



सीमा शुल्क आयुक्त का कार्यालय,
नवीन सीमा शुल्क भवन, नया कांडला
OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA-370 210 (GUJARAT)
Phone No: 02836-271468/469, Fax No. : 02836-271467.

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| A | File No. | S/10-95/Adj/ADC/Denovo-Dow Chemicals/2019-20 |
| B | Order-in-Original No. | KDL/ADC/GCJ/07/2020-21 |
| C | Document Identification Number | 20200671ML00008U5A1A |
| D | Passed by | SH. GYAN CHAND JAIN, ADDITIONAL COMMISSIONER |
| E | Date of order | 19.06.2020 |
| F | Date of issue | 19.06.2020 |
| G | SCN No. & Date | SCN F.No S/20-8/Gr.II/2005-Pt III dated 07.07.2011 |
| H | Noticee(s)/Co-Noticee(s) | M/s Dow Chemical International Pvt. Ltd., Plot No. 120, Sector-2, Gandhidham - 370201 |

1. यह अपील आदेश संबन्धित को नि प्रदान शुल्क: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 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 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 128 A (1) (a) of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

**“सीमा शुल्क आयुक्त (अपील), कांडला
मंजिल वी 7, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009”
“THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
7th Floor, Mridul Tower, Behind Times of India, Ashram Road, Ahmedabad - 380 009.”**
3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।
Appeal shall be filed within sixty days from the date of communication of this order.
4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 2/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 2/- under Court Fee Act it must accompanied by –
(i) उक्त अपील की एक प्रति और
A copy of the appeal, and
(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं.-6 में निर्धारित 2/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 2/- (Rupees Two only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.
5. अपील ज्ञापन के साथ इयूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.
6. अपील प्रस्तुत करते समय, सीमा शुल्क नियम (अपील), अधिनियम शुल्क सीमा और 1982, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.
7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, आयुक्त (अपील)के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (Appeals) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

BRIEF FACTS OF THE CASE

Present proceedings have arisen out of CESTAT Order No. A/10005/2019 dated 02.01.2019, whereby appeal filed by M/s Dow Chemical International Pvt. Ltd., Plot No. 120, Sector-2, Gandhidham (hereinafter referred to as "the importer" for the sake of brevity) against OIA No. 463/2013/Cus/Commr(A)/KDL dated 15.07.2013, has been allowed. Hon'ble CESTAT allowed the appeal by holding that the OIA as well as OIO No. KDL/AC/Manish/198/Gr. IIA/ 2012 dated 24.01.2012 go beyond the scope of Show Cause Notice. The impugned OIA is set aside and matter is remanded to Adjudicating Authority for fresh adjudication keeping in mind the charges made in the Show Cause Notice. The SCN dated 07.07.2011 issued from F.No. S/20-8/Gr.II/2005 -PT-III was originally answerable to the Assistant Commissioner (Group-II), Custom House Kandla but having issued a Corrigendum dated 28.01.2020 the same made answerable to the Additional Commissioner of Customs, Custom House Kandla. Brief facts of the case are as under:-

The "Importer" have imported various consignments of "Propylene Glycol" falling under Customs Tariff Heading 29053200 from their related supplier M/s. Hampshire Chemicals Corporation (A subsidiary of Dow Company) 2030, Willard H, Dow Centre, Midland MI 48674, USA and the filed following various Bills of Entry through their CHA M/s. Rishi Kiran Road Lines, Gandhidham for clearance subject goods as price mentioned therein:-

| S.No | WH/BE No. & Date | Quantity (MT) | Invoice No. & Date/ BL No. & Date | Price Declared (US \$-CIF) PMT | Price declared on high sea sale basis to subsequent seller by same importer/supplier from same country (US\$ PMT CIF) |
|------|------------------------|---------------|--|--------------------------------|---|
| 1. | 2886344/ 03.03.2011 | 199.190 | 06048146/06.01.2011 091B dtd 14.02.2011 | 1141.74 | - |
| 2. | 2914692/ 08.03.2011 | 300.000 | 06048146/06.01.2011 091A dtd 14.02.2011 | 1141.74 | 1635 (Value lodged 42.29% in the declared value on HSS sale to M/s Vimal Intertrade Pvt Ltd) |
| 3. | 3197950/ | 481.830 | 06048188/01.03.2011 | 1299.77 | - |

| | | | | | |
|----|------------------------|---------|--|---------|--|
| | 12.04.2011 | | 700B dtd 31.03.2011 | | |
| 4. | 3189064/ 12.04.2011 | 150.000 | 06048188/01.03.2011 700A dtd 31.03.2011 | 1299.77 | 1765(Value lodged 35.04% in the declared value on HSS sale to M/s Vimal Intertrade Pvt Ltd) |
| 5. | 3667408/ 31.05.2011 | 272.200 | 06048229/08.04.2011 080B dtd 30.05.2011 | 1305.87 | - |
| 6. | 3720364/ 07.06.2011 | 200.000 | 06048229/08.04.2011 080A dtd 30.05.2011 | 1305.87 | 1836(Value lodged 39.74% in the declared value on HSS sale to M/s Vimal Intertrade Pvt Ltd) |

2. Whereas, it appeared that the declared price of the above imported goods at Sr. No.1, 3 and 5 of the above table does not appear genuine transaction value and under fully competitive conditions laid down in Rule 3(3)(a) or (b) of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007 as well as prevailing price of the "similar goods" (contemporaneous imports) of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007 and required to be increased to the extent of their sales effected and shown at Sr. 2,4 and 6 in the above table at para-1. Thus, the price of Sr. No.1, 3 and 5 of the above table are liable to be enhanced at the rate mentioned in Sr. No.2 under Rule 5 of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007 and thus total differential duty of Rs.37,83,956/- is liable to be recovered from the importer along with interest as provided under Section 28 and 28AB of the Customs Act, 1962.

