

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

Customs Appeal No. 11756 of 2019

(Arising out of OIO-KND-CUSTM-000-COM-19-18-19, Dated-26/03/2019 passed by
Commissioner of Central Excise, Customs and Service Tax-KANDLA)

M/s. Agarwal Metals & Alloys

.....Appellant

C/O, Samir Agarwal- Partner 5th Floor , Agrasen Bhawan, 251, Thakurdwar Road
MUMBAI, MAHARASTRA

VERSUS

C.C.-Kandla

.....Respondent

Custom House, Near Balaji Temple,
Kandala, Gujarat

WITH

- 1. Customs Appeal No. 12058 of 2019 (Vipul Agarwal);**
- 2. Customs Appeal No. 12059 of 2019 (Samir Agarwal);**
- 3. Customs Miscellaneous (EH) Application No. 10858 of 2019
in Customs Appeal No. 11315 of 2019 (Ramesh Kumar H
Jain);**

(Arising out of OIO-KND-CUSTM-000-COM-19-18-19, Dated-26/03/2019 passed by
Commissioner of Central Excise, Customs and Service Tax-KANDLA)

APPEARANCE:

Shri Jitendra Motwani, Advocate for the Appellant

Shri. T.G. Rathod, Authorised Representative for the Repondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

Final Order No. A/ 10478-10481 /2020

DATE OF HEARING: 17.12.2019
DATE OF DECISION:13.02.2020

RAMESH NAIR

The issue involved in the present appeals is that whether the
appellant M/s Agarwal Metals & Alloys had undervalued the goods i.e
various types of Aluminium scrap imported by them?

2. The present appeals have been filed by M/s Agarwal Metals & Alloys (M/s AMA) and its partners Mr. Vipul Agarwal and Mr. Samir Agarwal and Ramesh Kumar H. Jain against OIO No. KND/Custom/000/Com/19/18-19 dated 26.03.2019 passed by the Commissioner of Customs, Kandla.

3. The brief facts of the case are that M/s AMA, the main Appellant herein, is engaged in the manufacture of Aluminium Alloy Ingots, which is their Final Product. The Aluminium scrap required in the manufacture of the Final products was imported by M/s AMA from various suppliers thereof based in Europe, Middle East and U.S.A. Mr Vipul Agarwal and Mr Samir Agarwal were the partners of M/s AMA and are co-appellants in the present case on whom penalty has been imposed.

4. During the course of their business M/s AMA imported various kinds of Aluminium scrap such as Tense, Trump, Twist, Twitch, Taint, Tense, Tread, Throb, Tassel, Testy etc at the Ports of Nhava Sheva, Kandla and ICD Tughlaqabad.

5. Investigation was initiated by the officers of Directorate of Revenue Intelligence ("DRI") against various firms including M/s AMA based on information that they are indulging in undervaluation of Aluminium scrap. The said investigation led to search being conducted by the officers of DRI at the premises of M/s AMA and other importers of Aluminium scrap. Statements of partners of M/s AMA, their high seas sellers, their Customs house agent and other importers of Aluminium scrap were recorded. The investigation culminated into issuance of Show cause notice (SCN) dated 28.03.2008. The allegation raised against M/s AMA, in the said SCN was that they had imported various consignments of Aluminium scrap from

various overseas suppliers either directly or through their indenter or purchased the same from various high seas sellers at a grossly undervalued price, in order to evade customs duty and they were sending the differential amount of money to the representatives of the overseas suppliers in cash. In the said SCN the Department relied upon following evidences to support the charge of undervaluation of imported goods i.e. Aluminium scrap:

- Alert circular no.14/2005 dated 16.12.2005 issued from F.No Val/TECH/37/2005 of Directorate of valuation (DGOV circular);
- Statements of Mr Vipul Agarwal, wherein he had confirmed the content of aforesaid circular;
- Statements of Mr Samir Agarwal;
- 3 insurance policies seized from the office premise of M/s AMA;
- Letter from First Secretary (trade), Embassy of India, Brussels in relation to one of the import of Aluminium scrap;
- Third party evidences such as three email correspondences found relevant to the imports of Aluminium scrap by M/s Sunland Alloys and other documents/statements which are stated at Annexure B of the SCN;

6. Accordingly, vide the said SCN, the following demands were sought to be confirmed in relation to imports made by M/s AMA from Ports of Nhava Sheva, Kandla and ICD Tughlaqabad.

Nhava Sheva Port

- The differential Customs duty amounting to **Rs. 4,91,64,242/-** (Rupees Four Crores Ninety One Lacs Sixty Four Thousand Two Hundred and Forty Two only) as detailed in the Annexure-A-1 to

the notice, short paid on the said goods, should not be demanded and recovered under proviso to Section 28(1) of the Customs Act, 1962;

- Interest should not be recovered on the said differential Customs duty under section 28AB of the Customs Act, 1962;
- Penalty should not be imposed separately under Section 112 and 114A of the Customs Act, 1962;

Kandla Port

- The differential Customs duty amounting to **Rs. 30,31,121/-** (Rupees Thirty Lacs Thirty One Thousands One Hundred Twenty One only) as detailed in the Annexure-A-2 to the notice, short paid by them on the said goods, should not be demanded and recovered under proviso to Section 28(1) of the Customs Act, 1962;
- Interest should not be recovered on the said differential Customs duty under section 28AB of the Customs Act, 1962;
- Penalty should not be imposed separately under Section 112 and 114A of the Customs Act, 1962;

ICD Tughlakabad

- The differential Customs duty amounting to **Rs. 16,59,309/-** (Rupees Sixteen Lacs Fifty Nine Thousand Three Hundred and Nine only) as detailed in the Annexure-A-3 to the notice, short paid on the said goods, should not be demanded and recovered under proviso to Section 28(1) of the Customs Act, 1962;
- Interest should not be recovered on the said differential Customs duty under section 28AB of the Customs Act, 1962;

- Penalty should not be imposed separately under Section 112 and 114A of the Customs Act, 1962;

7. The basis adopted for revaluation of scrap was LME price for virgin material to which discount band was applied in terms of DGOV circular supra. The SCN also proposed the confiscation of seized goods and in respect of goods which could not be seized, it proposed to impose redemption fine. Penalty under Section 114A/112 of the Customs Act, 1962 was proposed upon M/s AMA and under Section 112 (b) upon the co-appellants.

8. The differential duty demand as proposed in the SCN was confirmed vide Impugned order dated 26.03.2019 except demand in respect to 20 Bills of Entry by holding that the said Bills of Entry were provisionally assessed and hence duty cannot be demanded under Section 28 of the Customs Act, 1962 for the said Bills of Entry. Penalty was imposed on M/s AMA under Section 114 A of the Customs Act, 1962 and under Section 112 (b) on co-appellants.

9. Shri Jitendra Motwani, Learned Counsel, appearing for the Appellants during the course of hearing made following submissions:-

- It is not in dispute that in the present case duty is demanded on the re-determined value of Aluminium scrap of various grades by adopting the LME prices of Virgin metal and applying discounts as per the aforesaid DGOV circular. It is also not in dispute that in the present case, the demand is raised on the basis of the evidence recovered in the case of M/s Sunland Metal Recycling Industries and the same is evident from the statement of Mr Vipul Agarwal.

