

3054 & 3055

	<b>OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS, CUSTOM HOUSE: MUNDRA, KUTCH MUNDRA PORT &amp; SPL ECONOMIC ZONE, MUNDRA-370421</b> <u>Phone No.02838-271165/66/67/68</u> <u>FAX.No.02838-271169/62</u>	
File No.	: GEN/ADJ/COMM/49/2024-Adj-O/o Pr. Commr-Cus-Mundra	
Order-in-Original No.	: MUN-CUSTM-000-COM-018-24-25	
Passed by	: K. Engineer Pr. Commissioner of Customs, Customs House, AP & SEZ, Mundra.	
Date of order and Date of issue	: 16.07.2024 16.07.2024	
SCN No. & Date	: F.No. GEN/ADJ/COMM/49/2024-Adjn-O/o Pr Commr-Cus-Mundra dated 30.01.2024	
Noticee(s) / Party / Importer	: 1. <b>M/s Aparna Electricals</b> 2. <b>Shri Alok Gupta,</b> Partner of M/s Aparna Electricals, 3. <b>Shri Kanhaiya Jagdish Kashera,</b> Director of Customs Broker of M/s Cargo Concepts (Bombay) Pvt. Ltd.	
<b>DIN</b>	: 20240771MO0000229220	

1. यह अपील आदेश संबंधित को निःशुल्क प्रदान किया जाता है।

This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम (1)6 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 129 A (1) के अंतर्गत प्रपत्र सीए-3 में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है -

Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

“केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवाकर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ, 2<sup>nd</sup> फ्लोर, बहुमाली भवन, मंजुश्री मील कंपाउंड, गिर्धनगर ब्रिज के पास, गिर्धनगर पोस्ट ऑफिस, अहमदाबाद-380 004” “Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, 2<sup>nd</sup> floor, Bahumali Bhavan, Manjushri Mill Compound, Near Girdharnagar Bridge, Girdharnagar PO, Ahmedabad 380 004.”

3. उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।

Appeal shall be filed within three months from the date of communication of this order.

4. उक्त अपील के साथ 1000/- रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, दंड या शास्ति रूपये पाँच लाख या कम माँगा हो। 5000 रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, शास्ति या दंड पाँच लाख रूपये से अधिक किंतु पचास लाख रूपये से कम माँगा हो। 10,000/- रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, दंड व्याज या शास्ति पचास लाख रूपये से अधिक माँगा हो। शुल्क का भुगतान खण्ड पीठ बेंचआहरितट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीयकृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा।

Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs. 50 lakh (Rupees Fifty lakhs) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.

5. उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत 1/5 रूपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची- 1, न्यायालय शुल्क अधिनियम, 1870 के मदसं<sup>o</sup> 6-के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए।

The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.

6. अपील ज्ञापन के साथ ड्यूटी/दण्ड/जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये। Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo. अपील प्रस्तुत करते समय, सीमाशुल्क) अपील (नियम, 1982 और CESTAT (प्रक्रिया (नियम, 1982 सभी मामलों में पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहाँ शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहाँ केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।

An appeal against this order shall lie before the Tribunal 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.

### **BRIEF FACTS OF THE CASE**

Intelligence gathered by the DRI suggested that that **M/s Aparna Electricals** (*hereinafter referred to as 'the importer'*), Room No. 403 & 404, 3rd Floor, A-112, Group Industrial Area, Wazirpur, Delhi-110052, were importing LED Chain Lights, LED Cob Lights and similar items of different length and different quantity of bulb used therein from China, with huge undervaluation, in comparison to similar goods being imported by other importers at Mundra and other ports of India.

**2.** Accordingly, live consignments imported by the said importer through SEZ Entity M/s Holistic Global Corporation, APSEZ, Mundra and warehoused at M/s Steinwag Sharaf (India) Pvt. Ltd, APSEZ, Mundra were put on hold. Details of the said consignments is as given below: -

**TABLE-1**

<b>Sr. No.</b>	<b>THOKA / NOTING NUMBER</b>	<b>REQUEST SUBMISSION DATE</b>
1.	1014674	29-Jul-23
2.	1014964	02-Aug-23
3.	1014518	28-Jul-23
4.	1014652	29-Jul-23
5.	1014246	26-Jul-23
6.	1014298	26-Jul-23
7.	1014769	31-Jul-23
8.	1014621	29-Jul-23
9.	1007649	08-May-23
10.	1014439	27-Jul-23
11.	1014763	31-Jul-23
12.	1014243	26-Jul-23
13.	1014401	27-Jul-23
14.	1014402	27-Jul-23
15.	1014457	27-Jul-23
16.	1014285	26-Jul-23
17.	1012490	06-Jul-23

**3.** The importer had declared value between USD 0.014 to USD 0.3 per piece for the said goods in the above consignments. Total declared value of goods covered in above Bills of entry was Rs 1.07 Crores. Intelligence gathered indicated that the goods have been under-valued to the extent of 90% and the actual price of these goods varied between USD 0.14 to USD 3.

**4.** The above consignments put on hold by the DRI were examined by the officers of DRI vide panchnamas dated 10.08.2023, 11.08.2023, 14.08.2023 and 24.08.2023. One container related to consignment covered under Thoka Noting No. 1007649 dated 08.05.2023 had already left the warehouse during June-2023, hence could not be examined. During the examination of the remaining 16 consignments, the said consignments were found to contain LED Lights with various quantity of bulbs, LED COB Lights and accessories. During the examination proceedings as above,

Chartered Engineer from the Chartered Engineer firm M/s B G Bhatt & Company, Ahmedabad remained present and withdrew samples for the purpose of valuation of the subject consignments.

5. Search attempts were made by the officers of the DRI at the addresses of M/s Aparna Electricals, located at 3rd Floor, 403 & 404, A-112, Group Industrial Area, Wazirpur, North West Delhi, Delhi - 110052; and 583 square yards out of 1 Kanal 12 Marla, Godown No. 2, Ground Floor, Khasra no. 14/24/2 & 14/25/2, Village Nangli Poona, New Delhi-110036. During the said attempt, no firm with the name of M/s Aparna Electricals was found at 3rd Floor, 403 & 404, A-112, Group Industrial Area, Wazirpur, North West Delhi, Delhi - 110052. Further, address of M/s Aparna Electricals, 583 square yards out of 1 Kanal 12 Marla, Godown No. 2, Ground Floor, Khasra no. 14/24/2 & 14/25/2, Village Nangli Poona, New Delhi-110036, could not be located by the DRI officers. Therefore, searches could not be executed at the aforementioned addresses.

7. During the course of investigation, Statement of Shri Alok Gupta, partner of the importer M/s Aparna Electricals was recorded on 02.11.2023 and statement of Shri Kanhaiya Jagdish Kashera, Director of Customs Broker firm M/s Cargo Concepts (Bombay) Pvt. Ltd. was recorded on 02.11.2023.