3. Whereas, it appeared from the details of imports mentioned in the table below that the prevalent import prices of the "Similar goods" i.e. "Propylene Glycol" (Contemporaneous imports) were also at higher price than that of declared by the importer for goods mentioned at Sr. No.1,3 and 5 of the above table in para-1:-

| Sr. No. | Month of 2011 | B/E No. & date | Qty (MT) | Price declared (US\$-CIF) PMT | Importer | Supplier/ Country of origin |
|---------|---------------|---------------------|----------|-------------------------------|-----------------------------|-----------------------------|
| 1 | March | 2874791 3.3.2011 | 508.000 | 1650.00 | Crescent Organics Pvt. Ltd. | Lyondell Basell, Singapore |
| 2 | April | 3235644 | 525.070 | 1900.00 | Oversea | Shell Eastern |

| | | | | | | |
|---|-----|----------------------|---------|---------|----------------------------|--|
| | | 18.4.2011 | | | Polymers Pvt. Ltd. | Chemicals, Singapore |
| 3 | May | 3588478 24.5.2011 | 505.070 | 2000.00 | Oversea Polymers Pvt. Ltd. | Shell Eastern Chemicals, Singapore |
| 4 | May | 3656736 31.5.2011 | 314.000 | 1680.00 | C.J. Shah & Co. | M/s. Dow Europe, GMBH, Bachtobelstrasse 3 CH Horgen, USA |

4. Whereas, it further appeared that the importer have furnished wrong declaration with regard to the correct transaction value of the above imported goods as required under Section 14(1) of the Customs Act, 1962 read with Rule 11 of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007 relating to the value of the goods at Sr. No.1,3 and 5 of the above table in para-1 as compared to the price of the same goods sold by the same importer on High Sea Sale as well as contemporaneous prices of similar goods at the relevant time of the import. Therefore, the incorrect and intentionally mis-declared prices for the assessment are to be rejected under Rule 12 Customs Valuation (Determination of value of Imported Goods) Rules, 2007 and the importer failed to declare genuine transaction value.

5. Whereas, it appeared from the details of above imports by the importer that the import price of the import consignment of the same goods arrived from the same supplier and same country of origin were cleared by same importer as mentioned in the above table at para-1. However, it has been noticed that the same importer while selling the same imported goods to other buyer on high seas basis at this port is appearing at Sr. No. 2, 4 and 6 had increased the prices in the name of HSS load rate @ 42.29%, 35.04% and 39.74% for the same goods imported from the same country and supplier respectively. However, it is noticed that, the importer declared the lower value for the self/own clearance compared to the sale to the buyers on high seas sale basis. It is also declared by the importer they and overseas exporter are related person. They have not declared the correct import price for the import of the "Poly Polypropylene Glycol" and adapted different prices i.e. declared the lower value for the self-clearance as compared to the own import sold on high seas sale at higher value though the goods have arrived from the same country and

same supplier (i.e. supplier being a related party). Thus the declared price by the importer for the imports appearing at Sr. No. 1,3 and 5 of the above table based on an invoices from their related supplier operating from USA does not appear genuine transaction value under fully competitive conditions laid down under Rule 3(3)(a) or (b) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and required to be increased to the extent of their sales effected and shown at Sr. No. 2, 4 & 6 respectively. Based on enhanced high seas transaction between importer (seller) and Vimal Intertrade (buyer) of the "Polypropylene Glycol Industrial Grade"; Assistant Commissioner rejected the transaction value of the Importer under Rule 12 of Customs Valuation (Determination of value of imported goods) Rules, 2007 and proposed to enhance the value imported goods under Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007 to the 'transaction value' of high seas sale between Importer & Vimal Intertrade.

6. Whereas, it appeared that as per SVB Order No. 878/AC/SVB/RG/2010-11 dated 25.5.2010 the declared invoice price may be accepted except when if the contemporaneous import at higher price are noticed. Since there is evidence of higher price, the declared value is required to be enhanced in order to arrive at correct import price for the assessment of the above imported goods as per Rule 5 of Customs Valuation (Determination of value of Imported Goods) Rules,2007.

7. Because of above CIF price variation the Assistant Commissioner of Gr. IIA examined further the contemporary imports of similar goods and based on his observations/verification issued a demand cum Show Cause Notice dated 07.07.2011 from F. No. S/20-8/Gr. II/2005-PT-III under section 28 and section 124 of customs act, 1962 to importer as to why:-

(i) The declared value of "Propylene Glycol" 199.190 MT, 481.830 MT and 272.200 MT imported under the Bills of Entry No. 2886344/03.03.2011, 3197950/12.04.2011 and 3667408/31.05.2011 respectively, should not be enhanced from US\$ 1141.74 to US\$ 1635 PMT for Sr. No. 1, from US\$ 1299.77 to US\$ 1635 PMT for Sr. No. 3 and from US\$ 1305 to US\$1635 for Sr.

No. 5 under Section 14(1) of the Customs Act, 1962 read with Rule 11 of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007.

(ii) The differential duty of Rs. 37, 83,956/- (Rupees Thirty Seven Lakh Eighty Three Thousand Nine Hundred Fifty Six Only) should not be confirmed on the above three warehouse Bills of Entries and recovered under Section 28 of the Customs Act, 1962.

(iii) The interest at the appropriate rate should not be confirmed and recovered in terms of Section 28AB of the Customs Act, 1962. The same should not be enhanced to USD 1635 PMT as per Section 14 of the Customs Act, 1962 read with Rule 11 of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007.

8. The Assistant Commissioner (Group-II), Custom House Kandla vide Order-in-Original No. KDL/AC/Manish/198/Gr. IIA/ 2012 dated 24.01.2012 adjudicated the above Demand cum Show Cause Notice by way of confirming the demand. While confirming the demand he relied upon the high seas sale prices between importer and Vimal Intertrade as it was found out that the declared prices of importer do not represent the genuine transaction under fully competitive conditions as laid down in Rule 3(3)(a) or (b) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. He took lowest price of 1635US\$ of high seas sale as a correct valuation and enhanced the declared value of importer accordingly.

9. Being aggrieved by the impugned order, the importer filed an appeal with the Commissioner (A), who vide Order-In-Appeal No.463/2013/Cus/Commr(A)/KDL dated 15.07.2013 dismissed the appeal filed by the importer and ordered to maintain the order passed by the adjudicating authority.

10. Being further aggrieved by Commissioner (Appeals)'s impugned OIA the importer filed an appeal with CESTAT, who vide its Order No. A/10005/2019 dated 02.01.2019 allowed the appeal by holding that the OIA as well as OIO goes beyond the scope of Show Cause Notice. The impugned order is set aside and matter is remanded

to Adjudicating Authority for fresh adjudication keeping in mind the charges made in the Show Cause Notice. The remand is mainly based on the observations made by CESTAT at paragraph 4 & 4.1, for the reference, relevant paragraphs are reproduced as below,

“4. We gone through rival submissions. We find that the appellants have imported PolyPolypropylene Glycol and sold part of the consignment to M/s Vimal Intertrade Pvt. Ltd. Revenue has sought to adopt the assessable value which M/s Vimal Intertrade Pvt. Ltd has declared in their bill of entry as against the assessable value declared by the appellant. It is not in dispute that the goods imported by M/s Vimal Intertrade Pvt. Ltd. are part of the same original consignment and therefore identical in all physical specifications and in terms of country of origin to the goods imported by the appellant. Ld. Counsel has sought to argue that the imports made by C/13402/2013-DB 4 the appellant are at a different commercial level. However, we notice that the quantities imported by the appellant and by M/s Vimal Intertrade Pvt. Ltd. are practically similar and in the some cases, the quantity imported by M/s. Vimal Intertrade Pvt. Ltd is higher than the quantity imported by the appellant.

