



MAJESTY LEGAL
Advocates & Solicitors

CLASSIFICATION UNDER CUSTOMS ACT , NO CONFISCATION U/S 111(m)

"M/S RAJ METALS & ALLOYS VS THE COMMISSIONER OF CUSTOMS"

Ld. CESTAT Delhi, in case of *M/s Raj Metals & Alloys vs The Commissioner of Customs*¹, ruled that imported goods cannot be confiscated under Section 111(m) of Customs Act,1962 due to incorrect classification or the claim of an ineligible exemption notification. The appellant argued that the misclassification of 'Thorn' (Aluminium Scrap) was a genuine mistake, made without realizing that the item was not freely importable and that its import was restricted.

Ld. CESTAT determined that, since 'Thorn' was imported in violation of the prohibition under the Foreign Trade Policy (FTP), it was subject to confiscation under Section 111(d) of Customs Act,1962. Additionally, it was clarified that Section 111(m) of the said Act applies to goods that do not match the particulars stated in the Bill of Entry. Further, it was held that when an importer self-assesses goods, it is based on their own understanding; therefore, the remedy for incorrect self-assessment is re-assessment. It would lead to absurd results if Section 111(m) were interpreted to mean that goods could be confiscated simply because the self-assessment by the importer does not match the re-assessment by the proper officer.

Hence, Ld. CESTAT concluded that the appellant did not have required license to import, justifying the confiscation under Section 111(o) of Customs Act,1962. However, confiscation under Section 111(m) of Customs Act,1962 was deemed incorrect.

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¹ C/51286/2023 & one other

² Majesty legal is a LAW FIRM established in 2013 by Ms. Mahi Yadav. Objective of this legal update is to provide insights on law, statutes and is personal in nature, not to be deemed as legal advice.

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

PRINCIPAL BENCH,
COURT NO. I

E-HEARING

CUSTOMS APPEAL NO. 51286 OF 2023

[Arising out of the Order-in-Appeal No. 124-125(BSM)CUS/JPR/2022 dated 30/9/2022 passed by The Commissioner (Appeals), Central Excise & CGST, Jaipur – 302 005.]

M/s Raj Metals & Alloys,Appellant
G-158, Bagru Extension, RIICO Industrial Area,
Bagru, Jaipur,
Rajasthan – 303 007.

Versus

The Commissioner of CustomsRespondent
NCR Building, Statue Circle,
C-Scheme, Jaipur (Rajasthan) – 302 005.

**WITH
CUSTOMS APPEAL NO. 51300 OF 2023**

[Arising out of the Order-in-Appeal No. 124-125(BSM)CUS/JPR/2022 dated 30/9/2022 passed by The Commissioner (Appeals), Central Excise & CGST, Jaipur – 302 005.]

Shri Mahaveer Jamnalalji Jain, ...Appellant
Partner of M/s Raj Metals & Alloys,
G-158, Bagru Extension, RIICO Industrial Area,
Bagru, Jaipur,
Rajasthan – 303 007.

Versus

The Commissioner of CustomsRespondent
NCR Building, Statue Circle,
C-Scheme, Jaipur (Rajasthan) – 302 005.

APPEARANCE:

Shri Anil Balani, Advocate for the appellant.

Shri Rakesh Kumar, Authorized Representative for the
Department

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 55653-55654/2024

DATE OF HEARING: 04.01.2024
DATE OF DECISION: 29.04.2024

P.V. SUBBA RAO

M/s. Raj Metals and Alloys.¹, filed **Customs Appeal No. 51286 of 2023** and Shri Mahaveer Jamnalalji Jain, partner of the importer filed **Customs Appeal No. 51300 of 2023** to assail the order in appeal² passed by the Commissioner (Appeals), Jaipur whereby he upheld the orders-in-original³ dated 2.3.2022 passed by the Additional Commissioner and rejected the appeals filed by the importer and Shri Jain.