- This Hon'ble Tribunal in the case of M/s Sunland Metal Recycling Industries, vide Order No. A/11871-11874/2019 dated 01.10.2019, have set aside the demand by holding that contemporaneous import evidence produced by the party show that there was no undervaluation and furthermore held that LME price cannot be applied for purpose of valuation of scrap. He submitted that the ratio of aforesaid decision is squarely applicable to the present case because not only the facts of the present case is similar to the case of M/s Sunland Metal Recycling Industries but also the evidence relied upon for alleging undervaluation is same. Hence, it was submitted that the demand in the present case is not sustainable and should be set aside by following the aforesaid decision. He further submitted that identical goods were imported in the case of Baheti Metals & Alloys (decision reported as **Pushpak Metal Corporation v CC – 2014 (312) ELT 381**, which were imported during the same period as M/s AMA's and as stated above their import prices are comparable to the Appellants' import price. The import price for the goods in the case of Pushpak Metal Corporation (supra) were upheld by the Hon'ble Tribunal, wherein the Hon'ble Tribunal categorically held that the value cannot be determined on the basis of LME prices. He submitted that the decision in the case of Pushpak Metal Corporation has been accepted by the Central Board of Excise and Customs. In view thereof, he submitted that considering the ratio of aforesaid cases the present demand is not sustainable, as the import price in the present case was comparable to the price of goods in the aforesaid case and the evidence for enhancing the value was also same i.e. DGOV circular.

- It was submitted that the import price of goods in the present case is comparable to the import price in the case of M/s Sunland Metal Recycling Industries and M/s Baheti Metals & Alloys, wherein the Department had raised demand based on the same DGOV circular. During the course of hearing the counsel submitted a comparison sheet showing the price of goods in the present case and the price of goods in the case of M/s Sunland Metal Recycling Industries and M/s Baheti Metals & Alloys along with the annexure to SCN issued to M/s Sunland Metal Recycling Industries and M/s Baheti Metals & Alloys. Based on the said comparison chart it was demonstrated that the goods in the present case were valued at a higher price or at par with the goods imported in the case M/s Sunland Metal Recycling Industries and M/s Baheti Metals & Alloys.
- He further submitted that it is settled law that if the value of the contemporaneous goods are available, the same shall be the basis for re-determining the prices. As stated above, in the instant case the prices of contemporaneous imports were less or at par with the import price declared by M/s AMA. Hence, the present demand is not sustainable for this reason as well. Reliance was placed on the following decisions to support the aforesaid contention.
 - **Eicher Tractors V/s Commissioner - [2000 (122) ELT 322]**
 - **Varsha Plastics Pvt. Ltd V/s Commissioner - [2000 (122) ELT 322]**
 - **Commissioner of Customs, Calcutta V/s South India Television (P) Ltd. reported in 2007 (214) ELT 3 (SC)**

**- CC v/s Sanjivani Non-Ferrous Trading Pvt Ltd in
Civil Appeal No. 18300-18305 of 2017**

- He further submitted that the Statements of Partners i.e. co-appellants cannot be relied upon as the same was recorded under duress and hence, they were retracted immediately. It was submitted that the retracted statements cannot be accepted as evidence for confirmation of demand. He submitted that the adjudicating authority erred in discarding the retractions of co-appellants by holding that the same may not have been received by the investigating officers i.e. DRI. He submitted that the adjudicating authority failed to appreciate that the co-appellants after recording of their statements had immediately retracted the same and had sent their retraction to the office of DRI by registered post. It is settled law that if registered letter is not returned back undelivered, then it is presumed served and onus is on Department to show that they have not received it. In the present case, the aforesaid registered letters were not returned back and Commissioner has erroneously held that because the DRI had not chosen to rebut the same, it can be safely inferred that the letters were not received by the Department. He submitted that aforesaid retraction letters were received by the DRI, however they choose not to file a rebuttal against the same. He also submitted that if at all the Department had any objection on the said retractions, nothing prevented the Departmental officers to reject the same with cogent reasons or to record a counter statement in context with the retraction. However, no such effort was made by the Department.

- He further submitted that no parallel invoices were recovered in any search operations and enquiry was not conducted on alleged remittance. It is settled law that when a statement is retracted by the witness the adjudicating authority ought to examine such witness before reliance is placed on such statement in terms of Section 138 B of the Customs Act, 1962. In the aforesaid circumstances the adjudicating authority ought to have examined the co-appellants before considering their statements as relevant as required under Section 138 B of the Customs Act, 1962 in the course of adjudication, however the same was not done by the adjudicating authority. In such a situation, statements of co-appellants which were retracted cannot be accepted as evidence. Reliance was placed on the following decisions to support the aforesaid contention:

- **Agarwal Round Rolling Mills Ltd v/s Commissioner** 2015 (317) ELT 145

- **Tele Brands (India) Pvt Ltd v/s Commissioner of Customs** 2016 (336) ELT 97

- In any event, the statements of co-appellants were contradictory to documentary evidence and it is settled law that documentary evidence would prevail over the oral evidence. In the present case, the documentary evidence in the form of contemporaneous data support the case of the Appellants and hence the adjudicating authority erred by placing reliance on the statements of co-appellants i.e. partners of M/s AMA. Reliance was placed on the following decisions to support the aforesaid contention.

- **Philip Fernandes v/s Commissioner** 2002 (146) E.L.T 180

- **R.P Industries v/s Collector** 1996 (82) E.L.T 129
- **Commissioner v/s Latex Chemicals** 2005 (181) E.L.T. 138 (Tri. - Del.)
- Statements of co-noticees cannot be relied upon without any corroboration. In the present case, there is no independent corroboration in the form of documentary evidence to establish under valuation of the goods. The co-noticees did not appear for cross examination and therefore the statements cannot be relied upon. The decision of this Hon'ble Tribunal in Sunland Metal (supra) is applicable on this count too. Hence, the statements of other co-accused cannot be relied upon for confirmation of demand.
- He further submitted although cross-examination was allowed for some of the co-noticees, however they did not make themselves for cross. He submitted that that the Hon'ble Gujarat High Court has in **CC v Motabhai Iron & Steel Industries – 2015 (316) ELT 374 (Guj)** clearly laid down that where the person whose statement is relied upon by the department does not appear for cross-examination, no reliance can be placed on his statement. Further reliance is made on the following decisions to support the aforesaid contention. **Basudev Garg v CC – 2013 (294) ELT 353 (Del),**
Andaman Timber Industries v CCE- 2015 (324) ELT 641 (SC).
- He further submitted that the reliance placed on insurance policy in the SCN as well as Impugned order for confirmation of demand is misplaced and mis-conceived. It is settled law that adoption of insurance value for alleging under-valuation

is not proper. Reliance in this regard was placed on the following decisions to support the aforesaid contention.