4.1 However, it is seen that the Show Cause Notice invoked Rule 5 of the Customs Valuation Rules 2007 whereas the impugned order invoked Rule 3(1) read with Rule 10 (1)(d) of the Customs Valuations Rules 2007. It is apparent that the impugned order has gone beyond the scope of Show Cause Notice. The Order in Original also re-determined the value under any terms of Rule 5 of the Customs Valuations Rules, 2007 but in terms of Rule 11 of the Customs Valuations Rules, 2007. It is apparent that the Order-in-Original as well as Order-in-Appeal goes beyond the scope of Show Cause Notice. The impugned order is set aside and the matter is remanded to Adjudicating Authority for fresh adjudication keeping in mind the charges made in the Show Cause Notice. The appeal is allowed by way of remand”

11. The SCN dated 07.07.2011 issued from F.No. S/20-8/Gr.II/2005 -PT-III was originally answerable to the Assistant Commissioner (Group-II), Custom House Kandla but having issued a Corrigendum dated 28.01.2020 the same made answerable to the Additional Commissioner of Customs, Custom House Kandla. Therefore, now the above SCN is to be taken up by me for fresh adjudication keeping in mind the charges made in the Show Cause Notice.

SUBMISSIONS BY THE IMPORTER

12. In a letter dated 25th September, 2019 as a reply to impugned Show cause notice, importer submitted following submissions:-

12.1 Show Cause Notice in its paragraph 2 has admitted one important fact that, "PolyPolypropylene Glycol Industrial Grade" imported by Importer (DCIPL) from their related supplier i.e. Hampshire Chemical Corp., USA were in parts sold to Vimal Intertrade on High Seas Basis.

12.2 Consequent to purchase of goods on high seas from Importer, Vimal Intertrade filed Bills of Entry for the clearance of goods which have been shown at Sr. No. 2, 4 & 6 in the table at paragraph 1 of SCN. In these bills of entry, Vimal Intertrade rightly declared the "transaction price" i.e. the price which has been actually paid to the seller (in this case to the Importer/DCIPL) as an "assessable value" of the goods sold on high seas in terms of Section 14 (1) of Customs Act, 1962 and read with Circular No. 32/2004-Cus., dated 11-5-2004 issued by the Board.

12.3 However, surprisingly based on the assessable value /Transaction Value declared by Vimal Intertrade for their purchase of "Polypropylene Glycol Industrial Grade"; on high seas sale from Importer, SCN alleges that, since the prices of "Polypropylene Glycol Industrial Grade" sold to Vimal Intertrade on High Seas basis are higher than their own consignments by 35.04% to 42.29%; the Importer had undervalued the goods i.e. "Polypropylene Glycol Industrial Grade" .

12.4 While alleging the above charges, SCN also finds that the goods imported by Importer and by Vimal Intertrade have been supplied by the same supplier and have the same country of origin. It is quite obvious that when goods are sold on the high seas, the goods remain the same and thus the country of origin. However, coming to the inference that they have been supplied by the same supplier is blatant negligence of the facts.

12.5 It seems from the allegations levelled in the SCN, that Assistant Commissioner, the issuing authority of SCN failed to differentiate the basic international trade between the Importer and its supplier i.e. Hampshire Chemical Corp., USA and further High Seas Sale by the Importer to the Vimal Intertrade which is technically can be synonymous with international trade (since it falls in the definition of 'import' as HSS might have happened beyond the territorial water) but in reality very much domestic trade. Therefore, there is need to bring the difference in the above two trades.

12.6 Import by Importer (DCIPL) from Hampshire Chemical Corp., USA is an International Trade. The salient features of import trade by Importer are as below:-

- i) The Importer is a regular importer of various speciality chemicals for its manufacturing and trading purpose. Many of importers consignments have been imported from its "related party". Special Valuation Branch (SVB), Custom House, Mumbai had already examined the importers 'relationship' with its 'related parties' and issued an Order No. 878/AC/SVB/RG/2010-11 dated 25.05.2010 giving a direction to accept the declared invoice price of the importer except when contemporary import at higher prices are noticed. Now, the imports of Importer are to be assessed in the light of above order.
- ii) Importer has imported goods from international supplier and the supplier in this case is Hampshire Chemical Corp., USA.

- iii) Importer has to negotiate the 'price' with the supplier i.e Hampshire Chemical Corp., USA in the terms of existing international circumstance and market conditions.
- iv) Payments to supplier are always in foreign exchange.
- v) Importer has to negotiate with shipping lines and insurance for the actual transport and insurance charges.
- vi) The point of sale of goods for export to India by supplier i.e. by Hampshire Chemical Corp., USA to importer had happened much before the high sea sale. Therefore, the time of international trade sale and high sea sale are different.
- vii) Importer has to follow the specific supply chain procedures like initiating the purchase order, following with the supplier, shipper and other associated agencies which have an inherent cost.
- viii) Since the cargo/consignment is a liquid bulk cargo, Importer has to arrange for the offshore storage tank facility in advance at the place of importation which is an intrinsic cost component in the process of doing a trade.
- ix) And more importantly, the high seas sale by the Importer is the 'first sale' on purchase of goods from the supplier to the Vimal Intertrade and it is very obvious to have the 'element of profit' in any commercial trade which is one of the reason for increase in price between the Importer and Vimal Intertrade.

