
- c. *Makali Metals P. Ltd v CC – 2001 (138) ELT 607*
- d. *Gitanjali Gems Ltd v CC – 2011 (264) ELT 574.*

3.9 The Total number of pieces found on examination tallied with the total number of pieces declared and the mis-match in colour, batch number and batch-wise quantity has no bearing on the value of the goods or their eligibility to import. The goods are therefore not liable to confiscation under Section 111(m) and the fine and penalties are liable to be set aside.

Mistake of one batch number in Test Certificate produced for the purpose of DGFT Notification No.26/2015-20 dated 1-9-2017 does not justify confiscation of the goods since the said mistake was a typographical error which was later rectified by the test laboratory:

3.10 In the Test Certificate produced for the purpose of DGFT Notification No.26/2015-20 dated 1-9-2017, certifying compliance with IS Standards as required by the said Notification, there was typographical error with regard to mention of one of the Batch numbers as confirmed by the Test laboratory by their e-mail dated 8-1-2018 to the customs, by which the corrected certificate was provided.

3.11 There is no investigation by customs of the records maintained by the Testing Laboratory to show that their claim of typographical error was not correct. Accordingly, the goods are not liable for confiscation under Section 111(d) of the Customs Act on account of the mistake of mention of Batch number in the Test Certificate.

Bill of Entry was filed on First Check basis:

3.12 Para 2 of the Notice admits that the Bill of Entry was filed on 'First Check' basis. This itself proves that there was no deliberate misdeclaration or indentation to evade duty on the part of the Noticees. It is well settled that in such cases provisions of Sections 111(m) and 112(a) cannot be invoked. CESTAT Judgements in the cases of *Sahil International [2019 (369) ELT 1397 (Tri.-Mum)]*, *Amit Corp.Ltd.[2016 (333) ELT 340 (Tri.-Mum)]* & *Desert Exim [2019 (369) ELT 1333 (Tri.Del.)* are relied upon in support of this submission.

Section 114A is wrongly invoked:

3.13 Section 114A is wrongly invoked in the SCN. In this case the

imported goods were cleared provisionally under Section 18. Section 28 applies to cases where the goods are cleared in the normal course. Section 114A can be invoked only when duty is recoverable under Section 28(4). In a similar case of Amit Rajkumar Singhania (2019 (368) ELT A348(Tri.-Mum.) the CESTAT held that penalty under Section 114A cannot be imposed because the case is not covered by Section 28.

Penalty under Section 112 cannot be imposed:

3.14 *As the goods are not liable for confiscation under Section 111(d) & (m) as explained above and further as the Noticees have not committed any act rendering the goods liable to confiscation under Section 111, they are not liable for penalty under Section 112(a) and 112(b) of the Customs Act.*

Findings of CESTAT Order dated 15.04.2024:

3.15 *While remanding the matter for denovo adjudication, the Hon'ble CESTAT in its Order dated 15.04.2024 inter alia held as under:*

(1) *Value cannot be enhanced merely on the basis of the quote available on the website;*

(2) *The error of the supplier does not conclusively lead to any mala fide on the part of the Appellant. The Adjudicating Authority must reconsider the clarification given by the supplier. Even though this mistake has occurred, the total quantity of the goods is matching. This aspect also needs to be re-looked into by the adjudicating authority.*

(3) *As regards the allegation that in Test certificate one batch number is mentioned wrongly. We find that it was a typographical error and the testing laboratory has rectified the error. Once the typographical error has been rectified, the mistake doesn't remain and after rectification only for the mere typographical error goods cannot be confiscated.*

In the circumstances, it is prayed that the proceeding be dropped with consequential relief.”

Personal Hearing

17. Shri Anil Balani, Advocate, appeared for the Personal Hearing (Virtual Mode) on 05.02.2025, on behalf of both the Noticees (M/s. Momentum Solutions Pvt. Ltd. and Shri Vishal H. Khanna, Director of M/s. Momentum Solutions Pvt. Ltd) and reiterated submission made vide letters dated 26.02.2020 and 28.10.2024.