- **M/s Anand Mahindra v. CC [2008 (226) ELT 371 (Tri. Mum)]** as affirmed by Hon'ble Bombay HC [2009 (244) ELT 340 (Bom)].
- **Nina Chaka Pvt. Ltd v/s CC [2004 (163) ELT 464 (Tri. Del)]**.
- **MihirEnterprises –vs- CC 2008 (227) ELT 75**
- As far as reliance placed on Brussels Report for roping the charge of undervaluation it was submitted that a) the department through the First Secretary (Trade), Embassy of India, Brussels has obtained a report of the Belgium Customs Authorities along with its enclosures. The enclosure contains a proforma invoice dated 15.04.2003 issued by M/s. Huron Valley Europe NV on M/s. Ni-Met, New York and the document is in Dutch. It is a document of a sales transaction of a European Company selling goods to an American Company in which M/s Agarwal Metals & Alloys is not involved. The same goods have been consigned to M/s Agarwal Metals & Alloys as a separate independent business transaction. In any case the supplier M/s. Ni-met has issued a specific letter stating that the goods have been sold at a much lower price than the price that it was purchased. The adjudicating authority failed to appreciate that the proforma invoice dated 15.04.2003 is unsigned and un-stamped by the supplier. As is clear from the said proforma invoice, the same does not bear any signature of the maker nor a stamp of M/s. Huron Valley. The said report says that M/s. Huron Valley had shut their operation 3 years back. The proforma invoice also seems to have been received through fax and is

not the original. Hence, the authenticity of these documents is highly questionable and therefore, these documents cannot be relied upon for alleging under-valuation, especially when there is no evidence of payment being done by M/s AMA which is over and above the declared price. It is settled law that without authenticated copies of the foreign documents relied upon, the report being furnished cannot be relied upon for enhancement of value. Reliance was placed on the following decisions to support the aforesaid contention.

- **CC v/s South India Television P Ltd** 2007 (214) ELT 3 (SC)
- **Collector v/s East Punjab Traders** 1997 (89) ELT 11 (SC)
- It is settled law that applying the LME price minus discount band as per the DGOV circular for valuation of scrap is absolutely wrong. Reliance was placed on the following decisions to support the aforesaid contention.
 - **Bharathi Rubber Lining & Allied Services P Ltd** 2013 (287) ELT 124
 - **CCU, New Delhi v/s Prabhu Dayal Prem Chand** 2010 (253) ELT 353 (SC)
 - **GKN Sinter Metals Ltd v/s CCE, Pune** 2008 (232) ELT 692 (Tri-Mum)
 - **M/s Sunland Metal Recycling Industries**, Order No. A/11871-11874/2019 dated 01.10.2019
 - **Pushpak Metal Corporation v CC – 2014 (312) ELT 381,**
 - Even the **Central Board of Excise and Customs** has while accepting the decision in Pushpak Metal

Corporation v CC – 2014 (312) ELT 381, categorically taken the view that recourse to LME prices cannot be taken to substantiate charge of undervaluation when contemporaneous import of almost same prices was available during the material time.

- He also submitted that M/s AMA had submitted certificate from most of their suppliers from whom majority of the material was directly imported, who had stated that they had not received any additional payment from them. This clearly indicates that M/s AMA had not undervalued the imported goods and there is no evidence produced by the Department to substantiate the allegation that the differential amount was paid by M/s AMA through hawala transfer. He also submitted this fact is further substantiated by investigations carried out by the Income Tax Department in respect of the same DRI SCN and the Income Tax Appellate Tribunal in respect of AY 2007-08 and even Commissioner of Income Tax (Appeals) in respect of AY 2004-05 and AY 2005-06 have not found any wrong-doing during the relevant years in the case of the Appellant. The said orders were placed before us during the hearing and it was submitted that the order was 2007-08 has attained finality.
- He submitted that it is settled law that when the statement of partner is not conclusive and there is no evidence of payment of money which is over and above the invoice value, then the transaction value cannot be rejected on the basis of the statement of such partner. Reliance is placed on the decision of Hon'ble Tribunal in the case of **Surat Melton Pvt Ltd v/s Commissioner of Customs (Import), Nhava Sheva** to support the aforesaid contention.

- The subject SCN was issued demanding duty in respect of a total of 385 Bills of Entry. Out of the said 385 Bills of Entry, in respect of 68 Bills of Entry, the assessment is provisional. He submitted a chart depicting the 68 Provisional Bills of Entry, out of 385 Bills of Entry. Out of the said 68 Bills of Entry, in case of 50 Bills of Entry (out of which 48 are common with the impugned SCN), a separate Show Cause cum Demand Notice F.No. S/26-Misc-1566/2008/GR.IV 3 JCH dated 22.04.2008 under Section 18(2) of the Customs Act 1962 was issued on the same basis as in the present case, and the Assistant Commissioner of Customs, Group – IV, JNCH, vide order dated 18.05.2009 confirmed the demand. Being aggrieved M/s AMA filed an appeal before the Commissioner of Customs (Appeals), who vide order dated 09.09.2010 set aside the aforesaid order by holding enhancement of value based on the DGOV circular without any evidence of contemporaneous import is not sustainable. Thereafter the Department filed an appeal before the Hon'ble CESTAT who vide Order dated 10.7.2012, confirmed the order passed by the Commissioner (Appeals), wherein it has been held that, addition in value based on the same basis as in the present case, is deemed inappropriate in absence of any evidence of contemporaneous import at a higher price. Hence, he submitted that the decision of Hon'ble CESTAT is squarely applicable to the present case as well as in their own case the demand has been set aside by the aforesaid order.
- Confirmation of demand in respect of Bills of Entry that were finally assessed after enhancing the value is bad in law. He submitted that in respect of 166 Bills of Entry that were

finally assessed after enhancement of value, the demand raised by the SCN is not sustainable, since all the said Bills of entry has been finally assessed and an order of out of charge thereon had been passed, no demand of duty can survive without the said order on the respective Bills of Entry being challenged and set aside. Reliance was placed on the of cases of CC v/s Lord Shiva Overseas 2005 (181) ELT 213, Malhotra Impex v/s CC 2006 (203) ELT 561 and CC v/s Paras Electronics 2009 (246) ELT 231.

- No additional duty of customs (CVD) is payable in respect of Scrap since these are not manufactured products. It is settled law as laid down by the Hon'ble Supreme Court in the case of **Hyderabad Industries Ltd v UOI-** 1999 (108) ELT 321 (SC) that if an article is not liable to excise duty since it is not a manufactured product, no additional duty of customs can be levied on the import of such article.
- That demand is barred by limitation as the present SCN was issued on 28.03.2008 proposing to recover duty of goods, which were cleared during the period 2003-04 to 2006-2007 (upto May, 2006), hence, the same is not valid.
- Penalty cannot be imposed upon the Partners i.e. Mr Vipul Agarwal and Mr Samir Agarwal as the duty demand itself is not sustainable.

10. Shri T.G. Rathod, Learned Joint Commissioner, authorised representative appearing for the revenue reiterates the findings of the Impugned order and submits that the valuation of imported goods resorted by taking LME price less discount band is correct.

11. Heard both sides and perused the case records. We note from the SCN and the impugned order that the demand in the present case has been confirmed under Rule 4 of the Customs Valuation Rules, 1988 by applying price band to LME prices as per Alert circular No. 14/2005 dated 16.12.2005 issued by the Director General of Valuation. Apart from the above, the demand has been confirmed by relying upon the statements of co-appellants viz, the partners of AMA, indenting agents, etc., 3 insurance policies and Brussel Report in relation to one import consignment. After going through the findings arrived at in the impugned order and considering the comparison chart showing comparison of prices of goods imported by the Appellant herein viz. AMA, Sunland Metal (supra) and Baheti Metal (supra) produced by the Counsel during the PH, we are of the considered view that the present case is squarely covered by Order No. A/11871-11874/2019 dated 01.10.2019 passed in the case M/s Sunland Metal (supra) as the allegation and evidence relied upon in both the cases are similar in nature.