12.7 High Seas Sale between Importer & Vimal Intertrade - The salient features of sale of Polypropylene Glycol on high seas basis by Importer to Vimal Intertrade are as below:-

- i) The sale of PolyPolypropylene Glycol by Importer to Vimal Intertrade is 'first sale' on purchasing of goods from their supplier. Since it is a commercial transaction, it has to have a 'component of profit' which is determined as per market conditions and sale conditions between the two parties.
- ii) In the case of High seas sale, Vimal Intertrade did not have to negotiate with the international supplier; and Importer i.e. DCIPL is supplier of goods and not the Hampshire Chemical Corp., USA as claimed in the SCN.
- iii) The high sea sale is in rupee term and Importer had issued the invoice of a first stage dealer for the high sea transactions. Though this 'sale' technically happened beyond territorial water but has all the ingredients of domestic trade.
- iv) The point of sale at high sea sale is much beyond after the first international trade between Importer and its supplier Hampshire Chemical Corp., USA. Therefore, the time of high sea sale has happened much after first international trade and by any imagination can't be termed as contemporaneous.
- v) The delivery of goods by Importer to Vimal Intertrade is Ex-Kandla (kindly see the terms of stock sale quotation) and thus, Vimal Intertrade had not to incur any cost on account of transport cost and insurance. Their CIF price is the 'sale price' plus 1% landing charges.

- vi) Importer is providing the facility of storage tank to the liquid bulk cargo at the port of importation i.e. Kandla to the Vimal Intertrade for 30 days (kindly see the terms of High Seas Sale Agreement). The cost of this facility is already included in the price of high seas sale

12.8 From above facts of both the trades, it can be seen that both the above trades are two independent transactions. The international trade between Importer & Hampshire Chemical Corp., USA is a truly international trade and their price is determined by international market, whereas, the sale price of high sea sale between Importer & Vimal intertrade is mainly determined by the domestic (India) market. Thus, both the trades have different circumstances and they are commercially different. It is evident that the high seas sale transaction is one of trading or sale. The mark-up/trade margin charged by the Importer to the Vimal Intertrade is within the normal course of trade. The above principles of both the trade explain the difference between the original import price of Importer and the high sea sale price of Vimal Intertrade. Therefore, the high sea price can't be taken as criterion to reject the Transaction Value of importer and as such Assistant Commissioner was wrong in rejecting the Transaction Value of importer under Rule 12 of Custom Valuation (Determination of Value of Imported Goods) Rules, 2007 and also adopting the high sea price for re-valuation of 'transaction price' of importer.

12.9 Besides, as per the Section 14(1) and guidelines issued by Circular 32/2004 dated 11.05.2004, the new Transaction Value between Importer and Vimal Intertrade is subject to custom duty and Vimal Intertrade had rightfully declared the Transaction Value and paid the custom duty. However, based on this new transaction price, Assistant Commissioner was wrong in assuming that the Importer had declared lower value for their own consignments and therefore rejection of 'transaction price' of Importer under Rule 12 of Custom Valuation (Determination of Value of Imported Goods) Rules, 2007. It also appears that on high sea purchase of

goods, Vimal Intertrade did not carry necessary amendment and shown Hampshire Chemical Corp., USA as supplier of goods and not importer which might have created the misunderstanding.

12.10 In the case of Hyderabad Industries vs. Union of India as reported in ELT 2000 (115) ELT 593 (S.C.) the Supreme Court on the question of whether the service charges payable to Minerals and Metals Trading Corporation (for short 'the MMTC') by the appellant for the importation of raw asbestos made by them, is includible in the assessable value of import as provided in the Customs Act and Customs Valuation (Determination of Price) Rules, 1988 or not have given some observations which differentiate the principle import or first international imports and the high sea sale of such principle import. The relevant observations are reproduced below:-

“6. The undisputed facts which are to be noticed for the purpose of disposal of these appeals are as follows : To cater to the needs of the users of raw asbestos, the MMTC calls for global tender and after identifying foreign supplier it purchases the raw asbestos in bulk which is sold in high seas sales to various users of raw asbestos for which the MMTC charges apart from the sale consideration paid by it to the foreign buyer an additional sum as service charges. It is an admitted fact that there is no relationship of a principal and an agent between the purchaser like the appellant and the MMTC. The MMTC admittedly does not buy the raw asbestos for and on behalf of any particular consumer of raw asbestos in India. On the contrary, it makes a bulk purchase to cater the needs of various consumers of the raw asbestos in India and it is only after the goods are sold on the basis of high seas sales, the goods become the property of the purchasers like the appellant.

7. The argument of agency is obviously put forth to invoke the benefit of exemption granted to 'buying commission' under Rule 9(l)(a)(i) of the Valuation Rules referred to

above. This rule excludes the amount paid as 'buying commission' from the cost and services which is to be included in determining the transaction value. To attract this exclusion, the appellant seeks to rely upon Interpretative Note to Rule 9 which reads thus : In Rule 9(1)(a)(i), the terms 'buying commission' means fees paid by an importer to his agent for the service of representing him abroad in the purchase of the goods being valued'. The appellant wants this Court to firstly equate 'service commission' to 'buying commission', then on this basis to treat MMTC as an agent. It is not possible to accept this argument of the appellant for more than one reason. As already noticed, there is no relationship of principal and agent between the appellant and the MMTC nor is there any agreement between the parties to pay 'buying commission' nor has the MMTC agreed with the appellant to represent it abroad in the purchase of raw asbestos. Material on record, on the contrary, shows that the MMTC on its own goes through the process of identifying the foreign supplier from whom it purchases the goods in question on its own without representing any particular buyer in India and sells the same to the purchaser on high seas sales basis to the Indian buyers like the appellant. Purchase by MMTC from the foreign seller and subsequent sale by it to the Indian buyers are independent of each other. Therefore, MMTC when it includes service charges in its sale consideration, it does not include the same as 'buying commission'. Therefore, this contention of the appellant is rejected”.

12.11 Similarly, in the case of *STC India Vs. Commissioner of Service Tax, Mumbai* as reported in 2013 (032) STR 0702 (Tri. - Mumbai). Though the issue before tribunal was of charging of service tax on the trade margin of STC; the observations of the tribunal are important in the present case. The relevant paragraphs of judgement are reproduced below:-

“4. The Ld. Counsel for the appellant makes the following submissions:-

(i) The transaction undertaken by them in one of simple trading. They purchase the goods from the foreign suppliers based on the orders placed on them by their customers and they sell these goods to their customers. They are purchasing the

goods from the overseas suppliers on their own account and thereafter they sell these goods to their customers by adding a mark-up.

(ii) The transaction is on principal to principal basis and is a simple trading transaction. Further, the mark-ups added by them on their purchase price is already subject to customs duty and hence, Service Tax is not to be leviable on transaction of trading as the transaction is one of sale and not of service.

(iii) The Ld. Counsel for the appellant relies on the circular issued by C.B.E. & C. vide Circular No. 32/2004, dated 11-5-2004 wherein the Board has clarified as follows :-

Subject : Customs Valuation Rules, 1988 - Determination of assessable value for goods sold on high seas - Regarding.