8. Intelligence gathered by the DRI suggested M/s Aparna Electricals had imported 17 consignments of LED Chain Lights, LED COB Lights and similar items of different length and different quantity of bulb used therein from China, at Mundra Port with huge undervaluation, in comparison to similar goods being imported by other importers at Mundra and other ports of India. Value of some of similar goods being imported into India, compared to value declared by M/s Aparna Electricals in the subject 16 consignments is as given below:

Sr. No.	Product Description	Port of Import	Value declared (Rs.)	Month of Import	Value declared by M/s Aparna Electricals of similar import goods (Rs.)
1.	LED SERIAL LIGHT 180L (CHAIN LIGHT)	INNSA1	37.42	May-June-2023	15.10
2.	LED SERIAL LIGHT 36L (CHAIN LIGHT)	INNSA1	7.48	May-June-2023	3.01
3.	LED SERIAL LIGHT 22L (CHAIN LIGHT)	INNSA1	4.57	May-June-2023	1.84
4.	LED SERIAL LIGHT 40L (CHAIN LIGHT)	INNSA1	8.34	May-June-2023	3.35
5.	LED LIGHTING CHAINS 54L	INBOM1	8.06	May-June-2023	4.86

6.	LED LIGHTING CHAINS 76L	INBOM1	11.35	May-June-2023	8.20
7.	46L LED LIGHTING CHAINS	INBOM1	6.86	May-June-2023	3.35
8.	LED LIGHTING CHAINS 72L	INBOM1	10.76	May-June-2023	8.20

9. The 17 consignments were put on hold by the DRI on intelligence of huge undervaluation by the importer in the subject consignment. The examination of the 16 consignments out of the said 17 consignments was carried out in presence of a Govt. approved Chartered Engineer, who took samples from the subject consignments. Subsequently, the Chartered Engineer submitted valuation reports in respect of the subject 16 consignments which showed that the importer had hugely undervalued the import consignments. The Chartered Engineers in his valuation reports, determined the value of the subject import consignments at Rs. 2,92,39,896/-, while the declared value of the said consignments was Rs. 1,28,36,038/- by the importer M/s Aparna Electricals. As per the valuation reports submitted by the Chartered Engineer, the consignments wise value of the subject 16 import consignments, in comparison to value declared by the importer M/s Aparna Electricals, is as under:

TABLE-2

Sr. No.	Bill of Entry No. (Thoka / Noting Number)	Request Submission Date	Container No.	Declared Value	Value provided by the CE
1	1014674	29-Jul-23	HMMU6222495	6,60,698	13,54,947
2	1014964	02-Aug-23	GAOU6098554	5,95,477	12,87,565
3	1014518	28-Jul-23	TEMU7182540	6,89,030	14,78,314
4	1014652	29-Jul-23	ZCSU6905629	6,84,629	16,18,102
5	1014246	26-Jul-23	OOCU7721606	6,53,601	13,84,251
6	1014298	26-Jul-23	FFAU3315848	8,01,907	17,16,646
7	1014769	31-Jul-23	WHSU6488692	13,48,684	33,53,015
8	1014621	29-Jul-23	CAIU4375408	6,03,791	15,37,387
9	1014439	27-Jul-23	CAIU9849789	5,90,628	14,99,412
10	1014763	31-Jul-23	BSIU9900211	14,07,277	33,03,039
11	1014243	26-Jul-23	DFSU7717471	11,55,796	26,88,266
12	1014401	27-Jul-23	OOCU8145716	5,94,853	8,44,126
13	1014402	27-Jul-23	GLDU7444374	11,15,529	27,95,032
14	1014457	27-Jul-23	DFSU7326332	5,98,171	10,67,790
15	1014285	26-Jul-23	OOCU6948642	5,92,303	14,98,299
16	1012490	06-Jul-23	MSCU5241408	7,43,664	18,13,705

<b>Total</b>	<b>1,28,36,03 8</b>	<b>2,92,39,89 6</b>
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The differential duty payable by the importer as per the value determined on the basis of the valuation of the subject 16 consignments as discussed in Para 20 above, in respect of the subject consignment is given in below table:

**Amount in Rs.**

Sr. No.	SEZ W/H Bill of Entry No. (Thoka / Noting No.)	Declared Assesable value	Duty paid on (C) (BCD + SWS)	IGST @ 18% paid on (b)+(c)	Value of the consignment as per CE	Total Duty (BCD + SWS) Payable on (e)	Total IGST payable on (e)+(f)	Remaining Diff. duty (BCD + SWS) payable by the importer (f)-(c)	<b>Remaining Diff. IGST Payable (g)-(d)</b>
									Request Submission Date
									(a)
1	1014674	660698	181691	151630	13,54,947	372610	310960	190919	159330
	29-Jul-23								
2	1014964	595477	163756	136662	12,87,565	354080	295496	190324	158834
	02-Aug-23								
3	1014518	689030	189483	158132	14,78,314	406536	339273	217053	181141
	28-Jul-23								
4	1014652	684629	188174	157040	16,18,102	444978	371354	256804	214314
	29-Jul-23								
5	1014246	653601	179740	150001	13,84,251	380669	317686	200929	167685
	26-Jul-23								
6	1014298	801907	220525	184038	17,16,646	472078	393970	251553	209932
	26-Jul-23								
7	1014769	1348684	237724	285554	33,53,015	583002	708483	345278	422929
	31-Jul-23								
8	1014621	603791	166043	138570	15,37,387	422781	352830	256738	214260
	29-Jul-23								
9	1014439	590628	162423	135549	14,99,412	412338	344115	249915	208566
	27-Jul-23								
10	1014763	1407277	226763	294127	33,03,039	540481	691834	313718	397707
	31-Jul-23								
11	1014243	1155796	161459	237106	26,88,266	377814	551894	216355	314788
	26-Jul-23								
12	1014401	594853	163584	136519	8,44,126	232135	193727	68551	57208
	27-Jul-23								
13	1014402	1115529	306770	256014	27,95,032	768634	641460	461864	385446
	27-Jul-23								
14	1014457	598171	164497	137280	10,67,790	293642	245058	129145	107778
	27-Jul-23								
15	1014285	592303	162884	135933	14,98,299	412032	343860	249148	207927
	26-Jul-23								
16	1012490	743664	204508	170671	18,13,705	498769	416245	294261	245574
	06-Jul-23								
<b>Total</b>		12836038	3080024	2864826	29239896	6972580	6518246	3892556	3653420

**10.** Further, the goods covered under the 16 subject consignments, which were found mis-declared in respect of value, were placed under seizure vide Seizure memo dated 30.10.2023.

**11.** During the statement, the partner of M/s Aparna Electricals, Shri Alok Gupta was unable to provide any satisfactory facts/evidence/documents in support of the value of the import goods

declared by them. He claimed that since they placed orders in bulk, they were given discounts by the Chinese Suppliers, however he failed to provide any evidence/documents in support of his claim.

**12.** BIS Certification in respect of the imported goods were verified from BIS Portal and it was noticed that the imported goods in which respect BIS certificates were mentioned by the importer in the Bills of Entry, were valid at the time of import.