11.1 We note that the adjudicating authority has proceeded to re-determine the value of imported aluminium scrap on the basis of the DGOV circular without considering and overlooking the contemporaneous data available before it on record. It is a settled law that if the declared value is to be rejected in that case the CVR, 2008 has to be applied sequentially i.e. Rule 5 and 6 is to be applied. If the value of contemporaneous goods are available, the same shall be basis for re-determination of value, as held by Apex Court in the case of Commissioner of Customs, Calcutta V/s South India Television (P) Ltd. reported in 2007 (214) ELT 3 (SC). As mentioned above, the Appellant during the hearing has submitted a comparison chart giving prices of imported goods imported by it, Sunland Metal (supra) and Baheti Metal (supra) and submitted that the prices declared by it are either higher or at par with the prices of both Sunland Metal (supra) and Baheti Metal

(supra) respectively and hence comparable. Ongoing through the comparison chart and annexures to SCN issued to both Sunland Metals (supra) and Baheti Metals (supra) we are in agreement with the submissions of the Appellant that the import prices declared by it are indeed comparable with the prices of M/s Sunland Metal (supra) and Pushpak Metal Corporation (supra). We note that in the case of Sunland Metal (supra) prices declared by it were found identical to prices declared by other importers viz., Baheti Metal reported as Pushpak Metal Corporation – 2014 (312) ELT 381 and the order passed in Pushpak Metal has been accepted by the Central Board of Excise & Custom. Various submissions have been made by the Appellant herein to assail the impugned order and heavy reliance has been placed on the decision of this Tribunal in Sunland Metal (supra). Before dealing with the submissions of the AMA, we find it fit to reproduce the relevant portion of the order below:

5. *In case of imported Aluminium scrap as detailed in Annexure – 'C', 'D', 'E' and 'F' of the show cause notice, the demands have been made under Rule 8 of the Customs Valuation Rules, 1988 by applying price bands to LME prices as per Alert Circular No. 14/2005 dt. 16.12.2005 issued by the Director General of Valuation. The show cause notice has relied upon the statements of the Partners of M/s SMRI and indentors to allege undervaluation. The show cause notice has proposed demand by rejecting declared value. Even though the show cause notice states that wherever the contemporaneous values were found the same has been applied by re-determining the value under Rule 6 and in rest of the cases Rule 8 has been applied, but we find that all demands have been made by applying LME prices and nowhere such contemporaneous values has been cited in show cause notice. The demands have thus been made by adopting the LME prices of Virgin metal and applying discounts inspite of the fact that the Apepllant had produced details of contemporaneous imports. The adjudicating authority if was to redetermine the value, he should have sequentially applied Rule 5 and 6 of the Customs Valuation Rules i.e Transaction value of similar goods or determination*

under rule 6 by determining under provisions of Rule 7. The Appellant in their reply to show cause notice had provided list of contemporaneous import of identical goods at the same price and we have perused the same. This has been overlooked by the adjudicating authority. We are of the view that if the declared value is to be rejected in that case the CVR, 2008 has to be applied sequentially i.e Rule 5 and 6 is to be applied. If the value of the contemporaneous goods are available, the same shall be basis for re-determining the prices. Whereas in the case of instant demands the prices of contemporaneous imports were same as that of Appellant and hence the LME Prices reduced by discount band could not have been basis for re-determining the prices and rejecting the declared value. The Appellant has pointed out that identical goods were imported in case of Pushpak Metal Corporation 2014 (312) ELT 381 which were imported during the same period and comparable with Appellant's import price. The said prices were upheld by the Tribunal and it was held that value cannot be determined on the basis of LME prices. Also that the said decision was accepted by the CBEC. The Appellant has annexed comparison sheet showing the prices in their case and in case of Baheti Metal which was reported as Puspak metal case supra. We find that when the prices in case of Pushpak metal case supra has been accepted by the revenue and the same are contemporary prices to the Appellant's import, in that case the value redetermined vide the impugned order by taking LME Prices as basis is not sustainable. Hence we do not find any reason to uphold the demand confirmed against Appellant as above.

6. In case of demands made under Annexure- 'C' on Aluminium Scrap, it is observed that several imports were made through Nhava Sheva Port and the assessments were provisional. The Order No. 2958/09 AM (I) was passed for finalization of assessment and the prices were enhanced by applying LME. The Appellant approached Commissioner (Appeal) who vide Order-in-Appeal dt. 09.09.2010 set aside the enhancement. The revenue's appeal against said order-in-appeal also stands dismissed as reported in Bharathi Rubber Lining & Allied Services P. Ltd. 2013 (287) ELT 124. In such case there is no ground to redetermine the value as the redetermination on basis of LME price already stands decided by the Tribunal. Similarly in respect of imports

made through Kandla and Mudra Port included in Annexure – 'E' to SCN the assessments were provisional but were finalized vide Orders-in - Original dt. 21.02.2011 and 03.07.2012 accepting the transaction value. It was also held that value cannot be re-determined under Rule 8 on the basis of LME minus discount band. Such orders stands accepted by the revenue. In such case we do not find any reason to reject the declared value. We also find that the issue of determining the value by adopting the price of virgin metal and applying discount bands has been rejected in catena of judgments. In case of Bharathi Rubber Lining & Allied Services P. Ltd. 2013 (287) ELT 124, the tribunal held as under:

5.4 The lower appellate authority has rejected the reliance place on the DGOV Circular on the ground that in terms of the Hon'ble Apex Court judgment in the case of Varsha Plastics (cited supra), the assessment under the provisions of Customs Valuation Rules cannot be given a go-by and the Valuation Rules will prevail over the departmental instructions on the subject matter. The Hon'ble Apex Court in the said case held as follows :

"The valuation of the imported goods where the transaction value in the opinion of Assessing Authority is liable to be rejected because of invoice manipulation or under-invoicing or un-realistic price or misdeclaration in respect of valuation of goods or description or where transaction value of the goods declared is ridiculously low, which of course the Assessing Authority has to justify, he must proceed to determine valuation of goods by following Customs Valuation Rules. The availability of evidence of contemporaneous import of the same goods obviously provides the best guide for determination of value of the import of goods but in the absence of evidence of contemporaneous import, reference to foreign journal for finding out correct international price of imported goods may not be irrelevant."

5.5 In the instant case, the proposition in the show cause notice is that the value of the contemporaneous imports indicated a higher price. If that be so, that should have been the starting point for determination of value of the imported goods and not some other basis. Further even

when we take the values of the contemporaneous imports, the lowest of such value has to be adopted as provided for in Rule 6 and not the highest. In the instant case no such thing has been done by the assessing officer.

5.6 In view of the above, we do not find any infirmity in the observation of the Commissioner (Appeals) that the DGOV Circular cannot override the provisions of Valuation Rules. The Hon'ble Apex Court in the case of Commissioner of Customs, Calcutta v. South India Television - 2007 (214) E.L.T. 3 (S.C.) had held that casting suspicion on invoice produced by the importer is not sufficient to reject it as evidence of value. The invoice price is not sacrosanct but before rejecting the invoice price, the department has to give cogent reasons for such rejection. The assessing authority has to examine each and every case on merits for deciding its validity and he cannot form a view to reject all transaction values on the basis of some general criteria based on DGOV Circular and on that basis load the value of imports uniformly across board. This Tribunal in the case of FSP (India) Pvt. Ltd. (cited supra) held that uniform loading based on general criteria is not permissible.