Representations have been received on the Ministry to clarify the manner of determining the value of imported goods imported on high-sea-sales basis. As per the existing practice in Mumbai Custom House, the "high-seas-sales-charges" are added to the declared CIF value in terms of Public Notice No. 145/2002, dated 3-12-2002. Such "high-seas-sales-charges" are taken to be 2% of the CIF value as a general practice. In case the actual high-sea-sale contract price is more than "the CIF value plus 2%", then the "actual contract price" paid by the last buyer is being taken as the value for the purpose of assessment. In some of the custom houses, however, audit has raised objection stating that if, in a particular transaction, there were about three/four high-sea-sales, then high-sea-sales service charges @ 2% has to be added to the CIF value, for each such transaction.

2. The matter has been examined taking into account the Advisory Opinion 14.1 of the GATT. Valuation Code, which stipulates that if the importer can demonstrate that the immediate sale under consideration took place with a view to export the goods to the country of importation, then such transaction would constitute an international transfer of goods. The later transaction which led to the import would be the relevant

transaction for assessment and Rule 4 of Customs Valuation Rules, 1988 would apply. Hon'ble Supreme Court, in the case of M/s. Hyderabad Industries Limited [2000(01)LCX0224] have also upheld that the service charges/high-seas-sales-commission (actual) are includable in the CIF value of imported goods. Therefore, it is clarified that the actual high-seas-sale-contract price paid by the last buyer would constitute the transaction value under Rule 4 of Customs Valuation Rules, 1988 and inclusion of commission on notional basis may not be appropriate. However, the responsibility to prove that the high-seas-sales-transaction constituted an international transfer of goods lies with the importer. The importer would be required to furnish the entire chain of documents, such as Original Invoice, high-seas-sales-contract, details of service charges/commission paid etc., to establish a link between the first international transfer of goods to the last transaction. In case of doubt regarding the truth or accuracy of the declared value, the Department may reject the declared transaction value and follow the sequential methods of valuation under Customs Valuation Rules, 1988.

From the above circular, it can be seen that the transaction is one of import and their trade margin is included in the taxable value for the purposes of assessment of customs duty.

(iii) The Ld. Counsel also relies on the decision of the Tribunal in the case of Indian Oil Co. Ltd. vide Order No. S/108/2012/CSTB/C-I, dated 6-1-2012 [2012 (027) STR 0023 (Tri.-Mum.)] where in a similar situation, it was held that transaction is one of the sale and Service Tax liability is not attracted and accordingly waiver from pre-deposit of the dues adjudged was granted. Therefore, he pleads for grant of stay.

5. The Ld. Commissioner (AR) appearing for the Revenue, on the other hand, contends that the transaction of "sale" by the appellant to their customers includes the service element also. The appellant did not place the orders on the foreign supplier on their own, but on receipt of the orders from their customers and thereafter they place the

orders on the foreign supplier. For this purpose, they are charging 1 to 1.5% margin to cover expenses. This activity of the appellant would constitute procurement of goods on behalf of the client.

Accordingly, he prays for putting the appellant to terms.

6. We have carefully considered the submissions made by both sides.

6.1 From perusal of the import documents as well as invoices, it is evident that the transaction is one of trading or sale. The mark-up/trade margin charged by the appellant is also subject to customs duty as part of the transaction value. If that be so, there is no reason why the same part of the transaction value should be taken out of the customs transaction and subjected to Service Tax under the guise of Business Auxiliary Services. The Board's circular dated 11-5-2004 also clarifies that the customs duty liability is to be discharged on the value inclusive of trade margin in the case of High Seas Sales transaction.

7. Therefore, following the precedent decision in the case of M/s. Indian Oil Corporation Limited (*supra*), in the present case also, we grant waiver from predeposit of the dues adjudged against the appellant and stay recovery thereof during the pendency of the appeal”.

(Dictated and pronounced in Court)

12.12 The above judgement clarifies the difference between first international trade and high sea sale. Similarly, the salient features discussed in above two trades i.e. (i) between Importer and its foreign supplier and (ii) between Importer and Vimal Intertrade explain the different circumstances and different commercials of the trade. It also emphasized the element of profit/trade margin in the high sea sale. In such conditions, comparing the transaction prices of these two different trades is against the lawful provision of section 14(1) and under Rule 5 of Custom Valuation (Determination of Value of Imported Goods) Rules, 2007.

12.13 Contemporaneous Imports:

i) The Show Cause Notice in its paragraph 3 refers to certain contemporaneous imports during the period of March 2011 to May 2011. However, SCN did not allege that the price declared by the Importer is undervalued because of contemporaneous imports. Besides, it may be seen that the contemporaneous imports are not of 'similar goods' in as much as the country of production/origin and producer of goods imported by these importers cited in the table are different than the goods being valued. For example, in case of imports cited in the table in the paragraph 3 of SCN; the contemporaneous imports are from Singapore whereas the Importer has imported the goods from USA. As per the definition of similar goods appearing in rule 2(f) the goods can be called similar only when they have been produced in the country in which the goods being valued were produced and goods must have been produced by the same person who produced the goods being valued, i.e. the country of origin and the producer of the goods should be same. Therefore, it is submitted that these are not similar goods and hence cannot also be called as contemporaneous imports.

ii) Thus, it is established that, the 'transaction value' of goods in question imported by Importer cannot be compared either with its high sea sale in part with trade margin to the buyer or with the contemporary imports cited by Assistant Commissioner in the table at paragraph 3.

iii) Rather, it seems that, for the first time under the customs provisions, any custom house has taken 'high seas sale price' as reference price or for comparison to its original 'transaction price' of the import.

12.14 Valuation of the Imported Goods: -

(a) Section 14(1) of Custom Act, 1962 is the basic provision to determine the 'assessable value' of imported goods. The relevant part of Section 14 is reproduced below:-

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:

(b) Thus, according to Section 14 (1) of Custom Act, 1962 'amount paid or payable for the import of goods' shall be the 'transaction value'. In addition to the amount paid by Importer to supplier, Assistant Commissioner has not come with any evidence to substantiate that any additional consideration has been paid by the Importer to the supplier. Besides, 'relationship' between Importer and supplier has already been examined by SVB and the said order has not disputed in the SCN and therefore clause (i) to second proviso of section 14 is not the subject matter of present case. And, therefore, Assistant Commissioner has to accept the Transaction Value unless otherwise it is proved wrong/undervalued by evidence.