**13.** The above investigation of DRI culminated to issuance of show cause notice bearing F.No. GEN/ADJ/COMM/49/2024-Adj-O/o Pr. Commr-Cus-Mundra dated 30.01.2024 to **M/s Aparna Electricals and the other noticees whose roles were identified in the said evasion of duty.** Vide the said show cause notice **M/s Aparna Electricals** and others were called upon to show cause to the **Commissioner of Customs**, having office at Room No. 102, PUB Building, 5B, Mundra (Kutch) Gujarat 370 421, as to why:

- (i).** The value of goods covered under the 16 Bills of Entry/Thoka Noting Nos., given at Para 2 of this Show Cause notice, declared as **Rs.1,28,36,038/- (Rupees One Crore Twenty Eight Lakhs Thirty Six Thousand Thirty Eight only)**, should not be rejected and the value of the said goods not be determined as **Rs.2,92,39,896/- (Rupees Two Crore Ninety Two Lakhs Thirty Nine Thousand Eight Hundred Ninety Six only)** and the said goods covered under the above mentioned 16 Bills of Entry/Thoka/Noting Nos. should not be confiscated under the Section 111(m) of the Customs Act, 1962.
- (ii).** Differential Duty (BCD, SWS & applicable IGST) amounting to **Rs.75,45,976/- (Rupees Seventy Five Lakhs Forty Five Thousand Nine Hundred Seventy Six only)**, chargeable on the said consignments, imported in DTA by them, should not be demanded and recovered under Section 28(4) of Customs Act, 1962.
- (iii).** Interest at appropriate rate should not be demanded and recovered on the duty demanded at (ii) above under Section 28AA of the Customs Act, 1962.
- (iv).** Penalty should not be imposed upon **M/s Aparna Electricals** under Sections 114A and/or Section 112 (a) of the Customs Act, 1962.
- (v).** Penalty should not be imposed upon **Shri Alok Gupta, Partner of M/s Aparna Electricals** under Section 112(a), and 114AA of the Customs Act, 1962 **separately.**
- (vi).** Penalty should not be imposed upon **Shri Kanhaiya Jagdish Kashera, Director of Customs Broker M/s Cargo Concepts (Bombay) Pvt. Ltd** under Section 112(a) of the Customs Act, 1962 **separately**

#### **WRITTEN SUBMISSION**

**14. M/s. Aparna Electrical vide letter dated 07.03.2024 and 05.07.2024 filed the defence submission wherein inter alia they have submitted as under: -**

- It is apposite to mention that the subject Show Cause Notice has been delivered by Speed-Post on 06.02.2024 to Shri Alok Gupta, Partner of the Noticee firm, although the copy of the same meant for the Noticee firm has not been received so far. Since the date of communication of Show Cause Notice is 06.02.2024, time for availing benefit under Section 28(5) of the Customs Act, 1962 is available to the Noticee till 06.03.2024.
- It may be mentioned herein that entire amount of penalty @15% of the differential amount of duty demanded amounting to Rs. 11,31,897/- in respect of all the 16 consignments for which the subject Show Cause Notice has been issued, which Includes the amount of penalty on aforesaid 5 consignments, has since been paid vide TR-6 Challan No. APSEZ/8961/23-24 dated 06.03.2024.
- Copies of aforesaid 5 I/BSOE with respective O/BSOE, TR-6 Challans for payment of differential duty with interest in respect of said 5 BSOE and TR-6 Challan dated 06.03.2024 for payment of penalty are enclosed herewith for kind perusal please.
- It may be mentioned here that the Noticee firm has since obtained export order confirmed vide e-mail dated 06.03.2024 (copy enclosed) in respect of the remaining 11 consignments, therefore, option available under Section 28(5) of the Customs Act, 1962 is not being exercised in respect of those consignments.
- In view of the above it is most respectfully requested that:
  - (i)** Matter pertaining to 5 BSOE mentioned in the table above may kindly be concluded;
  - (ii)** Order release of the aforesaid 5 consignments for DTA;
  - (iii)** Permit the Noticee firm to export the consignments covered under remaining 11 BSOE as per export order.

**14.1. M/s. Aparna Electrical vide letter dated 05.07.2024 reiterated that they have deposited differential duty along with interest and penalty under the provisions of Section 28(5) of Customs Act, 1962 and requested for conclusion in terms of Section 28(6)(i) of Customs Act, 1962.**

**15. Shri Kanhaiya Jagdish Kashera, Director of Customs Broker M/s Cargo Concepts (Bombay) Pvt. Ltd letter dated 07.07.2024 filed the defence submission wherein inter alia they have submitted as under: -**

At the outset I deny all the allegations and charges contained in the notice. The following submissions may kindly be noted:

- In his statement Alok Gupta of Aparna Electricals stated that he had approved the checklists received from the Custom Broker before filing Bill of Entry.
- He had negotiated the price with the Chinese supplier in each consignment. They got discounted rates because they placed bulk orders
- He did not agree with the valuation reports of the department. No undervaluation was done by him
- I in my statement stated that I was not aware how the importer decided the value of the import goods. I was not involved in deciding the value of the import consignments.
- In the circumstances, it is clear that the allegations in the notice against me are false baseless and unsubstantiated. They are not supported by any evidence. They are based on surmises and conjectures, assumptions and presumptions.
- I have acted in the normal course of my business, bona fide and in good faith. We prepared the documents for filling Bills of Entry on the basis of import invoices supplied by the importer.
- was never aware about the alleged undervaluation. Hence the question of abetment does not arise. Abetment presupposes knowledge.
- A CB has no role in valuation of the goods. The value mentioned in the supplier's invoice is filled up in the Bills of Entry. Determination of assessable value and thereafter assessment of duty is the exclusive domain of the department. It is up to the department to accept or reject the value. By merely putting up the value given in the supplier's invoice I did not commit any act rendering the goods liable for confiscation. I did not have any intention of evading duty. I did not have any ulterior motive. I did not gain anything extra over and above my normal fees.
- I am therefore not liable for penalty under 112(a). It is well settled that even when the importer is guilty of undervaluation, penalty cannot be imposed on Custom Broker. The following judgments are relied upon in this connection:
  - (i) Hera Shipping Solutions Pvt.Ltd.-2022 (382) ELT 552 (Tri.)
  - (ii) Adani Wilmar Ltd.-2015 (330) ELT 549 (T)
  - (iii) Quick Systems-2019 (365) ELT 558 (Tri.-Chennai)
  - (iv) P.N.Shipping Agency-2019 (369) ELT 1560 (Tri.-Mum)
  - (v) Neptune's Cargo Movers Pvt. Ltd.-2007 (219) ELT 673 (T)
  - (vi) Sethu Samudhra Shipping Services-2010 (262) ELT 570 (T)

In view of above submissions, Shri Kanhaiya Jagdish Kashera, Director of Customs Broker M/s Cargo Concepts (Bombay) Pvt. Ltd requested to drop the proceedings initiated against the show cause notice dated 30.01.2024.

### **PERSONAL HEARING**

**16.** Following the principles of natural justice and the provisions laid down in Customs Act, 1962, opportunity of personal hearing in the case was given to the noticees and personal hearing in the matter was fixed on 05.07.2024 and 09.07.2024.

**16.1. 1<sup>st</sup> Personal hearing on 05.07.2024:-** Shri Rahul Bhardwaj, Authorised Representative appeared in the personal hearing on behalf of M/s Aparna Electricals and Shri Alok Gupta, Partner of M/s Aparna Electricals. He reiterated written submissions filed on 07.03.2024 and 05.07.2024.