2. The importer claims to be an actual user of aluminium scrap registered as such with the Rajasthan State Pollution Control Board for storing aluminium scrap and for manufacturing aluminium ingots. It imported aluminium scrap described as 'Thorn' and filed a Bill of Entry dated 30.12.2020 to clear it. The Institute of Scrap Recycling Industries, Inc.⁴, Washington classifies various types of aluminium scrap and has a standard nomenclature for them. Generally, scrap of aluminium is traded using the terms prescribed by ISRI. 'Thorn' imported by the importer was one of the categories of aluminium prescribed by ISRI.

3. Import of goods into India can be regulated under various laws but the primary regulation is by the Foreign Trade

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1. Importer
 2. Impugned orders
 3. OIO
 4. ISRI

Policy formulated under the Foreign Trade (Development and Regulation) Act, 1992⁵. As per this policy, goods are classified based on the HSN but further sub-classified up to 8 digit level and against each good, the policy is specified as 'free' i.e., there are no restrictions on import or 'restricted' which means the goods can be imported only if one has an import licence from the Director General of Foreign Trade or 'prohibited' which means that the goods cannot be imported at all. Often any restrictions on imports under any other law is also indicated as 'Policy notes' in the ITC (HS) classification published by the DGFT. These policy notes are not relevant for this appeal.

4. Section 11 of the Customs Act, 1961⁶ also empowers the Central Government to prohibit imports either absolutely or conditionally. Regardless of under which law the imports are prohibited or regulated, it is enforced by the Customs under the Customs Act because Customs officers control the entry points for the goods. Section 111 of the Customs Act provides for confiscation of goods for various violations including the violation of any prohibition on imports under the Customs Act or under any other law for the time being in force. For instance, if there is a violation of import restrictions under the FTDR Act, such imported goods become liable to confiscation

5. FTDR Act

6. Customs Act

under section 111 of the Customs Act and consequently, they can be seized under section 110 of the Customs Act.

5. It needs to be pointed out that while FTDR Act has three categories of goods 'free', 'restricted' and 'prohibited', the Customs Act has only 'prohibited goods' and everything else is considered freely importable. The term 'prohibited goods' is defined in section 2 (33) as follows:

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

6. Thus, for instance, if the goods are 'restricted' under the FTDR Act and the importer has no import licence as required, then they will be 'prohibited goods' under the Customs Act and the consequences follow. On the other hand, if the importer has the required licence, they will not be 'prohibited goods' under the Customs Act. Similarly, if there are any requirements for import of goods under any other law and those requirements (say, requirement of a licence, permission, type approval, NOC, etc.) are not met, such goods fall under the category of 'prohibited goods' under section 2(33) of the Customs Act and the consequences follow. If the requirements are met, then they will not be 'prohibited goods'.

7. Import of Aluminium scrap is either 'free' or 'restricted' under the FTP depending on the type of scrap. Scrap of ISRI code **Tablet, Tabloid, Taboo, Taint, etc.** are classified under ITC (HS) classification 76020010 and their import is free. Other types of scrap not covered by 76020010 are classifiable under ITC (HS) 76020090 as 'other waste and scrap' and their import is restricted. '**Thorn**' imported by the appellant does not fall under 76020010 and it falls under 76020090 and its import was restricted, i.e., one would require a licence from the DGFT to import it.

8. The importer classified the **Thorn** under 76020010 instead of the correct classification of 76020090. The officers noticed the discrepancy while assessing the Bill of Entry and asked the importer to produce copy of the licence and the importer could not do so because it had no licence to import **Thorn**.

9. The consignment was seized under section 110 and handed over to the custodian of the Inland Container Depot, Jaipur for safe custody. Samples of the scrap were sent to the chemical examiner, Team Test House, which is a government approved laboratory for testing. The test report showed that the scrap had 98.8% aluminium and some other metals. As per the importer's test report, it was about 94% aluminium and the rest other material.