Discussion & Findings

18. I have carefully studied all the case records before me. **I note that the subject matter is remanded vide Hon'ble CESTAT Final Order No. 10872-10873/2024 dated 15.04.2024.**

19. The importer submitted that the subject goods were seized

on 04.01.2018, and the SCN was issued on 26.12.2019 and that the SCN is time-barred. In this respect I reproduce the relevant provisions of Custom Act as follows:

Section 110(2) Customs Act reproduced as under:

(2) *Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:*

[Provided that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified:

Provided further that where any order for provisional release of the seized goods has been passed under section 110A, the specified period of six months shall not apply.]

20. I note that this Order is issued in pursuance to the remand directions as per the Hon'ble CESTAT Order dated

15.04.2024. Further, in subject matter the seized goods were provisionally released and therefore in pursuance to the second proviso to Section 110(2) Custom Act, the submission of importer that SCN is time barred is not legally tenable.

21. **Misdeclaration and Test Certificate issued by testing laboratory.**

i. I note that the earlier test certificate issued by the testing laboratory had a mistake of a batch number. Further, I note that the importer submitted it to be a typographical error which was later rectified by the test laboratory.

In this regard, I note that para 4.2 of the said CESTAT Order reads as follows:

'4.2 As regard the allegation that in test certificate one batch number is mentioned wrongly. We find that it was a typographical error and the testing laboratory has rectified the error. Once the typographical error has been rectified, the mistake dose not remains and after rectification only for the mere typographical error goods cannot be confiscated. Therefore the adjudicating authority has to

reconsider this matter accepting the rectification of the error done by the concerned laboratory.'

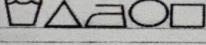
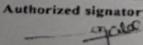
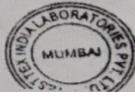
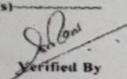
ii. In this regard, I find that during the investigation of subject matter, the importer had submitted that it had deliberated this issue of mismatching batch number to M/s Testtex laboratory pvt ltd, Mumbai an NABL accredited laboratory and consequently a corrected test report was submitted resolving the mismatching batch number. Further, I note that the importer submitted that this mistake was at the end of the supplier and they did not have any role to play. From the subject records, I note that the importer submitted the following:

"M/s Testtex Laboratory Pvt Ltd, Mumbai an 'NABL Accredited Laboratory' issued Test Report No. MUM-76319/2017-18 Dated 28.11.2017, the findings of which reads as Batch Nos.: ACT {170001, 170002, 170003, 170004, 170005} Colours: Red, Blue, Green, Yellow & White Inference: PASS The Test Report declared subject goods as 'PASS on Standard Qualities' as per IS (required). Further, upon their deliberation, the said Lab removed Typographical Error' and issued duly 'Corrected Test Report' and forwarded the same to the office of the Deputy Commissioner of Customs i/c ICD Tumb. Thus, it is substantially established that, all 'Batch Numbers' were matched with declarations made in Invoice & Packing List in this regard.

Hence, SCN fails to stand with "Test of Legality" for the allegation such as, 'the impugned goods violated Testing Norms & Standards'."

iii. In this regard the relevant portion of the test report is as follows:

Testte
ESTD. 1988

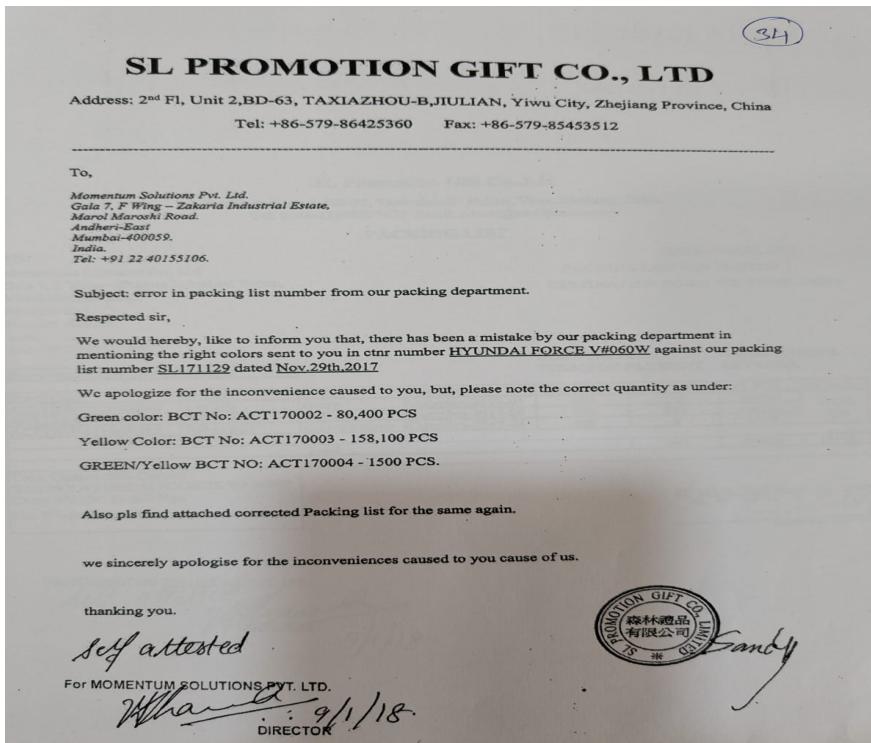
TEST REPORT NO		MUM - 76319 / 2017-18	DATE	28.11.2017	LOCATION	MUMB
Client	Address	M/S. SI. Promotions & Gift Co. Ltd. 2nd Floor unit 2, BD-63, Taxiszhou-B, Yiwu City, Zhejiang Province China.	Date of Receiving	24.11.2017	Page	1 of 7
Contact Person	Contact Details		Date of Test Start	25.11.2017		
Email			Date of Test Completion	28.11.2017		
			Date of Reporting	28.11.2017		
			Environmental condition	Temp(21±5)°C RH(65±5)%		
Sample was submitted by supplier and all test(s) performed as per current standards edition or unless otherwise requested. Identification of submitted sample based on information given by the client is as under: The test results stated in this report relate only to the item(s) tested.						
Sample Description		Fidget Spinner				
Order Number	Batch No	ACT 170001(2500000), ACT17002 (1800000), ACT17003(1500000), ACT17004(1200000), ACT17005(1400000)				
Style	Red, Blue, Green, Yellow, White					
Colour	Nov. 2017					
Month & Year of Mfg.	3-12 Years					
Age Grade	China					
Country of Origin	Momentum solutions Pvt. Ltd.					
Importer Name	Good					
Sample Condition	Client					
Invoice To	Client					
Report Mailing To	Yes					
Report Hard copy Required	Yes					
Labeled age grading	Yes					
Wash Care Instructions as provided by the vendor  Care wordings: Not mentioned						
Summary of Test Results						
Sr. No.	Test Parameters	Test Standards	Conclusion	Remark		
01	Mechanical and physical properties	IS 9873-1:2017	PASS			
02	Flammability Test	IS 9873-2:2017	PASS			
03	Migration of certain Elements	IS 9873-3:2017	PASS			
04	Phthalates present in Toys & Children's product	IS 9873-9:2017	PASS			
05	Labelling & Marking	IS 9873-1:2017	NA			
06	Requirements and Test method for finger paints	IS 9873-7:2017	NA			
07	Swings, slides and similar activity toys for Indoor and outdoor family domestic use	IS 9873-4:2017	NA			
08	Safety of electric toys	IS 15644 : 2006 (RA 2011)	NA			
<i>Conformity : The submitted sample meets the compliance .</i> Notes : P = Pass, F = Fail, NA = Not Applicable, NC = No Comments (See Results) Remark : At the request of the client, test(s) was conducted on the certain component(s) of the submitted sample(s)/ Submitted component(s).						
For Further Details, Please Refer to the following Page(s)						
Authorized signatory  (Technical Manager)		 Verified By 				

Summary of the Test Report:

Sr. No.	Test Parameters	Test Standards	Conclusion
1	Mechanical and physical properties	IS 9873-1:2017	PASS
2	Flammability Test	IS 9873-2:2017	PASS
3	Migration of certain Elements	IS 9873-3:2017	PASS
4	Phthalates present in Toys & Children's product	IS 9873-9:2017	PASS
5	Labelling & marking	IS 9873-1:2017	NA
6	Requirements and Test method for finger paints	IS 9873-7:2017	NA
7	Swings, slides and similar activity toys for Indoor and outdoor family domestic use	IS 9873-4:2017	NA
8	Safety of electric toys	IS 15644 : 2006 (RA 2011)	NA
Conformity: The submitted sample meets the compliance.			
Notes: P = Pass. F = Fail. NA = Not Applicable. NC=No Comments (See Results)			

Remark: At the request of the client, test(s) was conducted on the certain component(s) of the submitted samples(s)/ Submitted component(s)

- iv. I find that the subject goods should meet the criteria of standards prescribed as required under DGFT Notification No. 26/2015-20 dated 01.09.2017.
- v. I find that vide Test Report No. MUM-76319/2017-18 issued by M/s Testtex Laboratory Pvt Ltd, Mumbai—an NABL Accredited Laboratory—it was reported that the subject goods pass the test standards.
- vi. I note that the importer submitted that absence of embossed permanent logo and affixing of logo stickler does not amount to misdeclaration and that there is no existing law which mandates that toys must be affixed with permanent and that this was done to keep the cost low, especially in case of promotional goods. Further, I note that consequent to examination of subject goods, there is misdeclaration of the colour wise quantity of the fidgets in the subject Bill of entry. In this regard, I note that a clarification from supplier vide letter dated 09.01.2018 regarding the reason of mismatching colour packing list and that corrected packing list is on record, copy of the same produced as follows:



- vii. The importer submitted that declaration in the bill of entry was based on invoice, packing list and that they had no way to verify the correctness or check the goods in the container. **In this regards, Hon'ble CESTAT Order dated 15.04.2024 reads as follows:**

"4.1. As regard the confiscation of the goods on the basis mis-match of colour, batch number and batch quantity the appellant submitted that the mistake has occurred in the part of the supplier which has subsequently been clarified by the supplier. We prima facie find that

because of this error it does not conclusively lead to any mala fide on the part of the appellant. The Adjudicating authority must reconsider the clarification given by the supplier and also to see that whether there is any intention to evade/ short paid the custom duty. It is also the submission of the appellant that even though this mistake has occurred the total quantity of the goods is matching. This aspect also needs to be re-looked into by the adjudicating authority.”

viii. I find that the importer had filed a bill of entry No. 4649801 dated 02.01.2018 for the import of subject goods as follows:

1. Small Fidget Spinner Blue Complan 2017-01 (Toy) 120000 units (Unit price -0.11 USD).
2. Small Fidget Spinner White Complan -2017-04 (Toy) 60000 units (Unit price - 011 USD).
3. Small Fidge Spinner Yellow Complan -2017-04 (Toy) 60000 units (Unit price - 0.11 USD).

ix. I find that on examination of the goods revealed batch numbers as B.C. No. ACT170002, B.C. No. ACT170003, and B.C. No. ACT170004. The test certificate issued by M/s. Testtex India Laboratory Pvt. Ltd., as per the requirements of DGFT Notification No. 26/2017 dated 1.9.2017, mentioned batch numbers B.C. No. ACT170001, B.C. No. ACT170004, and B.C. No. ACI170003 the goods differed in colour, quantity, and batch numbers from those declared in the Bill of Entry (BE). With the batch number rectified in pursuance to the revised Test Certificate, yet there persists a discrepancy between the declared and examined colour wise quantity for subject goods. Shri Vishal H. Khanna, Director of M/s Momentum Solutions Pvt. Ltd., stated that this discrepancy was a bona fide mistake caused by an error in the supplier's packing department. I note that the total quantity of the goods declared matches the total quantity imported, however the error in relation to the mismatch of colour and batch quantity declared in the subject bill of entry does amount to misdeclaration in the subject bill of entry of the said particulars. I note that as per law, consequent upon amendment to the Section 17 of the Customs Act, 1962 vide Finance Act, 2011; 'Self-Assessment' has been introduced in Customs. Section 17 of the Customs Act, effective from 08.04.2011, provides for self-assessment of duty on imported goods by the importer himself by filing a Bill of Entry, in the electronic form. Provisions of the Section 46 of the Customs Act, 1962 makes it mandatory for the importer to make proper & correct entry for the imported goods by presenting a Bill of Entry electronically to the proper officer. As per Regulation 4 of the Bill of Entry (Electronic Declaration) Regulation, 2011 (issued under Section 157 read with Section 46 of the Customs Act, 1962) the Bill of Entry shall be deemed to have been filed and after self-assessment of duty completed when, after entry of the electronic declaration (which is defined as particulars relating to the imported goods that are