**16.2. 2<sup>nd</sup> Personal hearing on 09.07.2024:-** Shri Kanhaiya Jagdish Kashera, Director of Customs Broker of M/s Cargo Concepts (Bombay) Pvt. Ltd appeared and reiterated the written submission dated 07.07.2024.

### **DISCUSSION AND FINDINGS**

**17.** I have carefully gone through the show Cause Notice; relied upon documents, legal provisions, submissions made by the Noticees and the records available before me. The main issues involved in the above cases which are required to be decided in the present adjudication are as below: -

**(i).** Whether the value of goods covered under the 16 Bills of Entry/Thoka Noting Nos., is liable to be reject and re-determined.

**(ii).** Whether the goods covered under 16 Bills of Entry/Thoka/Noting Nos. are liable for confiscation under the Section 111(m) of the Customs Act, 1962.

**(iii).** Whether the differential Duty (BCD, SWS & applicable IGST) amounting to **Rs.75,45,976/-** chargeable on the said consignments, imported in DTA by them, is liable to be demanded and recovered under Section 28(4) of Customs Act, 1962 alongwith interest at appropriate under Section 28AA of the Customs Act, 1962.

**(iv).** Whether **M/s Aparna Electricals** is liable to penalty under Sections 114A and/or Section 112 (a) of the Customs Act, 1962.

**(v).** Whether **Shri Alok Gupta, Partner of M/s Aparna Electricals** under Section 112(a), and 114AA of the Customs Act, 1962 separately.

**(vi).** Whether **Shri Kanhaiya Jagdish Kashera, Director of Customs Broker M/s Cargo Concepts (Bombay) Pvt. Ltd** is liable to penalty under Section 112(a) of Customs Act, 1962.

18. After having framed the main issues to be decided, now I proceed to deal with each of the issues herein below. The foremost issue before me to decide in this case as to whether the goods imported by the Importer are undervalued and the value of the same is to be re-determined.

19. An intelligence gathered by DRI, Gandhidham indicated that M/s Aparna Electricals were importing LED Chain Lights, LED Cob Lights and similar items of different length and different quantity of bulb used therein from China, with huge undervaluation, **in comparison to similar goods being imported by other importer at Mundra and other ports of India.** Acting upon the said intelligence, live consignments imported by the importer through SEZ Entity M/s Holistic Global Corporation, APSEZ, Mundra and warehoused at M/s Steinwag Sharaf (India) Pvt. Ltd, APSEZ, Mundra were put on hold and the same were examined. Out of 17 Containers one container related to consignment covered under Thoka Noting No. 1007649 dated 08.05.2023 had already left the warehouse during June-2023, hence could not be examined. In remaining 16 containers, goods were found to contain LED Lights with various quantity of bulbs, LED COB Lights and accessories.

19.1. The impugned goods were valued by Chartered Engineer M/s B G Bhatt & Co., Ahmedabad who submitted their valuation reports in respect of the 16 consignments and the total value of the import consignment calculated to Rs. **2,92,39,896/-**, compared to Rs. **1,28,36,038/-** declared by the importer. Therefore, the value declared by the importer of impugned goods in under reasonable doubt and the same is to be examined in terms of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962.

#### **REJECTION AND REDETERMINATION OF VALUE:**

20. I find that in terms of Section 2 (41) of the Customs Act, 1962, "value" in relation to any goods, means the value thereof determined in accordance with the provisions of sub-section (1) or sub-section (2) of section 14 of the Customs Act, 1962. Relevant provisions of Customs Act, 1962 and Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (herein after referred to as the "**CVR, 2007**" for the sake of brevity) are reproduced herein below with regard to valuation of imported goods.

#### **Legal Provisions:**

##### **> Section 14 of the Customs Act, 1962:**

*"SECTION 14. Valuation of goods. - (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation,*

or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:

Provided further that the rules made in this behalf may provide for,-  
(i) the circumstances in which the buyer and the seller shall be deemed to be related;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section :

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

*Explanation. - For the purposes of this section –*

(a) "rate of exchange" means the rate of exchange –

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)."

➤ **Rule 2(f) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007:**

(f) "similar goods" means imported goods -

(i) which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to

be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;

(ii) produced in the country in which the goods being valued were produced; and

(iii) produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person, but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods;

➤ **Rule 3 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007:**

**3. 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:  
Provided that -

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -

(i) are imposed or required by law or by the public authorities in India; or  
(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.

(3) (a) Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.

(b) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time.

(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;

(ii) the deductive value for identical goods or similar goods;

(iii) the computed value for identical goods or similar goods:

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity

levels, adjustments in accordance with the provisions of rule 10 and cost incurred by the seller in sales in which he and the buyer are not related;

(c) substitute values shall not be established under the provisions of clause (b) of this sub-rule.

(4) if the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through rule 4 to 9.

**"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, the lowest such value shall be used to determine the value of imported goods.

**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 goods.

**Rule 6. Determination of value where value can not be determined under rules 3, 4 and 5. -**

If the value of imported goods cannot be determined under the provisions of rules 3, 4 and 5, the value shall be determined under the provisions of rule 7 or, when the value cannot be determined under that rule, under rule 8.

Provided that at the request of the importer, and with the approval of the proper officer, the order of application of rules 7 and 8 shall be reversed.

**Rule 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.

(3) (a) If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India.

(b) In such determination, due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (iii) of sub-rule (1).

**Rule 8. Computed value. -**

Subject to the provisions of rule 3, the value of imported goods shall be based on a computed value, which shall consist of the sum of:-

- (a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;
- (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India;
- (c) the cost or value of all other expenses under sub-rule (2) of rule 10.

➤ Rule 9 of the CVR, 2007:

**9. Residual method.- (1)** Subject to the provisions of rule 3, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India;

Provided that the value so determined shall not exceed the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade, when the seller or buyer has no interest in the business of other and price is the sole consideration for the sale or offer for sale.

(2) No value shall be determined under the provisions of" this rule on the basis of -

- (i) the selling price in India of the goods produced in India;
- (ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;
- (iii) the price of the goods on the domestic market of the country of exportation;
- (iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 8;
- (v) the price of the goods for the export to a country other than India;
- (vi) minimum customs values; or
- (vii) arbitrary or fictitious values.

➤ **Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007:**

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 and if, after receiving such further information, or in the absence of a response of 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.