(c) Apex court in various judgements had discussed 'transaction value' and the 'circumstances' under which it can be rejected in detail though in reference to erstwhile Section 14 and erstwhile Rule 4 (now Rule 3) but are very much relevant with amendment of Section 14 (1) and thereby Valuation rules, 2007. One of such judgement in the case of COMMISSIONER OF CUSTOMS, MUMBAI Versus J.D. ORGOCHEM LTD., as reported 2008 (226) E.L.T. 9 (S.C.) is mentioned below. The relevant paragraphs are reproduced below:-

"22. In the case before us, it is not alleged that the appellant has mis-declared the price actually paid. Nor was there a mis-description of the goods imported as was the case in Padia Sales Corporation. It is also not the respondent's case that the particular import fell within any of the situations enumerated in Rule 4(2). No reason has been given by the Assistant Collector for rejecting the transaction value under Rule 4(1) except the price list of vendor. In doing so, the Assistant Collector not only ignored Rule 4(2) but also acted on the basis of the vendor's price list as if a price list

is invariably proof of the transaction value. This was erroneous and could not be a reason by itself to reject the transaction value. A discount is a commercially acceptable measure which may be resorted to by a vendor for a variety of reasons including stock clearance. A price list is really no more than a general quotation. It does not preclude discounts on the listed price. In fact, a discount is calculated with reference to the price list. Admittedly in this case discount up to 30% was allowable in ordinary circumstances by the Indian agent itself. There was the additional factor that the stock in question was old and it was a one-time sale of 5-year-old stock. When a discount is permissible commercially, and there is nothing to show that the same would not have been offered to anyone else wishing to buy the old stock, there is no reason why the declared value in question was not accepted under Rule 4(1)."

The same principle has been reiterated recently in Commissioner of Customs, Calcutta vs. South India Television (P) Ltd. : 2007(07)LCX0001 holding:-

"Therefore, the transaction value under Rule 4 must be the price paid or payable on such goods at the time and place of importation in the course of international trade. Section 14 is the deeming provision. It talks of deemed value. The value is deemed to be the price at which such goods are ordinarily sold or offered for sale, for delivery at the time and place of importation in the course of international trade where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or for offer for sale. Therefore, what has to be seen by the Department is the value or cost of the imported goods at the time of importation, i.e., at the time when the goods reaches the customs barrier. Therefore, the invoice price is not sacrosanct. However, before rejecting the invoice price the Department has to give cogent reasons for such rejection. This is because the invoice price forms the basis of the transaction value. Therefore, before rejecting the transaction value as incorrect or unacceptable, the Department has to find out whether there are any imports of identical goods or similar goods at a higher price at around the same

time. Unless the evidence is gathered in that regard, the question of importing Section 14(1A) does not arise. In the absence of such evidence, invoice price has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient to reject it as evidence of value of imported goods. Under-valuation has to be proved. If the charge of under-valuation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer. If the Department wants to allege under-valuation, it must make detailed inquiries, collect material and also adequate evidence."

d) If the present case is examined in the light of above judgment, it can be noticed that Assistant Commissioner could not come with any evidence either in the form of contemporary imports of 'identical goods' or 'similar goods', but relied on the 'high sea sale' of same import goods by the importer to the buyer. Reference or relying on such high sea sale itself was wrong and unlawful and shows poor understanding of law.

12.15 Further to above submission, importer submitted vide their letter dated 26th November, 2019; an investigation report dated 11.01.2018 of special valuation branch, Mumbai in respect of all imports from April 2010 to August 2016.

PERSONAL HEARING

13. Shri Sanjay Mahajan, consultant appeared on behalf of importer for personal hearing on 19.11.2019 before the Assistant Commissioner Gr. IIA and before me on 04.03.2020. During the personal hearing held on 19.11.2019; Shri Sanjay Mahajan has submitted the list of 28 Bills of Entry and (copies of first four); imports of Polypropylene Glycol by importer from its related parties Hampshire Chemical Corp., Dow Chemical Taiwan, Dow Chemical Thailand and Dow Chemical Pacific. During P.H. Shri Sanjay Mahajan reiterated importer's written submissions.

DISCUSSION & FINDINGS

14. This is a remand case by CESTAT with specific direction to examine the import valuation of importer's goods strictly within the scope of Rule 5 of Custom Valuation (Determination of value of imported goods) Rules, 2007 as specified in the Show Cause Notice dated 07.07.2011. Accordingly, I have gone through the details of import, high seas sale and its conditions/contracts, various circulars issued by CBIC, Section 14 of Customs Act, 1962, provisions of Custom Valuation (Determination of value of imported goods) Rules, 2007 especially the provisions of its Rule 5.

15. Having gone through the show cause notice, I find that the importer is a regular importer of "Polypropylene Glycol Industrial Grade" from its related party Hampshire Chemical Corp. USA. The following three consignments which were purchased from Hampshire Chemical Corp. USA are subject matter of the SCN.

Invoice wise detail of the same is as under:-

| Sr. No. | Hampshire Invoice No. & Date | Total Quantity (MT) | WH/BE No. & Date | Importer | WH/BE Quantity (MT) | Price declared (US\$-CIF) PMT |
|---------|------------------------------|---------------------|--------------------------|----------|---------------------|-------------------------------|
| 1 | 6048146 dated 06.01.2011 | 499.186 | 2886344 dated 03.03.2011 | DCIPL | 199.190 | 1141.74 |
| 2 | 6048188 dated 01.03.2011 | 631.828 | 3197950 dated 12.04.2011 | DCIPL | 481.830 | 1299.77 |
| 3 | 6048229 dated 08.04.2011 | 472.200 | 3667408 dated 31.05.2011 | DCIPL | 272.200 | 1305.87 |

Out of the above three consignments part quantity were sold by the importer on high sea to Vimal Intertrade at higher prices. Detail of the same is as under:-

| Sr. No. | Hampshire Invoice No. & Date | Total Quantity (MT) | WH/BE No. & Date | WH/BE Quantity (MT) | Price declared (US\$-CIF) PMT | Price declared on High Sea Sale basis (US\$-CIF) PMT |
|---------|------------------------------|---------------------|--------------------------|---------------------|-------------------------------|--|
| 1 | 6048146 dated 06.01.2011 | 499.186 | 2914692 dated 08.03.2011 | 300.00 | 1141.74 | 1635 (Value lodged 42.29%) |

| | | | | | | |
|---|--------------------------------|---------|--------------------------------|---------|---------|-------------------------------------|
| 2 | 6048188 dated 01.03.2011 | 631.828 | 3189064 dated 12.04.2011 | 150.000 | 1299.77 | 1765 (Value lodged 35.04%) |
| 3 | 6048229 dated 08.04.2011 | 472.200 | 3720364 dated 07.06.2011 | 200.00 | 1305.87 | 1836 (Value lodged 39.74%) |

Taking the note of above high sea sales, the SCN proposes the following charges on importer:-

- that the importer, while selling the imported goods to Vimal Intertrade on high seas basis had increased the prices in the name of HSS load rate @ 42.29%, 35.04% and 39.74% for the same goods imported from the same country and supplier respectively;
- that the supplier to importer is related party and therefore, importer did not declare correct prices of their imports; and
- that 4 (four) imports detailed at paragraph 3 of SCN are of 'similar goods' import which are imported at higher prices during the same period.