entered in the Indian Customs Electronic Data Interchange System) in the Indian Customs Electronic Data Interchange System either through ICEGATE or by way of data entry through the service centre, a Bill of Entry number is generated by the Indian Customs Electronic Data Interchange System for the said declaration. Thus, under self-assessment, it is the importer who has to ensure that he declares the correct particulars while presenting the Bill of Entry. Thus, with the introduction of self-assessment by amendments to Section 17, since 8th April, 2011, it is the responsibility of the importer to declare the correct description and particulars of the imported goods. I find that in the subject case, the noticee has mis-declared the particulars of the colour wise quantity of the imported goods in subject bill of entry which is mis-declaration as per law laid down vide Section 111(m) Custom Act. Thus, I hold that the provisions of Section 111(m) Custom Act come into play in subject matter. Further, the importer has failed to submit a certificate of conformance from the manufacturer, as mandated under DGFT Notification No. 26/2015-20 dated 01.09.2017 and thereby I hold that the goods are thereby rendered liable for confiscation due to non-fulfilment of the said DGFT Notification, as per law laid down vide Section 111(d) Custom Act. Thus, I hold that the subject goods are liable to confiscation under Section 111(d) and Section 111(m) of the Customs Act, 1962 and fine in lieu of the confiscation is liable to be imposed under Section 125 of the Customs Act, 1962. I rely on the ruling in Commissioner of Customs, Mumbai Vs. Multimetal Ltd., 2002 (144) ELT 574 (Tri-Mumbai), affirmed by the Hon'ble Supreme Court in 2003 (151) ELT A309, which held that goods are liable to confiscation when mis-declared, regardless of mala-fide intent.

- x. As per the provisions of section 112 Custom Act, any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111 shall be liable to penalty as per the provisions of section 112 of the Custom Act, as applicable in subject matter, I hold that the importer shall be liable to penalty under the provisions of Section 112 of the Custom Act.

22. **Valuation of subject Goods**

- i. I note that the Show Cause Notice (SCN) dated 26.12.2019 proposes that the assessable value per unit of fidget spinner toys be determined based on the price listed on www.alibaba.com for quantities exceeding 11,111 pieces, which amounts to USD 0.36 per unit (equivalent to Rs. 23.36 per unit). Further, I note that as per the Subject SCN, it is on record that no data was found in NIDB corresponding to similar/same/identical goods. I note that the gist of the submission of the importer can be summarised that the value cited at Alibaba.com does not indicate the transaction value in subject matter. The importer submitted that no extra amount other than that agreed vide purchase order was paid to their supplier. In this regard, Hon'ble CESTAT Order dated 15.04.2024 at

para 4 reads as follows:

“4. We find that as regard the enhancement of the value of the goods from US \$ 0.11 per piece to US \$ 0.36 per piece, the sole reliance for enhancing the value was made on quote appearing on website www.alibaba.com. We find that merely on the basis of the quote available on particular website it is not sufficient to enhance the value of the imported goods, at the same time the value appearing on website is abnormally high i.e. 0.36 per piece therefore the matter needs to be reconsidered on the basis of other material, if any. It is also observed that for applying the value of contemporaneous import it will also be important to see various factor such as similar goods, same quality, country of the export and the time of import. Therefore, we are of the *prima facie* view merely on the basis of the quote available on the website value cannot be enhanced.”