In case of CCU, NEW DELHI Vs. PRABHU DAYAL PREM CHAND 2010 (253) ELT 353 (SC), the Apex Court held as under :

"2. The respondent assessee filed two Bills of Entry dated 16th September, 1988 and 17th December, 1998 for clearance of Brass Scrap and Copper Scrap as per ISRI grade "Honey" and Birth/Cliff" respectively. The Bills of Entry were assessed at the declared invoice value, viz., CIF US \$ 1100 and US \$ 1300 PMT respectively. After inspection, the goods were cleared on payment of customs duty assessed.

3. Subsequently, on the basis of the information received from the London Metal Exchange, (for short, "the LME") to the effect that the price of the said metals in the LME as on the date of import was more than the price declared by the respondent, an additional duty amounting to Rs. 90,248/- and 1,94,035/- respectively was demanded from the assessee on the said two Bills of Entry. The additional demand having been confirmed by the Deputy Commissioner of Customs, the assessee preferred

appeal to the Commissioner (Appeals) but without any success.

4. Aggrieved, the assessee carried the matter in further appeal to the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, (for short "the Tribunal") as it then existed. By the impugned order, the Tribunal has allowed the appeal and quashed the additional amount of duty demanded from the respondent. While accepting the plea of the assessee that they were not confronted with any contemporaneous material relied upon by the revenue for enhancing the price declared by them in the bills of entry, the Tribunal has observed thus :

"In the present case as mentioned above, even though there is a reference to contemporaneous import in the order passed by the Deputy commissioner no material regarding such import has been placed before us or made available by the appellant at any point of time. Therefore, assessment in this case has to be taken as having been made purely on the basis of LME Bulletin without any corroborative evidence of imports at or near that price which is not permissible under law. We, therefore, set aside the impugned order and allowed the appeal."

5. Not being satisfied with the said order, the revenue is before us in this appeal.

6. We have heard Mr. Biswajit Bhattacharya, learned Additional Solicitor General on behalf of the revenue. The assessee remains unrepresented.

7. Learned counsel submits that since the LME bulletin is a true indicator of current international prices of metals, the adjudicating authority was justified in adopting the price of the said two metals as notified by the LME, and therefore, the Tribunal was not justified in quashing the additional customs duty determined to be payable on the imports in question.

8. We are unable to persuade ourselves to agree with the learned counsel. It is manifest from the afore-extracted order of the Tribunal that no details of any contemporaneous imports or any other material

indicating the price notified by the LME had either been referred to by the adjudicating Officer in the adjudication order or such material was placed before the Tribunal at the time of hearing of the appeal. Learned counsel for the Revenue has not been able to controvert the said observations by the Tribunal. In that view of the matter no fault can be found with the order passed by the Tribunal setting aside the additional demand created against the assessee."

In case of GKN SINTER METALS LIMITED Vs. CCE, Pune 2008

(232) E.L.T. 692 (Tri. - Mumbai), the tribunal held as under :

"2. We have heard both sides. We find that the prices in the LME bulletin for prime metal are only indicative and cannot be the sole basis for enhancing the value of copper scrap, particularly when the goods imported are copper scrap and not copper. Further there is no basis for holding that refining charges for refining scrap and conversion of the same to copper bar/rod will be US\$ 150 per MT. As per Rule 4(2)(b) of the Valuation Rules transaction value of the imported goods shall be accepted provided that (a)- - - (b) the sale does not involve any abnormal discount or reduction from the ordinary competitive price. It is clause (b) which is highlighted by the Commissioner (Appeals). However, there is no material on record to establish that the suppliers offered any abnormal discount or reduction from the ordinary competitive price for copper scraps which were imported by the appellants. Further, it is brought to our notice that the price declared is only marginally lower than the price as loaded.

3. *In the light of the Tribunal's decision in the case of Drunkey Exports (P) Ltd. v. Commissioner of Customs (Port), Kolkata-I- 2004 (165) E.L.T. 417 (Tri.-Kolkata) and Commissioner of Customs, Kandla v. Meera Impex - 2004 (167) E.L.T. 446 (Tri.-Mumbai) holding that LME prices are indicative and cannot be the basis for enhancing the value in the absence of corroborative evidence of contemporaneous imports at higher price, we hold that enhancement of the value is*

not justified in the present case and accordingly set aside the impugned order and allow the appeal.

The above Tribunal judgment stands upheld by the Apex Court as reported in Commissioner Vs. GKN Sinter Metals Limited - 2010 (254) E.L.T. A43 (S.C.)]"

Same analogy has been taken by the Tribunal in case of Bothra Metal & Alloys 2013 (9) TMI 546. It is therefore absolutely clear that the redetermination of value based upon LME prices less discount band as per DGOV Alert Circular supra is not sustainable.

7. *From the above judgments it is absolutely clear that applying the LME price minus discount band as per SMRI bulletin or DGIV Circular No. 14/2005 dt. 16.12.2005 is absolutely wrong. The Appellant has also relied upon the letter F. No. S/26 – Misc-1040/2005 GrIV dt. 13.02.2006 of the Commissioner of Customs, Nhava Sheva wherein the Commissioner in reference to Valuation of Aluminium Scrap under Alert Circular No. 14/2005 issued under F. No. VAL/TECH/37/2005 dt. 16.12.2005 has stated that there is no linear correlation between the prices of Aluminium Metal and prices of Aluminium Scrap quoted in Metal Bulletin. The main excerpts of the above communication of the Commissioner Nhava Sheva clearly mentions as under:*

2.

A.

B. the enquiries with the trade reveal that in case the difference between the prime metal and scrap is indeed so small, it does not make economic sense to go in for purchase of scrap. Inquiries from the trade have revealed that the Aluminium Scrap is used for melting purpose and re-melted Aluminium Ingots produced out of it has a sale price of 8 to 10% lower than the virgin metal. This also includes manufacturing cost and the recovery of the metal from scrap is never 100%.

3.

4. *It may also be mentioned that there is no linear correlation between the prices of Aluminium Metal and the prices of Aluminium Scrap quoted in the Metal Bulletin.*

.....

5. It can be seen that the prices of Aluminium Scrap has not changed in spite of surge in the prices of Aluminium Metal as mentioned in the Metal Bulletin.

From the above communication it is absolutely clear that even the revenue authorities did not consider the valuation of Aluminium scrap to be made as per Alert Circular or based upon LME Prices.

Even the CBEC Board while accepting the decision of the Pushpak Aluminium case vide letter F. No. 387/w/9/2013- JC dt. 25th June 2013 F No. 387/W/9/2013-JC dated 25 June, 2013 has clarified as under:-

"Recourse to LME prices can't be taken to substantiate the charge of undervaluation when contemporaneous import of almost same prices was available during the material time. It is a settled law that transaction value can't be rejected unless there is contemporaneous evidence to reject the invoice value as being held by the Apex Court in case laws like Commissioner of Customs, New Delhi vs. M/s. Prabhu Dayal Prem Chand reported in 2010 (253) ELT 353 (S.C.), Commissioner of Customs, Kolkata vs. M/s. South India Television (P) Ltd. reported in 2007 (214) ELT 3 (S.C.), Commissioner of Customs, Mumbai vs. H.D. Orgochem Ltd. reported in 2008 (226) ELT 9 (S.C.).