Based on above charges Show cause notice proposes to enhance the declared assessable value (as shown in above table) of Polypropylene Glycol imported by importer to 1635 US\$; the lowest price at which importer had sold the above goods to its buyer Vimal Intertrade on high seas basis. The enhancement of declared assessable value is proposed under Section 14 of Customs Act, 1962 read with Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007.

16. Therefore, moot question before me is to examine the assessable value of three consignment in question with respect to the price of the similar goods imported by Vimal Intertrade having bought from the importer (who sold the part quantity of goods on high sea) as well as prices of "Similar goods" (Contemporaneous imports) at the relevant time of import as shown in above para-3, under the provisions of Section 14 of Customs Act, 1962 and Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007.

16.1 From the details shown in the above para-15, I find that the declared price of the goods imported by the importer for self/own clearance is significantly lower than that of the prices of goods partly sold to Vimal Intertrade on high seas. Whereas, entire quantity of goods was of same quality, same country of origin and imported in the same vessel from the same supplier, who is related to the importer. Therefore, I am of the considered view that the prices of goods imported and sought customs clearance for self can not be considered as genuine transaction value as per prevailing price of the "similar goods" (contemporaneous imports) of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007.

16.2 I find that the importer has not declared the correct transaction value of the above imported goods, mentioned at Sr. No.1, 3 and 5 of the table in para-1 above, as required under Section 14(1) of the Customs Act, 1962 read with Rule 11 of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007. Therefore, the declared value of the above said goods liable to be rejected under Rule 12 of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007 and the same is proposed to enhance the declared prices of importer in terms of Section 14 of Customs Act, 1962 and Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007. Therefore, transaction prices of both the transaction requires to be examined under Section 14 of Customs Act, 1962, and under Rule 5 for comparison of transaction value of 'similar goods. To examine the 'transaction value', the relevant provisions of section 14 are reproduced as below:-

"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”:

On examination of ‘transaction value’ of Importer and its supplier Hampshire Chemical Corp., USA vis-a vis ‘transaction value’ of importer & Vimal Intertrade on the facts narrated in the foregoing paras, I find that the importer and its supplier Hampshire Chemical Corp., USA are related *and price of goods imported for self is not the sole consideration for the sale* as both transactions pertain to similar goods originally imported from the same supplier and country of origin at the same time. Therefore, Transaction Value of the goods imported by the importer is not correct and need to be compared with the “Similar goods” (Contemporaneous imports) at the relevant time of import under the provisions of Section 14 of Customs Act, 1962 read with Rule 3 and Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007.

16.3 As provided under Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007 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. **Provision of Rule 5** is reproduced below:-

“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”.*

16.4 The provisions of Rule 5 are subject to provisions of Rule 3 and further, 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 Rule 5. Therefore, I refer to provisions of Rule 3 and Rule 4 and also definition of 'similar goods' as defined in valuation rules, as below:-

“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”.

“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”.

Definition of "similar goods" provided under Rule 2(f) of the CVR, 2007 which reads as follows:-

(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;

17. Further, I rely on the **Board's Circular No. 32/2004-Cus., dated 11-5-2004** which directs the determination of value of goods sold on high sea sale. The circular clarified that the actual high-seas-sale-contract price paid by the last buyer would constitute the transaction value under Rule 4 of Customs Valuation Rules, 1988 (new Rule 3 of Customs Valuation Rules). The intent of the circular was to guide the assessment of value of goods purchased by buyer on high sea sale and definitely not of the seller who sold the goods. The relevant paragraph of circular is reproduced below,

"2. The matter has been examined taking into account the Advisory Opinion 14.1 of the GATT. Valuation Code, which stipulates that if the importer can demonstrate that the immediate sale under consideration took place with a view to export the goods to the country of importation, then such transaction would constitute an international transfer of goods.

*The later transaction which led to the import would be the relevant transaction for assessment and Rule 4 of Customs Valuation Rules, 1988 would apply. Hon'ble Supreme Court, in the case of **M/s. Hyderabad Industries Limited [2000(01)LCX0224Eq 2000 (115) ELT 0593 (S.C)]** have also upheld that the service charges/high-seas-sales-commission (actual) are includable in the CIF value of imported goods. Therefore, it is clarified that the **actual high-seas-sale-contract price paid by the last buyer would constitute the transaction value under Rule 4 of Customs Valuation Rules, 1988 and inclusion of commission on notional basis may***

not be appropriate. However, the responsibility to prove that the high-seas-sales-transaction constituted an international transfer of goods lies with the importer. The importer would be required to furnish the entire chain of documents, such as Original Invoice, high-seas-sales-contract, details of service charges/commission paid etc., to establish a link between the first international transfer of goods to the last transaction. In case of doubt regarding the truth or accuracy of the declared value, the Department may reject the declared transaction value and follow the sequential methods of valuation under Customs Valuation Rules, 1988”.

Accordingly, the price at which importer sold the goods to Vimal Intertrade on high sea sale shall be the value for assessment of goods of Vimal Intertrade and the same would be considered as comparable price in case of importer for import of “Similar goods” (Contemporaneous imports) at the relevant time of import under the provisions of Section 14 of Customs Act, 1962 and Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007.

18. I find that the importer was regularly importing the goods from their related party. Hence, Special Valuation Branch, Custom House Mumbai vide SVB Order No. 878/AC/SVB/RG/2010-11 dated 25.5.2010 (further reviewed and Investigation Report dated 11.01.2018 was issued till fresh order) given a direction to accept the declared invoice price except when if the contemporaneous import at higher price are noticed. I find that there is evidence of higher price, hence, the declared value is required to be enhanced in order to arrive at correct import price for the assessment of the above imported goods as per Rule 5 of Customs Valuation (Determination of value of Imported Goods) Rules, 2007.