10. As the aluminium content was different from what was declared, it was proposed to reject the transaction value under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007⁷ and re-determine it under Rule 9 of the Valuation Rules based on the methodology suggested by the Directorate General of Valuation. The importer agreed to this method of valuation by a letter dated 29.12.2020 and further said that they did not want a show cause notice⁸ or a speaking order under Section 17(5) with respect to the valuation.

11. After investigation, an SCN was issued by the department proposing to:

- a) Reject the classification of the imported aluminium scrap **Thorn** under Customs Tariff Item⁹ 76020010 and re-classify it under **CTI 76020090**;
- b) confiscate the imported goods under sections 111(d), 111(m) and 111(o) of the Customs Act;
- c) reject the value of Rs. 10,77,132.99 declared by the appellant under Rule 12 and re-determine it under Rule 9 as Rs. 27,48,405/- and charge duties of Rs. 5,83,999/-;
- d) impose penalty under section 112 (a) (i) of the Customs Act on the importer;
- e) impose penalty under section 114AA of the Customs Act on the importer; and
- f) impose penalties under section 112 (b) (i) and 114AA on Shri Jain.

7. Valuation Rules
8. SCN
9. CTI

12. The Additional Commissioner passed the OIO confirming the proposals except the one of demanding duty. Although he changed the classification and valuation as proposed in the SCN, he did not demand any duty possibly for the reason that he confiscated the goods absolutely. Once the goods are confiscated absolutely, the title in them vests in the Government and the importer has no responsibility to pay the duty. If however, if the goods are allowed to be redeemed on payment of fine, the importer will have to pay not only the fine but also the applicable duties.

13. The OIO was upheld by the Commissioner (Appeals) in the impugned order.

Submissions on behalf of the appellant

14. Learned counsel for the appellant made the following submissions.

- a) The appellant had imported **Thorn** under a genuine mistake without realising that it was not freely importable and its import was restricted.
- b) The appellant had no intention to evade any law and all the documents including the Bill of Entry declared the imported goods as **Thorn**.
- c) Import of **Thorn** was not prohibited or banned but was only restricted and therefore, an option to redeem the goods should have been granted.

- d) The appellant is registered with the State Pollution Control Board for manufacture of aluminium ingots from aluminium scrap. While **Thorn** cannot be freely imported by all, it can be imported by actual users holding registration with Pollution Control Board.
- e) Alternatively, permission should have been granted for re-export of the imported **Thorn**.
- f) The department's case is self-contradictory because on the one hand, it says the scrap is **Thorn** and on the other, it says that the aluminium content was 98.8% and as per ISRI definition, in **Thorn** the aluminium percentage is about 33%.
- g) Penalty under section 114AA can be imposed only in the case of exports and it cannot be imposed on imports.
- h) Imposing penalty under both section 112 and 114AA is not correct.
- i) As the goods were absolutely confiscated, the discussion about valuation is meaningless. The enhancement of value was based on test reports which were not accepted by the importer.
- j) Since penalty has been imposed on the importer, further imposition of penalty on the partner also is not correct.

- k) The appeal may be allowed and the impugned order may be set aside with consequential reliefs to the appellant.

Submissions on behalf of the Revenue

15. Learned counsel for the appellant made the following submissions.

- a) The importer imported **Thorn** whose import was restricted and attempted to clear it by wrongly classifying it under 76020010 (which pertains to freely importable types of scrap but not **Thorn**).
- b) The appellant also undervalued it and when it was proposed to reject the transaction value and re-determine it under Valuation Rule 9, the appellant had given a consent letter not only accepting the enhanced value but also waiving the SCN and the issue of a speaking order.
- c) Since the import of scrap was restricted, the adjudicating authority confiscated it and had not allowed its redemption because it might be hazardous to the society at large unless imported through a proper licence.
- d) Since the goods have been confiscated, the penalty under section 112 (b) automatically follows.
- e) Since the importer was a regular importer of aluminium scrap it must be aware of the classification

of the scrap and it had mis-classified **Thorn** so as to circumvent the restriction on its import.