**20.1. Rejection of Value under Rule 12 of CVR, 2007 in respect of the goods declared the goods declared as per Table-1 above:**

20.1.1. I observe that M/s Aparna Electricals have imported LED Chain Lights, LED Cob Lights and similar items of different length and

different quantity of bulb used therein from China, with huge undervaluation, in comparison to similar goods being imported by other importers at Mundra and Other ports of India. Value of some of the similar goods being imported into India, compared to value declared by M/s Aparna Electricals, in the subject 16 consignments, is as given below:-

Sr. No.	Product Description	Port of Import	Value declared (Rs.)	Month of Import	Value declared by M/s Aparna Electricals of similar import goods (Rs.)
1.	LED SERIAL LIGHT 180L (CHAIN LIGHT)	INNSA1	37.42	May-June-2023	15.10
2.	LED SERIAL LIGHT 36L (CHAIN LIGHT)	INNSA1	7.48	May-June-2023	3.01
3.	LED SERIAL LIGHT 22L (CHAIN LIGHT)	INNSA1	4.57	May-June-2023	1.84
4.	LED SERIAL LIGHT 40L (CHAIN LIGHT)	INNSA1	8.34	May-June-2023	3.35
5.	LED LIGHTING CHAINS 54L	INBOM1	8.06	May-June-2023	4.86
6.	LED LIGHTING CHAINS 76L	INBOM1	11.35	May-June-2023	8.20
7.	46L LED LIGHTING CHAINS	INBOM1	6.86	May-June-2023	3.35
8.	LED LIGHTING CHAINS 72L	INBOM1	10.76	May-June-2023	8.20

20.1.2. From the above comparison, it can be seen that M/s Aparna Electricals have undervalued their import goods ranging from 25 % to 60 %, in the subject 16 consignments. The importer had declared the value between USD 0.014 to USD 0.3 per piece for the said goods in the above consignments. Total declared value of goods covered in above Bills of entry was Rs 1.07 Crores. The subject 16 consignments appear to be hugely undervalued compared to similar goods being imported into India by other importers, and there is reason to believe that the importer has deliberately suppressed the actual value of the import goods.

20.1.3. During the course of investigation, Shri Alok Gupta, partner of the importer M/s Aparna Electricals, responsible person of the firm who deals with overseas supplier, didn't provide any satisfactory facts/evidence/documents in support of the value of the import goods declared by them. He claimed that since they placed orders in bulk, they were given discounts by the Chinese Suppliers, however he failed to provide

any evidence/documents in support of his claim. Further, on valuation by the Chartered Engineers the total value of the import consignments was found to be Rs. **2,92,39,896/-**, compared to Rs. **1,28,36,038/-** declared by the importer.

20.1.4. From the evidences placed on record, I find that the price declared by presenting undervalued invoices in respect of Bills of Entry filed by the importer for procurement of subject imported goods were incorrect and the actual value of imported goods was different and higher. Hence, the same cannot be considered as the correct values for imported goods for the purpose of Section 14 of the Customs Act, 1962.

20.1.5. I find that as there is a reasonable doubt regarding the truth and accuracy of the value declared, as discussed with evidences in the foregoing paras, the same is liable to be rejected in terms of Rule 12 and the actual transaction value cannot be ascertained on the basis of Rule 3 of the Customs Valuation Rules, 2007, the value is required to be determined by proceeding sequentially through Rule 4 to 9.

**20.2. Value re-determination in terms of proceeding sequentially from Rule 4 to 9 of CVR, 2007 in respect of the goods declared as per Table-2 above:**

20.2.1. I find that exact comparative data in respect of all of the import goods covered under the subject consignments is not available, the value of the subject 16 import consignments cannot be determined as per the provisions of Rule 4 to Rule 8 to the Customs Valuation (Determination of value of Imported goods) Rules, 2007 and value of the goods is to be re-determined under the provisions of Rule 9 ibid.

20.2.2 I find that Residual Method for determining transaction value is adopted where the value of imported goods cannot be determined under the provisions of rule 4 to 8 and the value has to be derived under rule 9 using reasonable means consistent with the principles and general provisions of CVR, 2007 and on the basis of data available in India. In the instant case since Rules 4 to 8 are not applicable for re-determination of value, therefore, I find that the declared value is liable to be re-determined under Rule 9 of CVR, 2007 and the re-determined value of is as under: -

**TABLE-3**

<b>Sr. No.</b>	<b>Bill of Entry No. (THOKA / NOTING NUMBER)</b>	<b>Container No.</b>	<b>Declared Value</b>	<b>Re-determined Value under Rule-9</b>	<b>Basis of Re-determination of value</b>
1	1014674	HMMU6222495	6,60,698	13,54,947	CE Certificate dtd 16.10.2023
2	1014964	GAOU6098554	5,95,477	12,87,565	CE Certificate dtd 16.10.2023
3	1014518	TEMU7182540	6,89,030	14,78,314	CE Certificate dtd 16.10.2023

4	1014652	ZCSU6905629	6,84,629	16,18,102	CE Certificate dtd 16.10.2023
5	1014246	OOCU7721606	6,53,601	13,84,251	CE Certificate dtd 16.10.2023
6	1014298	FFAU3315848	8,01,907	17,16,646	CE Certificate dtd 16.10.2023
7	1014769	WHSU6488692	13,48,684	33,53,015	CE Certificate dtd 16.10.2023
8	1014621	CAIU4375408	6,03,791	15,37,387	CE Certificate dtd 16.10.2023
9	1014439	CAIU9849789	5,90,628	14,99,412	CE Certificate dtd 16.10.2023
10	1014763	BSIU9900211	14,07,277	33,03,039	CE Certificate dtd 16.10.2023
11	1014243	DFSU7717471	11,55,796	26,88,266	CE Certificate dtd 16.10.2023
12	1014401	OOCU8145716	5,94,853	8,44,126	CE Certificate dtd 16.10.2023
13	1014402	GLDU7444374	11,15,529	27,95,032	CE Certificate dtd 16.10.2023
14	1014457	DFSU7326332	5,98,171	10,67,790	CE Certificate dtd 16.10.2023
15	1014285	OOCU6948642	5,92,303	14,98,299	CE Certificate dtd 16.10.2023
16	1012490	MSCU5241408	7,43,664	18,13,705	CE Certificate dtd 16.10.2023
<b>Total</b>			<b>1,28,36,038</b>	<b>2,92,39,896</b>	

## **21. DUTY DEMAND UNDER SECTION 28(4) OF CUSTOMS ACT, 1962**

**21.1.** The demand in the present show cause notice has been raised under the provisions of Section 28(4), therefore, it is imperative to examine whether the section 28(4) of Customs Act, 1962 has been rightly invoked or not. The relevant legal provisions of Section 28(4) of the Customs Act, 1962 are reproduced below for sake of clarity: -

*“28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.—*

*(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded; by reason of,—*

- (a) collusion; or*
- (b) any willful mis-statement; or*
- (c) suppression of facts.”*

*by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been [so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously*

*been made, requiring him to show cause why he should not pay the amount specified in the notice.*

**The term "relevant date" For the purpose of Section 28 ibid, has been defined in Explanation 1, as under:**

**Explanation 1.** - *For the purposes of this section, "relevant date" means,-*

- (a) in a case where duty is 21[not levied or not paid or short-levied or short-paid], or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;*
- (b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;*
- (c) in a case where duty or interest has been erroneously refunded, the date of refund;*
- (d) in any other case, the date of payment of duty or interest.*

**21.2.** I find that with the introduction of self-assessment and consequent upon amendments to Section 17 of the Customs Act, 1962 w.e.f. 08.04.2011, it was the obligatory on the part of the importer to declare the actual value of the goods imported by them and pay the duty applicable in respect of the said goods. Therefore, by not disclosing the true and correct facts to the proper officer, at the time of clearance of imported goods, the importer appears to have indulged in mis-declaration and mis-classification by way of suppression of facts and wilfully mis-declared and mis-classified the imported goods with intent to evade the payment of applicable Custom duties. Thus, the importer has contravened the provisions of Section 46(4) & 46(4A) of the Customs Act, 1962, in as much as they have mis-classified and mis-declared the goods imported by them, by suppressing the true value of the goods, while filing the declaration seeking clearance at the time of importation of impugned goods. **Section 17 (1) & Section 2 (2) of the Customs Act, 1962 read with CBIC Circular No. 17/2011- Customs dated 08.04.2011** cast a heightened responsibility and onus on the importer to determine duty, classification etc. by way of self-assessment. The importer, at the time of self- assessment, is required to ensure that they declared the correct classification, applicable rate of duty, value, benefit of exemption notifications claimed, if any, in respect of the imported goods while presenting the Bill of Entry.