19. I have examined the imported goods detailed in table at para-1 above in light of the provisions of Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007 read with Section 14 of Customs Act, 1962 & definition of “similar goods” mentioned above. The imported goods viz. “Polypropylene Glycol” satisfies all conditions of similar goods in case of imports shown in table at para-1. The importer, while selling the imported goods to Vimal Intertrade on high seas basis had increased the prices in the name of HSS load rate @ 42.29%, 35.04% and 39.74% and declared CIF value to US\$ 1635 PMT, US\$1765 PMT and US\$ 1836

PMT respectively. No difference in terms of specification or in their technical characteristics exist between the goods sold to Vimal Intertrade on high seas and the goods imported by the importer for self.

Apart from this, 4 import consignments of similar goods have also been discussed in SCN at para-3, which are reproduced as below:

| Sr. No. | Month of 2011 | B/E No. & date | Qty (MT) | Price declared (US\$-CIF) PMT | Importer | Supplier/ Country of origin |
|---------|---------------|----------------------|----------|-------------------------------|-----------------------------|--|
| 1 | March | 2874791 3.3.2011 | 508.000 | 1650.00 | Crescent Organics Pvt. Ltd. | Lyondell Basell, Singapore |
| 2 | April | 3235644 18.4.2011 | 525.070 | 1900.00 | Oversea Polymers Pvt. Ltd. | Shell Eastern Chemicals, Singapore |
| 3 | May | 3588478 24.5.2011 | 505.070 | 2000.00 | Oversea Polymers Pvt. Ltd. | Shell Eastern Chemicals, Singapore |
| 4 | May | 3656736 31.5.2011 | 314.000 | 1680.00 | C.J. Shah & Co. | M/s. Dow Europe, GMBH, Bachtobelstrasse 3 CH Horgen, USA |

As the table shows, 3 consignments are imported from Singapore and one consignment is imported from Germany (USA origin). However, the quantum and time of imports is almost similar to that of importer. But, the declared price in all 4 imports is in the range of US\$ 1650 to 2000 PMT which is considerably very higher than that of price declared by the importer. It is evident from the price of contemporaneous imports of the similar goods that the importer had declared very low price for the goods meant for self clearance and he failed to produce any concrete justification for the lower price. From the above facts, I am of the considered view that the importer had declared significantly lower price for the goods imported for self clearance. Whereas, in case of Vimal Intertrade and in other contemporaneous imports, the similar goods were assessed and cleared at higher prices as discussed above. Hence, the declared lower value can not be

accepted. The declared value is liable to be rejected in terms of Rule 12 of Customs Valuation (Determination of value of Imported Goods) Rules, 2007 on the ground of significantly higher value at which similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed. Accordingly, the goods are liable to be reassessed by considering the lowest price, which is US\$ 1635 PMT in this case, of similar goods as provided under Rule 5 of Customs Valuation (Determination of value of imported goods) Rules, 2007.

For this I rely upon the decision of Tribunal in case of Resina Combination Vs. Commissioner of Customs, Chennai - 1999 (114) E.L.T. 860 (Tribunal) wherein Hon'ble Tribunal observed that :-

"The price in Section 14(1) is a deemed price, the price at which such similar goods are imported by persons not related. In the face of importation of identical and similar goods at very higher price and in the absence of justification for the lower price, the Collector was entitled to not to accept the transaction value. No difference in terms of specification or in their technical characteristics exist between the two consignments referred to in the order".

Further, I also rely upon the following decisions of Hon'ble Tribunal :-

- (i) Collector Of Customs, Bombay Vs. Ankit Audio Industries - 1995 (76) E.L.T. 173 (Tribunal) – wherein it is held that –

"Goods being identical as regards model number and country of origin, valuation thereof made by allowing for difference in quantities imported proper under Rule 5 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988."

- (ii) Deepak Electronics Vs. Collector Of Customs, Bombay - 1994 (73) E.L.T. 817 (Tribunal) - wherein it is held that –

"Transaction value dischargeable when found too low in comparison with price of identical goods - Rule 5 ibid - Section 14(1A) of Customs Act, 1962".

20. In view of the above, I pass the following order:

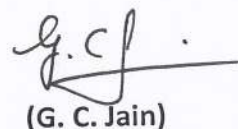
ORDER

(i) I enhance the declared value of "Propylene Glycol" 199.190 MT, 481.830 MT and 272.200 MT imported under the Bills of Entry No. 2886344/03.03.2011, 3197950/12.04.2011 and 3667408/31.05.2011, mentioned at Sr. No. 1,3 and 5 in the table at para-1, from US\$ 1141.74 to US\$ 1635 PMT, from US\$ 1299.77 to US\$ 1635 PMT and from US\$ 1305 to US\$ 1635 respectively, under Rule 5 of the Customs Valuation (Determination of value of Imported Goods) Rules, 2007 read with Rule 11 of the Customs Valuation Rules 2007 and the Section 14 of the Customs Act, 1962.

(ii) I confirm the demand of the differential duty of Rs. 37,83,956/- (Rupees Thirty Seven Lakhs Eighty Three Thousand Nine Hundred Fifty Six Only) and order to recover the same under Section 28 of the Customs Act, 1962.

(iii) I confirm the demand of interest on the differential duty of Rs. 37,83,956/- (Rupees Thirty Seven Lakhs Eighty Three Thousand Nine Hundred Fifty Six Only) confirmed and ordered to be recovered in above sub para (ii), under Section 28AB (now Section 28AA) of the Customs Act, 1962.

21. This order is issued without prejudice to any other action that may be taken against the noticee or against any other person(s) mentioned in the notice, under the provisions of the Customs Act, 1962, and / or any other law for the time being in force, in the Republic of India.


(G. C. Jain)

Additional Commissioner,
Custom House, Kandla

F.No. S/10-95/Adj./ADC/-Denovo- Dow Chemical/2019-20

Date: 19.06.2020

By Regd. Post AD.

To,
M/s Dow Chemical International Pvt. Ltd.,
Plot No. 120, Sector-2,
Gandhidham - 370201.

Copy to:

- 1) The Commissioner of Customs, Kandla.
- 2) The Assistant Commissioner/ Deputy Commissioner (RRA) & (Recovery), CH, Kandla.
- 3) The Assistant Commissioner, Group-II, CH, Kandla
- 4) The Superintendent (EDI), CH Kandla with a request to upload it on the official website of the Commissionerate.
- 5) Guard File