- ii. Hon'ble Tribunal's subject Order dated 15.04.2024 reads that merely on the basis of the quote available on the website value cannot be enhanced. I find that the yardstick pertaining to the quantity 11,111 quoted in Alibaba website and the quantity of subject goods 2,40,000 is not comparable parameter. From the documents on record, I find that as per the Investigation conducted, there is no data available in NIDB corresponding to similar/same/identical goods.
- iii. In view of the facts on record, I find that the subject investigations conducted did not unearth any additional payments made beyond the declared value but acknowledged that there is no data on contemporaneous imports of identical or similar goods for comparison in NIDB. I find that the price quoted on www.alibaba.com for 11,111 pieces is not comparable with a quantity of 2,40,000 pieces; and that in pursuance to the judicial discipline laid down vide Hon'ble CESTAT Order dated 15.04.2024; the importer's submission that the declared value is the transaction value holds ground as it represents the transaction value as per Section 14 of the Custom Act. I find my view in compliance to judicial discipline laid down vide the Hon'ble Supreme Court in the judgment of Eicher Tractors [2000 (122) ELT 321 (SC)] that transaction value must be accepted as the primary basis for valuation unless there is concrete evidence of manipulation or under-declaration.

23. As discussed in para 22 (iii), I hold that the declared value being the transaction value, the duty demand proposed does not hold ground and thereby interest demand under section 28AA Custom Act does not hold ground; thereby with no further duty or interest liable to be determined, the invocation of penalty provisions under section 114A on the importer also does hold ground. In subject matter, no nexus

or involvement of Shri Vishal H. Khanna is on record and thereby his abetment in rendering the subject goods liable to confiscation under Section 111 Custom Act has not been established on record and consequently invocation of penalty provision on Shri Vishal H. Khanna, Director of the importer does not hold ground.

24. In conspectus of the aforementioned discussion and findings, I pass the Order

ORDER

- i. I order to confiscate the subject goods under Section 111(d) and 111(m) of the Customs Act, 1962 and I give an option to pay fine in lieu of confiscation of Rs. 10,000 (Rupees Ten thousand only) as per the provisions of Section 125 of the Customs Act 1962.
- ii. I order to impose penalty of Rs 5000/- (Rupees five thousand only) on M/s Momentum Solutions Pvt. Ltd. under Section 112 of Customs Act, 1962.
- iii. I order to confirm the declared value as the transaction value, as discussed at para 22(iii) above and thereby the proceedings of proposed demand liability and proposed interest invocation in subject SCN dated 26.12.2019 is hereby dropped.
- iv. I refrain from imposition of penalty upon M/s Momentum Solutions Pvt. Ltd, under Section 114A of the Customs Act, 1962 and refrain from imposition of penalty on Shri Vishal H. Khanna, Director of M/s Momentum Solutions Pvt. Ltd., under Section 112 of the Custom Act, 1962.
- v. The aforesaid pending dues if not paid by M/s Momentum Solutions pvt ltd. shall be recovered by enforcing the executed Bond and bank guarantee as per law and procedure.
- vi. **The subject matter is adjudicated in pursuance to the Hon'ble CESTAT Order No. 10872-10873/2024 dated 15.04.2024**

Arun Richard
Commissioner in situ
Customs

F. No. VIII/10-04/ICD-Tumb/O&A/2018.

DIN-20250271MN000000E921

To,

1. M/s Momentum Solutions Pvt. Ltd., Gala 7, F Wing, Zakarta Industrial Estate, Marol, Maroshi Road, Andheri East, Mumbai 400059.
2. Shri Vishal H. Khanna, Director of M/s Momentum Solutions Pvt. Ltd, Gala 7, F

Wing, Zakarta Industrial Estate, Marol, Maroshi Road, Andheri East, Mumbai 400059.

Copy to:

1. The Principal Commissioner, Customs Commissionerate, Ahmedabad.
2. The Deputy Commissioner, ICD Tumb.
3. The Deputy Commissioner, TAR, Custom Ahmedabad.
4. The Superintendent Systems, Customs Ahmedabad with request to upload the subject Order on website.
5. Guard File.