21.3. I find that the provision of Section 28(4) of the Customs Act, 1962 provides for demand of duty not levied or short levied by reason of collusion or wilful mis-statement or suppression of facts. As **M/s Aparna Electricals** wilfully mis-declared the description of impugned imported goods by suppressing material facts, the said condition of Section 28 ibid is fulfilled in the instant case. Further, I find that the said provision provides that duty can be demanded by proper officer within five years from the relevant date. Thus, I find that Section 28(4) ibid provides mechanism to demand duty during the period starting from the relevant date and within five years from such relevant date. The relevant date has been defined in above

mentioned Explanation-I of Section 28. I find that in this case subject Bill of Entry has been filed but order for clearance of the goods has not been granted under Section 47 *ibid*. Therefore, after importation, the impugned goods are still lying in customs area and out of charge under Section 47 *ibid* is yet to be granted. In view of clause (a) of the said Explanation-1, I find that the relevant date in this case will start from the date on which proper officer of Customs will make an order for the clearance of impugned goods.

21.4. At this juncture, I would like to refer a judgement of Hon'ble CESTAT Principal Bench Delhi in case of EVERSHINE CUSTOMS (C & F) PVT LTD vs COMMISSIONER OF CUSTOMS in CUSTOMS APPEAL NO. 51320 of 2019 wherein the Tribunal has answered a question "**Can a differential duty can be demanded under section 28(4) on the goods even before the goods have been cleared for home consumption?**" The relevant portion of the said judgement is as under: -

*30. Thus, the legal position settled by the Hon'ble Supreme Court in the above case laws is that the power under Section 28 is a power of review which has been specially conferred on the proper officer who has done the assessment or his successor in office. Only he can issue the SCN for the purpose.*

*31. It is also evident from the 'Relevant date' for calculating the limitation of time for issuing a notice under Section 28. It is the defined in the explanation to Section 28 as follows:*

*Explanation 1- For the purposes of this section, "relevant date" means,-*

*(a) in a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;*

*(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;*

*(c) in a case where duty or interest has been erroneously refunded, the date of refund;*

*(d) in any other case, the date of payment of duty or interest.*

*32. Evidently, if the order clearing the goods for home consumption was not issued, the assessment is still open and the goods are still imported goods assessable to duty under section 17. There cannot be any demand under section 28. In the present case, the goods were not yet cleared. The importer (or his CB) filed a Bill of Entry self assessing the duty which has been found to be erroneous. The duty has to be reassessed and a speaking order has to be passed by the proper officer. If the officer of DRI is also the proper officer [under Section 28(11) or otherwise] and has done the reassessment, he must pass a speaking order. Any SCN under Section 28 can only arise after the goods have been cleared for Home Consumption and not before. This is because a demand under section 28 is in the nature of review of the assessment already done under section 17 by the proper officer. **Without the assessment under section 17***

***being completed, there cannot be review under section 28 and the relevant date under section 28 for reckoning the time limit has not yet arisen. For this reason, the demand under section 28 in respect of the goods which have not yet been cleared for home consumption cannot be sustained and the answer to the question (c) which we raised is 'No demand under section 28 can be issued unless the goods have been cleared for home consumption and hence the demand does not sustain'.***

21.3. The above judgment of Hon'ble Tribunal strengthens my view that in case of live consignment where order of clearance has not been granted, proceeding of demand of Demand of duty under Section 28(4) cannot be initiated. In this case, till date no order for clearance of impugned goods in Domestic Area has been granted, **I find it premature to demand the duty under Section 28(4) ibid, as this Section would kick in only after clearance of goods by customs officer after importation.**

## **22. CONFISCATION OF THE GOODS UNDER SECTION 111 (m) OF THE CUSTOMS ACT, 1962:**

22.1. As far as confiscation of goods are concerned, I find that Section 111 of the Customs Act, 1962, defines the Confiscation of improperly imported goods. The relevant legal provisions of Section 111(m) of the Customs Act, 1962 are reproduced below: -

*(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 proviso to sub-section (1) of section 54;"*

22.2. On plain reading of the above provisions of 111(m) of the Customs Act, 1962 it is clear that goods which are imported by way of mis-declaration, will be liable to confiscation. It has already discussed in paras supra that the Importer had mis-stated the facts and has declared wrong value of good with intention to evade the Customs Duty. Therefore, I find that impugned goods are liable for confiscation under the provisions of Section 111(m) of Customs Act, 1962.

22.3. I find Hon'ble Apex court in the case of Shri OM Prakash Bhatia V/s. Commissioner of customs, Delhi[2003 (155) E.L.T. 423 (S.C.)] has held that any goods which have been imported/ exported by breach of any of conditions subject to which the goods are permitted to be imported or exported have been not been complied with are prohibited goods. The relevant portions of the said order is as under:-

**8. Further, Section 2(33) of the Act defines "prohibited goods" as under :-**

“prohibited goods” means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.”

9. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either ‘absolutely’ or ‘subject to such conditions’ to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in *Shekikh Mohd. Omer v. Collector of Customs, Calcutta and Others* [(1970) 2 SCC 728] wherein it was contended that the expression ‘prohibition’ used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955.

22.3.1. To review the above order of Hon’ble Supreme Court, a review petition was also filed before the Supreme Court. The Hon’ble Court was pleased to dismissed the Review Petition (C) No. 1282 of 2003 the said Review petition was dismissed by the Hon’ble Court with following order:[*Om Prakash Bhatia v. Commissioner - 2003 (158) E.L.T. A177 (S.C.)*]:

“Delay condoned.

We have gone through the review petition and its connected documents. We find no ground to entertain the review petition which is, accordingly, dismissed.”

22.4. Further, Hon’ble High Court of Madras in case of MALABAR DIAMOND GALLERY P. LTD. Versus ADDL. DIR. GENERAL, DIRECTORATE OF REVENUE INTELLIGENCE, CHENNAI [2016 (341) E.L.T. 65 (Mad)] as observed as under:-

38. Before advertizing to the rival contentions of both parties, it is relevant to have a cursory look at the provisions of the Customs Act, 1962. As per Section 2(33) of the Customs Act, “prohibited goods” means, any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force

*but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.*

**39.** *Positively, prohibited goods are defined, as goods, import or export of which, should be subject to any prohibition under this Act or any other law for the time being in force. Negatively, Section 2(33) of the Act, also states that goods are not prohibited goods, when import or export of which, does not include any such goods, in respect of which, the conditions subject to which the goods are permitted to be imported or exported have been complied with.* The expression “subject to any prohibition under this Act or any other law for the time being in force and compliance of the conditions, subject to which, the goods are permitted to be imported or exported, are the determining factors, to understand and to give effect to the meaning of the words, “prohibited goods”.

.....  
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.....