The case laws relied upon by the Department will not help our cause because these decisions were applicable in respect of prime metals only and not w.r.t. scrap except in the case of Varsha Plastics. In Varsha Plastic also, the Hon'ble Supreme Court held that the availability of evidence of contemporaneous import of the same goods obviously periods the best guide for determination of value of the import of goods. But in the absence of evidence of contemporaneous import, reference to foreign journals for finding out the correct international prices for the purpose of Section 14 of the Customs Act is not irrelevant. Since contemporaneous import prices were available in the present case as being noted but not accepted by the Commissioner in the Order—in-Original, departmental case for undervaluation become weak and appeal in Supreme Court is not merited"

We find from the communication dated 29.10.2008 of the Institute of Scrap Re-cycling Industries, INC (ISRI), wherein they have stated as under :

"We have been asked to explain how aluminum scrap prices are determined. Please be advised that ISRI, as a trade association, does not become involved in scrap pricing. However, our understanding of the market is that scrap prices are determined through negotiations between buyers and sellers, based upon then current market information derived from a variety of sources, including trade press such as the American Metal Market and the Metal Bulletin, as well as future markets. These information sources are utilized as a general market trend basis for negotiation. It should be noted that scrap metal is not traded directly on the futures exchanges – rather it is alloy ingots derived from scrap material that are traded on some of the exchanges such as the London Metal Exchange (LME)."

8. In view of above communication of ISRI it is absolutely clear that the scrap price would depend on many factors and the LME based price cannot be applied blindly to imports of scrap for the purpose of valuation.

9. Most pertinently we find that the whole case is also based upon allegation that the differential amount was paid by the Appellant through Hawala Channels or transfer. However we find that in the show cause notice not a single person was identified or investigations were made as whom the differential value amount was handed over. Except naming Chaganlal no person has been named. There is no evidence as to how the Appellant came into possession of cash alleged to be differential amount towards scrap import neither there is any evidence of any cash being handed over to any person representing suppliers. In absence of same the allegation of undervaluation cannot be supported.

10. The Adjudicating authority in order to justify the LME based valuation has relied upon the statement of Shri Sushil Agarwal, Partner of M/s SMRI and indentors. The Appellant has objected to reliance on such statements that the statement dt. 29.05.2006 and 23.04.2007 of Shri Sushil Agarwal are contradictory as different pricing method was stated by him which are not applicable in the facts of the

case. That the cross examination of Shri Sushil Agarwal was also not allowed. Further that even though the cross examination of indentors were allowed but they did not appear for the cross examination. The Appellant has pleaded that in such circumstances, the statement of Shri Sushil Agarwal and indentors cannot be relied upon. We find that the adjudicating authority ought to have allowed cross examination of Shri Sushil Agarwal as the same was necessarily required in view of his statements dated 29.5.2006 and 23.04.2007 which were contradictory in respect of value of imported goods. In his statement dated 29.5.2006 on being shown an alleged abstract of LME prices of Aluminium Scrap, which showed price of Aluminium scrap as 80% of the LME price he had stated that the prevailing LME prices formed the basis of negotiation and that normally, the prices of Aluminium scrap were negotiated at 80% of the LME. However in his statement dated 23.04.2007, he has stated that the import price of Aluminium Scrap was negotiated by applying different discount bands ranging from 5% to 35% to the LME price of various grades, viz. Trump, Tense, Taldon, Trob etc., which corresponded to the discount band provided in Alert Circular No. 14/2005 dated 16.12.2005 of the Director General of Valuation. In such a case, we are inclined to accept the submission of the Appellant that initially the investigating officers were attempting to apply 80% of the LME, but later on realizing that even the Director General of Valuation was not recommending valuation of 80% of the LME, the statement of Shri Sushil Agarwal was recorded to match the discount band, as per DGOV Circular. In such view of the facts, we do not find any reason to rely upon the statement of Shri Agarwal to support the allegation of undervaluation on the part of the Appellant. The Appellant has pleaded that it is incomprehensible that Shri Sushil Agarwal, who was in business of imports of Aluminium Scraps and Zinc Scrap since last many years would state that the prices of Scrap would be equal to the prices of metal content. It is a known fact that re-cycling of scrap would not result into recovery of entire metal content as there would be a process loss, cost to be incurred for conversion of scrap to metal. Such metal produced from Scrap cannot command same price as that of virgin metal. We find that the Appellant had sought cross examination of Shri Sushil Agarwal under Rule 138B of the Customs Act. The allegation of undervaluation are based upon the letters of Indian Consulates and statements of

indentors namely Shri Anil Parolia of Nihon Ispat, Shri TarunJhingon, Shri Ehsan Amin Gadawala and Shri Mihir Bhat as well as letters from Indian Consulate at U.S.A in reference to import of 32 consignments of Zinc Ash, Indian Consulate at UK in respect of 11 Consignment imported from Sunberg and Indian Consulate at Singapore in respect of 2 consignments imported from PWT Australia. The Appellant had sought cross examination of Indentors. The Appellant has also sought cross-examination of the officials and panchas, who were present during drawal of Panchnama on 26.04.2006 for examination of seized laptop of Shri TarunJhingon on the ground that it was not possible to complete the proceedings in 2 hours, as stated in the show cause notice. The cross examination of the officials, who had recorded the statement of Shri Sushil Agarwal on 9.4.2007 was also sought since it was recorded in his statement that he had submitted in tabular form running into 120 pages the particulars of all imports made in 5 years by the Appellant, which are involved in the impugned appeal. The Appellant in their reply had contended that the cross examination of officials was sought as all the import related documents of the Appellant were lying seized with the investigating officers and there was no occasion for Shri Sushil Agarwal to compile such information in absence of any import documents. However except indentors no cross examination of any of the above persons was allowed. The cross examination of Shri Sushil Agarwal was denied by the adjudicating authority on the ground that no new facts are likely to come out at such examination and cross-examination. This reasoning of the adjudicating authority is highly erroneous since it cannot be assumed that the cross examination of a person would not bring any material not already available. Our views are based upon the judgment of the Hon'ble apex court in case of Andaman Timber Industries – 2015 (324) ELT 641 (SC) , wherein the apex court held as under :

"6.According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the

aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view of the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two

witnesses was the only basis of issuing the show cause notice.

9. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”