**76.** *A conjoint reading of Sections 2(33), 11 or 11A of the Act and other provisions in the Customs Act, 1962, and any other law, for the time being in force, would also make it clear that importation of goods, defined as illegal or prohibited or without complying with the conditions, or in violation of statutory provisions in the Customs Act, 1962 or any other law for the time being in force and in all cases, whether there is either total prohibition or restriction, in the light of the judgment of the Apex Court in Om Prakash Bhatia's case, such goods should fall within the definition of prohibited goods. When import is in contravention of statutory provisions, in terms of Sections 11 or 11A of the Customs Act, 1962 or any other law, for the time being in force and when such goods squarely fall within the definition “illegal import”, or the other provisions in the statute, dealing with prohibition/restriction, the same are to be held as, “prohibited goods” and liable for confiscation.*

22.5. In view of provisions of Section 111(m) of Customs Act, 1962 and judgements of higher judicial forums, I hold that the impugned goods are liable for confiscation under Section 111(m) of Custom Act, 1962.

22.6. As the impugned goods are found to be liable for confiscation under Section 111(m) of the Customs Act, 1962, I find that it necessary to consider as to whether redemption fine under Section 125 of Customs Act, 1962, is liable to be imposed in lieu of confiscation. The Section 125 ibid reads as under: -

*“Section 125. Option to pay fine in lieu of confiscation.—(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods,*

*give to the owner of the goods 1/or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit."*

22.6.1. A plain reading of the above provision shows that imposition of redemption fine is an option in lieu of confiscation. It provides for an opportunity to owner of confiscated goods for release of confiscated goods, by paying redemption fine. I find that redemption fine can be imposed in those cases where goods are either physically available or the goods have been released against appropriate bond binding concerned party in respect of recovery of amount of redemption fine as may be determined in the adjudication proceedings. Since, the goods are physically available in customs area, redemption fine under Section 125 of Customs Act, 1962 is liable to be imposed in lieu of confiscation on such goods.

**23. REQUEST OF IMPORTER FOR DEEMED CONCLUSION UNDER SECTION 28(6) OF CUSTOMS ACT, 1962 IN RESPECT OF 05 BILLS OF ENTRY AND PERMISSION OF RE-EXPORT OF 11 CONSIGNMENTS.**

23.1. The importer vide letter dated 07.03.2024 and 05.07.2024 have submitted that they have paid the duty, interest and penalty @15% under the provisions of Section 28(5) of Customs Act, 1962 in respect of 05 Bills of Entry and they have requested for conclusion of proceeding under Section 28(6) ibid. Further, the importer have also sought permission of re-export in respect of requested for other 11 Consignments.

**The details of consignments which DTA clearance are sought:-**

**TABLE-4**

Sr. No. of Table under para 25 of SCN	Bill of Entry No. (Thoka / Noting Number)	Request Submission Date	Container No.	Declared Value	Value Re-Determined under Rule-9 of CVR, 2007
2	1014964	02-Aug-23	GAOU6098554	5,95,477	12,87,565
5	1014246	26-Jul-23	OOCU7721606	6,53,601	13,84,251
7	1014769	31-Jul-23	WHSU6488692	13,48,684	33,53,015
10	1014763	31-Jul-23	BSIU9900211	14,07,277	33,03,039
11	1014243	26-Jul-23	DFSU7717471	11,55,796	26,88,266

**The details of consignments which Re-export permission are sought: -**

**TABLE-5**

Sr. No. of Table under	Bill of Entry No. (Thoka /	Request Submission	Container No.	Declared Value	Value Re-Determined under Rule-

para 25 of SCN	Noting Number)	on Date			9 of CVR, 2007
1	1014674	29-Jul-23	HMMU6222495	6,60,698	13,54,947
3	1014518	28-Jul-23	TEMU7182540	6,89,030	14,78,314
4	1014652	29-Jul-23	ZCSU6905629	6,84,629	16,18,102
6	1014298	26-Jul-23	FFAU3315848	8,01,907	17,16,646
8	1014621	29-Jul-23	CAIU4375408	6,03,791	15,37,387
9	1014439	27-Jul-23	CAIU9849789	5,90,628	14,99,412
12	1014401	27-Jul-23	OOCU8145716	5,94,853	8,44,126
13	1014402	27-Jul-23	GLDU7444374	11,15,529	27,95,032
14	1014457	27-Jul-23	DFSU7326332	5,98,171	10,67,790
15	1014285	26-Jul-23	OOCU6948642	5,92,303	14,98,299
16	1012490	06-Jul-23	MSCU5241408	7,43,664	18,13,705

23.1.1. I have carefully examined the request of importer for conclusion of proceedings under the provisions of 28(6) of Customs Act, 1962 in respect of Bills of Entry mentioned in Table-4. I find that proceedings under the provisions under 28(6) of Customs Act, 1962 can be concluded in such cases where the demand of duty has been raised under Section 28(1) and Section 28(4) of Customs Act, 1962. It is also a fact that in the present show cause notice demand of duty was raised invoking Section 28(4) of the Customs Act, 1962. However, in the foregoing paras it has been held that it is premature to demand the duty under Section 28(4) ibid., therefore, I hold that proceedings against the noticees cannot be concluded under Section 28(6) of Customs Act, 1962.

23.1.2. As regard request of importer for re-export of goods imported under Bills of Entry mentioned in Table-5, I find that though the goods were imported by way of undervaluation, it is prerogative of an Individual as to how to deals with his goods. Usage or disposal of the goods in a particular fashion is the fundamental right of the owner of such goods. There is no provision in the Customs Act whereby the owner of goods can be compelled to clear the goods in Domestic Area. The option of re-exporting the goods is always available with the importer. Further, there is no provision in law which bars re-export of imported goods, therefore I allow the goods tabled at Table-5 to re-export to the same supplier/his nominee within a period of three months from the date of receipt of this order. As, I have allowed for re-export, I will take a lenient view for imposition of redemption fine.

#### **24. Liability of Penalty under Section 114A and/or Section 112(a), 114AA of the Customs Act, 1962 on M/s Aparna Electricals**

24.1. I find that section 112(a) stipulates the penalty for improper importation of goods on any person who in relation to goods does or omits to do any act, which act or omission would render such goods liable to

confiscation under section 111, or abets the doing or omissions of such an act.

24.1.1. In the instant case it is pertinent to mention that the importer has imported the subject goods in violation of Section 111(m) of the Customs Act, 1962. For the said violation, the goods are liable to confiscation under Section 111(m) of the Customs Act, 1962. Therefore, I find that for these acts and omissions, the importer is liable for penal action under Section 112(a)(ii) of the Customs Act, 1962.

24.2. As regard proposal of imposition of penalty on M/s Aparna Electricals under Section 114A of the Customs Act, 1962, I find that Penalty under Section 114A can be imposed in the cases only where any person have been made liable to pay the duty or interest, as the case may be, as determined under [ sub-section (8) of Section 28]. In the foregoing paras, it has been held that demand of duty under Section 28(4) is pre-mature, therefore penalty under Section 114A of Customs 1962 is not imposable on importer.

**25. Liability of Penalty under Section 112(a) and 114AA of the Customs Act, 1962 on Shri Alok Gupta, Partner of M/s Aparna Electricals.**

25.1. Shri Alok Gupta, Partner of M/s Aparna Electricals in his statement tendered before DRI has admitted that he used to receive the invoice, packing list and all related documents from their agent in China. I find that he is the responsible person for import related activities of M/s Aparna Electricals. Omission and commission on his part has made the goods liable for confiscation under the provision of Section 111(m) of Customs Act, 1962 and for this act he is liable to penalty under the provision of Section 112(a)(ii) of the Customs Act, 1962.

25.2. As regards imposition of penalty on Shri Alok Gupta under Section 114AA and 117 of Customs Act, 1962, the Section 114AA envisages penalty on a person who knowingly or intentionally makes, signs or uses, or causes to be made signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act. I observe that in the instant case no documents have been placed on record evidencing that Shri Alok Gupta has submitted false or incorrect material which make them liable for penal provisions under Section 114AA of Customs Act, 1962, therefore, I refrain from imposing penalty on Shri Alok Gupta under Section 114AA of Customs Act, 1962.

**26. Liability of Penalty under Section 112(a) of the Customs Act, 1962 on Shri Kanhaiya Jagdish Kashera, Director of Customs Broker M/s Cargo Concepts (Bombay) Pvt. Ltd.**

26.1. I have carefully gone through the case records and submission filed by Shri Kanhaiya Jagdish Kashera, Director of Customs Broker M/s Cargo Concepts (Bombay) Pvt. Ltd. The role of Customs Broker is filing of documents; check their correctness, to guide the importer etc. I find that the Custom Broker has filed Bills of Entry on behalf of importer noticee on

the basis of documents submitted by the importer. Shri Alok Gupta, Partner of M/s Aparna Electricals in his statement has tendered that he had approved checklists, received from the Customs Broker before filing Bill of Entry on behalf of him; he had received Checklists through email from the Customs Broker for approval and that the customs broker always shared the copy of checklist to him for approval. There is nothing on record in the Show Cause Notice that Customs Brokers were in knowledge of wrong declaration by importer in documents furnished by importer and they connived with importer to mis-classify the goods. There is catena of judgments wherein the scope of work of CB and their culpabilities have been decided. These judgments are of guidance value in the present case and therefore I do not find it reasonable to impose penalty on Kanhaiya Jagdish Kashera, Director of Customs Broker M/s Cargo Concepts (Bombay) Pvt. Ltd. under Section 112(a) of Customs Act, 1962.

27. In view of above discussion and findings, I pass the following order: -

**:ORDER:**

- (i).** I reject the declared value of **Rs.1,28,36,038/- (Rupees One Crore Twenty Eight Lakhs Thirty Six Thousand Thirty Eight only)** in respect of goods covered under the 16 Bills of Entry/Thoka Noting Nos., given at Para 2 of this Show Cause notice under Rule 12 of CVR, 2007 and order to re-determine the same as **Rs.2,92,39,896/- (Rupees Two Crore Ninety Two Lakhs Thirty Nine Thousand Eight Hundred Ninety Six only)** in terms of Rule 9 of the CVR, 2007 read with section 14 of Customs Act, 1962 and order to re-assess 16 Bills of Entry mentioned in Table-3 accordingly.
- (ii).** I order to confiscate the said goods having assessable value of **Rs.2,92,39,896/- (re-determined value)** covered under 16 Bills of Entry/Thoka/Noting Nos. under the provisions of Section 111(m) of the Customs Act, 1962. However, I give. **M/s Aparna Electricals** an option to redeem the goods on payment of Fine of **Rs. 15,00,000/- (Rs. Fifteen Lakh Only)** under Section 125 of the Customs Act, 1962.
- (iii).** I hold that demand and recovery of differential Duty (BCD, SWS & applicable IGST) amounting to **Rs.75,45,976/- (Rupees Seventy-Five Lakhs Forty-Five Thousand Nine Hundred Seventy-Six only)**, under the provisions of Section 28(4) of Customs Act, 1962 is prior to clearance of goods, is pre-mature thus do not demand the same under said provision as discussed in Para-21 above. Accordingly, the proposal to demand of interest on such duty under Section 28AA of the Customs Act, 1962 is also premature and thus do not demand the same.
- (iv).** I order to re-assess 05 DTA Bills of Entry corresponding to Bills of Entry mentioned at **Table-4** on re-determined value with consequential duty under Section 17(4) of Customs Act, 1962.

(v). I allow the re-export of 11 containers covered under Bills of Entry as mentioned table at **Table-5** above. The re-export to be made to the same supplier/his nominee within a period of three months from the date of receipt of this order.

(vi). I impose a penalty of **Rs. 5,00,000/- (Rs. Five Lakh Only)** upon **M/s Aparna Electricals** under the provisions of Sections 112 (a)(ii) of the Customs Act, 1962

(vii). I refrain from imposition of any penalty on **M/s Aparna Electricals** under the provisions of Section 114A of the Customs Act, 1962.

(viii). I impose a penalty of **Rs. 2,50,000/- (Rs. Two Lakh Fifty Thousand Only)** upon **Shri Alok Gupta, Partner of M/s Aparna Electricals** under Section 112(a)(ii) of the Customs Act, 1962.

(ix). I refrain from imposition of any penalty on **Shri Alok Gupta, Partner of M/s Aparna Electricals** under Section 114AA of the Customs Act, 1962.

(x). I refrain from imposition of any Penalty on **Shri Kanhaiya Jagdish Kashera, Director of Customs Broker M/s Cargo Concepts (Bombay) Pvt. Ltd** under the provisions of Section 112(a) of the Customs Act, 1962.

This OIO is issued without prejudice to any other action that may be taken against the claimant under the provisions of the Customs Act, 1962 or rules made there under or under any other law for the time being in force

o/c

  
**(K. Engineer)**

Principal Commissioner of Customs,  
Custom House, Mundra.

Date: 16.07.2024.

DIN: **20240771MO0000229220**

F.No. GEN/ADJ/COMM/49/2024-Adjn-O/o Pr Commr-Cus-Mundra.

**To, (The Noticees):-**

3054 & 3055

**1. M/s Aparna Electricals,**

583 square yards out of 1 Kanal 12 Marla,  
Godown No. 2, Ground Floor,  
Khasra no. 14/24/2 & 14/25/2,  
Village Nangli Poona, New Delhi-110036.

**2. Shri Alok Gupta,**

Partner of M/s Aparna Electricals,  
11/5A, Second Floor, Shakti Nagar,  
Near Chaudhary Sweets, Delhi-110007.  
(email address-aparna.elc2010@yahoo.com)

**3. Shri Kanhaiya Jagdish Kashera,**  
Director of Customs Broker of  
M/s Cargo Concepts (Bombay) Pvt. Ltd.

**Copy to:- for information and necessary action, if any.**

1. The Chief Commissioner of Customs, CCO, Ahmedabad
2. The Additional Director, DRI, Gandhidham Regional Unit, Plot No.5866, Ward-5A, Near Vinayak Hospital, Adipur, Kutch-370 205, (Email:driganru@nic.in).
3. The Specified Officer, Mundra Special Economic Zone, Gandhidham.
4. The Deputy Commissioner (EDI), Custom House, Mundra.
5. Notice Board.
6. Guard File.