11. Similarly, in case of Vasudev Garg – 2013 (294) ELT 353 (DI), it was held that it was mandatory to give cross examination. It was held that the statement against the assessee cannot be used without giving them opportunity of cross examining the witness as it is valuable right of accused/noticee in quasi judicial proceedings which can have adverse consequence for them. The Adjudicating authority had allowed cross examination of indentors and even they were also issued notice, none of the indentor was made available for cross examination. In such circumstances when these persons could not be produced for cross examination, their statements could not have been relied upon. Especially in case of Mihir Bhatt, Ehsan Amin Gadawala where the only evidence was their own statements stating undervaluation. In case of other persons also in the light of above facts, the adjudicating authority should have allowed the cross examination. In absence of the opportunity to cross examine the above persons, we are of the view that no reliance can be placed upon their statements. Our views are supported by the judgment of Hon’ble High Court of Gujarat in case of CC Vs. Motabhai Iron & Steel Industries 2015 (316) ELT 374 (GUJ) wherein the Hon’ble High Court has held that “no reliance can be placed on the statement of such witness who has not subjected himself to cross-examination by the affected party”. Similarly we are of the view that no reliance can be placed on the alleged recovery of email from indentor Shri TarunJhington as no opportunity of cross examination of panch witness and officers was given to Appellant. We further find that during the visit to the factory of M/s SMRI, the officers had questioned the employee of M/s SMRI namely Shri Rajesh Kumar Trivedi, C. Haridas and Nikhil Jain on the basis of documents called “Abstract of LME Price of Aluminium Scrap and Zinc Scrap’ to which said employees had stated that the Appellant’s declared price was less. This document was handed over to the Appellant on 20.02.2018 and it contained Pages 1 to 8 lowest & Highest Zinc prices of a day and the next 10 pages tiled MP Prices & Archive containing low price of the day alongwith 80% of said price. However we

find that nowhere the said papers contain prices of Aluminium or Zinc Scrap. Also no prices of Aluminium Scrap is issued by the LME as it is not concerned with scrap pricing. Hence the allegation that the Appellant's declared price was less than the mentioned in said document does not hold any substance. We also find that the Appellant had sought cross examination of the officers for the source and authenticity of such document and 80% formula derived by officers. They had also sought cross examination of panch witness who had witnessed such proceedings. However the same was not allowed. In absence of authenticity of such document and refusal of cross examination we find that the charges of undervaluation are not sustainable.

12. Coming to the issue raised by the Appellants that no additional duty of Customs is payable in respect of Zinc Ash, skimmings and scrap as these are not manufactured product, we observe that adjudicating authority has denied relief to Appellant on ground that they have not produced evidence to show that goods are not manufactured products. We find from the definition of various scrap imported as per ISRI and the photographs annexed to appeal papers that it clearly shows that the scrap was not arising as a result of process of manufacture. The ratio of law on such scarp being non excisable is absolutely settled by the judgments and Circulars viz. Hindalco Industries Ltd. 2015 (315) ELT 10 (Bom), Circular No. 904/24/2009 – CX dated 28.10.2009, Circular No. 1027/15/2016-CX dated 25.04.2016, Slugs India Ltd Vs. CCE - 202 (278) ELT 611, CC vs Tata Iron & Steel Co. Ltd - 2004 (165) ELT 386 (SC), Bhushan Steel Ltd vs CCE - 2012 (284) ELT 713, Shri Ram Agro Chemicals (P) Ltd vs UOI - 2009 (234) ELT 218 (P & H), CC vs L. Madanlal(Aluminium) Ltd – 2010 (258) ELT 107, Karnataka Chemical IndusCorpn. Ltd vs CC – 2005 (183) ELT 207. The adjudicating authority also held that since the issue of non-payment of Additional duty was not raised at the time of assessment, hence cannot be raised in reply to show cause notice under section 28. The contention of adjudicating authority is not sustainable as when notice under section 28 is issued to an assessee, he can contest the whole assessment to say that duty is not payable for a reason not taken up at the time of original assessment. He is entitled for all reliefs/ exemption associated with the assessment. The issues is well settled by the Tribunal's order in case of Decora Ceramics P. Ltd. 1998 (100) ELT 297, Lili

Foam Indus. P. Ltd. 1990 (46) ELT 462, Bakeman Home Products P. Ltd. 1997 (95) ELT 278.

13. Further, we also find that in respect of 550 Bills of entries covered under Annexure – C, value was already enhanced at the time of assessment and hence further proposal to re-enhance the value when the earlier assessment order has attained finality since no appeal/review was filed against such order, is not sustainable. There cannot be any reassessment of the said values, which had become final for want of appeal against the same. Our views are supported by judgments in case CC vs Lord Shiva Overseas – 2005 (181) ELT 213, Malhotra Impex vs CC - 2006 (203) ELT 561 and CC vs Paras Electronics - 2009 (246) ELT 231.

14. In respect of export declaration in respect of one consignment shipped from New Zealand and 11 consignments shipped from Spain, we are in agreement with the submission of the Appellant that such declarations have no relevance as the same were not authenticated by the News Zealand Customs and Spanish Customs. Even otherwise also most of these declarations are in respect of goods viz. Iron and Steel i.e other than those imported by the Appellants and the Appellant are not consignees. Even in some declarations, the goods are Iron & Steel scrap which were not imported by Appellant. Even the values has not been re-determined on the basis of such declarations and hence the same are not relevant in the instant case.

11.2 We note that in the above case, prices declared by Baheti Metal (supra) reported as Pushpak Metal (supra) has been accepted by the department and the same was relied upon to reject the re-determination of Value in the case of Sunland Metal (supra). The order of Pushpak Metal has been accepted by the department and the CBEC and the same goes on to show that the price declared by them has been found to be correct. Once the said price has been accepted to be true and having found that prices of the AMA, the appellant herein, are identical to the prices declared by both Sunland Metal and Baheti Metal (reported as Pushpak Metal (supra)), we have no hesitation in holding

that the impugned order redetermining the value of imported scrap on the basis of DGOV circular and by overlooking the contemporaneous data is required to be set aside. In any event as held the case of Sunland Metal (supra), the value of imported Aluminium scrap could not be re-determined on the basis of the DGOV Circular as the said circular takes the price of LME as the basis which deal with prime metal and the imported goods in dispute are admittedly Aluminium scrap and not prime metal. In view of the above, we hold that the impugned order redetermining the value of imported aluminium scrap on the basis of DGOV Circular cannot be upheld and the value declared by the AMA, being similar to the contemporaneous import data mentioned above has to be upheld.

11.3 Having held as above, we now deal with all the evidences that has been relied upon for confirmation of present demand.

11.4 The adjudicating authority in the present case has confirmed the demand on the basis of the LME price as stated in the DGOV circular supra. We find that the Tribunal in the case of M/s Sunland Metal (supra) after considering the various case laws and communication/clarification given by the then CBEC/ISRI has held that LME price cannot be the basis for redetermination of value of scrap.

11.5 The Adjudicating authority in order to justify the LME based valuation has relied upon the statements of Shri Vipul Agarwal and Samir Agarwal. The Appellant has objected to such reliance, as the statements were retracted immediately and the same are contradictory to documentary evidence i.e. contemporaneous import price. The Appellant has pleaded that retracted statements cannot be accepted as evidence for confirmation of demand and the said retraction was immediately sent

by RPAD to the office of DRI. The adjudicating authority in the impugned order has chosen to not consider the retraction letter on the ground that looking at the same it cannot be inferred that the same were received by the DRI. We are of the view that the said approach of the adjudicating authority is incorrect as the reason for not considering the retraction appears to be presumptive in nature as no evidence has been produced to show that the DRI was not in receipt of the said letters. Be that as it may we note that statements cannot be the sole reason to confirm the charge of undervaluation and the same has to be corroborated with documentary evidence. In the present case the documentary evidence in the form of contemporaneous import data, produced by the AMA, is contrary to the oral statements. It is settled law that in case of difference between documentary evidence and oral evidence the former should be given precedence and later should be ignored. In view of the settled law, we are of the view that the statements of co-appellants and other witnesses cannot be relied upon or the same cannot be the sole basis to confirm the charge of undervaluation as the same is contrary to documentary evidence which is in the form of contemporaneous import price. Our views that documentary evidence will prevail over oral evidence is case of contradiction between them are based upon the judgment of Tribunal in the cases of **Philip Fernandes v/s Commissioner** 2002 (146) E.L.T 180, **R.P Industries v/s Collector** 1996 (82) E.L.T 129 and **Commissioner v/s Latex Chemicals** 2005 (181) E.L.T. 138 (Tri. - Del.). We also note that the allegation that the excess amount over and above the invoice price was paid through hawala transaction is equally baseless and there is no evidence of any hawala transaction to prove the said allegation. There is no evidence as to how the Appellant came into possession of cash alleged to be differential amount towards scrap import neither there is any evidence of any cash being handed over to any person representing suppliers. We

respectfully follow the finding given in para 9 of the order of Sunland Metal (supra) in this regard. Even in own case of Appellant, the same issue has been examined by the Income Tax Department and no wrongdoing is noticed by the ITAT and Commissioner of Income Tax (Appeals) as evident from the orders placed before us for assessment years 2007-08, 2004-05 and 2005-06. The said orders specifically record that no amount was paid by the Appellant herein over and above the invoice price. Once the expert body viz, the Income Tax Tribunal and Income Tax Commissioner has found the claim of the department of amounts being paid by AMA over and above the invoice price to be not correct, we have no hesitation to follow the same view more so when even in the present proceedings no evidence has been produced by the department in support of the unsubstantiated claim of cash being paid towards the differential value.

11.6. We are also in agreement with the Appellant that the statements of witnesses cannot be relied upon as they failed to appear for cross-examination. The Appellant had sought cross examination of the witnesses and had justified the reason for the same. We observe that even though the adjudicating authority had granted cross examination of certain witnesses i.e Mr Ramesh Jain, Mr Azad Derasaria, Mr Narendra Jain and Mr Rajeshwar Dubey none appeared for the same. We are of the view that the Department is bound to enforce the presence of the witnesses whose cross-examination was sought by the Appellant. Our views are based on the following decisions **Tulsyan NEC Ltd v/s Commissioner of Customs, Chennai** reported in 2003 (157) E.L.T 627 (Mad); **Rama Shyama Papers Ltd v/s Commissioner of C.EX, Lucknow** reported in 2004 (168) E.L.T 494 (Tri-del and **Shalimar Agencies v/s Commissioner of Customs, Kandla** reported in 2000 (120) E.L.T 166 (Tribunal). Since the witnesses failed to appear for

cross-examination, their statements cannot be relied upon. Similar view has been taken by us in Sunland Metal (*supra*) in Para 10 to 12 of the order and we reiterate the same.

11.7. In respect of reliance placed upon 3 insurance policies for confirmation of demand, we are in agreement with the Appellant that the same cannot be relied upon for confirmation of demand. The adjudicating authority has relied upon 3 insurance policies in respect of purchase of consignments of scrap from M/s. Sims Group Limited, North Sydney, Australia, M/s. Istanbul Recycling Ltd., Istanbul and M/s. Stena Metal International, Gothenburg for upholding the charge of under valuation. On perusal of the policy certificates it is clear that the beneficiaries in each case, is the supplier himself. We are of the view that supplier could have obtained a higher insurance cover for his own benefit or it could also be a clerical error on the part of the supplier's staff while applying for insurance cover. Our view is based on the fact that Appellant in all had imported scrap under 385 Bills of Entry from 2003-2006 as per the SCN and in each of the insurance certificate accompanying the other 382 different consignments imported by them, goods are covered for the values as mentioned in the invoices accompanying the same. In any event we are in agreement with the plea of the Appellant that value shown in the insurance policies, cannot be a ground to enhance value, as such value might have been shown to get a higher amount of compensation in the event of goods getting lost or destroyed. We find that apart from the insurance policy, no other independent evidence is on record to establish the fact that the goods covered under the said policies were under-valued. Hence, we are of the view that adoption of insurance value for alleging under-valuation is not proper. Our views are based upon the judgment of Tribunal in the cases of **M/s Anand Mahindra v. CC [2008 (226) ELT 371 (Tri. Mum)]** as affirmed by Hon'ble Bombay

HC [2009 (244) ELT 340 (Bom)]; **Nina Chaka Pvt. Ltd v/s CC** [2004 (163) ELT 464 (Tri. Del)] and **MihirEnterprises –vs- CC** 2008 (227) ELT 75.

11.8. In respect of report given by First Secretary (Trade), Embassy of India, Brussels is concerned we are of the view that the adjudicating authority has wrongly placed reliance on the same. We are in agreement with submission of Appellant that the invoices and supporting documents with the report has no relevance as the same were not authenticated and relates to transaction between two different parties of which the Appellant is not a party of. The department through the First Secretary (Trade), Embassy of India, Brussels had obtained a report of the Belgium Customs Authorities along with its enclosures. We note that the enclosure contains a proforma invoice dated 15.04.2003 issued by M/s. Huron Valley Europe NV on M/s. Ni-Met, New York and the document is in Dutch. It is a document of a sales transaction of a European Company selling goods to an American Company in which Appellant is not involved. The same goods has been sold to the Appellant by Ni-Met under a separate independent business transaction, hence the aforesaid report cannot be applied to present import. In any event, we observe that supplier i.e M/s. Ni-met had subsequently issued a specific letter stating that the goods have been sold to the Appellant at a much lower price than the price that it was purchased and the contents of the said letter have not been disputed in the order. Hence, the aforesaid report cannot be relied upon.

11.9. Further, we also find that in respect of 166 Bills of entry value was already enhanced at the time of assessment and hence further proposal to re-enhance the value when the earlier assessment order has attained finality since no appeal/review was filed against such order, is

not sustainable. There cannot be any reassessment of the said values, which had become final for want of appeal against the same. Our views are supported by judgments in case CC vs Lord Shiva Overseas – 2005 (181) ELT 213, Malhotra Impex vs CC - 2006 (203) ELT 561 and CC vs Paras Electronics - 2009 (246) ELT 231. Similar view has been expressed by us in para 13 of the Sunland Metal order (supra) and we respectfully follow the same.

11.10. We also find that as in the case of Sunland Metals (supra), recorded in para 6 of the order, in Appellant's own case of 50 Bills of Entry the Commissioner (Appeal) who vide Order-in-Appeal dt. 09.09.2010 set aside the enhancement of value. The revenue's appeal against said order-in-appeal also stands dismissed as reported in Bharathi Rubber Lining & Allied Services P. Ltd. 2013 (287) ELT 124. In such case there is no ground to redetermine the value as the redetermination on basis of LME price already stands decided by the Tribunal against the revenue.

11.11. Coming to the issue raised by the Appellants that no additional duty of Customs is payable in respect of scrap as these are not manufactured product, we observe that the same has been held by us in favour of the Appellant in the case of Sunland Metal (supra) in para 12 of the order and hence the Appellant herein is entitled for all reliefs/exemption associated with the assessment.

11.12. Since we are deciding the appeals on merit, we are not addressing the issue of limitation and the same is kept open

12. In view of our above observations and findings, we are of the view that the demands confirmed against M/s AMA, confiscation of goods and penalties imposed upon M/s AMA is not sustainable. For the same reason

the penalty imposed upon co-appellants namely Shri Samir Agarwal, Shri Vipul Agarwal and Ramesh Kumar H. Jain is also not sustainable. We thus set aside the impugned order and allow all the appeals before us with consequential reliefs to the Appellants. EH application is also disposed of.

(Pronounced in the open court on 13.02.2020)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Prachi