- f) The appellant's contest of the valuation cannot be sustained as the appellant had accepted the valuation in writing making it unnecessary for the department to produce any additional evidence. Had the appellant not accepted, the department would have conducted further enquiries and produced evidence to justify the valuation. As held by the **Supreme Court in Commissioner vs Systems & Components Pvt. Ltd.¹⁰**, once the valuation is accepted, it need not be again proved.
- g) The appeal may be dismissed and the impugned order may be upheld.

Findings

16. We have considered the arguments advanced by both sides. The issues to be decided in this appeal are:

- a) Rejection of the classification of **Thorn** imported by the importer under 76020010 and its re-classification under 76020090 of the Customs Act.
- b) Rejection of the declared assessable value under Valuation Rule 12 and its re-determination at Rs. 27,48,405/- under Valuation Rule 9.
- c) Absolute confiscation of the imported **Thorn** under sections 111(d), (m) and (o).
- d) Imposition of penalty of Rs. 4,00,000/- under section 112 (a) (i) on the importer.

10. 2004 (165) ELT 136 (SC)

- e) Imposition of penalty of Rs. 5,50,000/- under section 114AA on the importer.
- f) Imposition of penalty of Rs. 2,50,000/- under section 112 (a) (i) on Shri Jain.
- g) Imposition of penalty of Rs.3,50,000/- under section 114AA on Shri Jain.

Re-classification of Thorn

17. There is no dispute about the rejection of the classification of the imported **Thorn** under **CTI 7602 00 10** and its reclassification **under CTI 7602 00 90**. The importer's only contention is that it had mistakenly classified it under **CTI 7602 00 10**. Therefore, the re-classification must be upheld.

Rejection of the transaction value under Valuation Rule 12 and re-determination of the value under Valuation Rule 9

18. The submission of the learned counsel for the appellant on this question is that since the goods were absolutely confiscated, the enhancement of value is meaningless. His second submission is that the enhancement of value was based on a test report which was not accepted by the importer.

19. Learned authorised representative draws attention of the bench to the letter dated 29.12.2020 signed by the authorised signatory for the appellant categorically accepting the re-determined value. This states that:

- a) the importer was informed of the grounds for rejection of the declared value under Valuation Rule 12 and Section 14 of the Customs Act;
- b) that they have gone through the details of contemporaneous imports of similar/identical goods and that they agree that their declared value is liable to be rejected and the value has to be enhanced under section 17(5);and
- c) therefore, they are in agreement with the proposed enhancement of the value which they accept and that they did not want any personal hearing or a speaking order and the Bill of Entry may be assessed accordingly.

20. Learned authorised representative submits that it is not open for the importer to now contest the value after having categorically accepted it and further having waived the personal hearing or speaking order.

21. We find this an interesting case. The two elements to be modified in the Bill of Entry were classification and value. There is never any dispute about the classification and the importer's contention was only that it had classified under an incorrect **CTI** by mistake. The importer also categorically accepted the value. Thus, the assessment could have been completed without even issuing a speaking order (which the importer had waived).

22. The only points of contention were the confiscation of the goods and penalties which could have been decided by issuing a SCN under section 124. However, while issuing the SCN, the department put the importer on notice with regard to value also. Thus, while the importer waived the requirement of notice, personal hearing and order, the department, on its

part, gave up the waiver given by the importer and put the importer to notice also on the question of valuation in the SCN. Having given up on the waiver given by the importer and issuing a notice, the department has to consider the reply and submissions and decide the issue.

23. The Additional Commissioner did consider all aspects of the valuation and rejected the transaction value under Valuation Rule 12 in view of the results of the test report and thereafter, found that the value must be re-determined under Valuation Rules 4 to 9 sequentially. Rule 4 provides for valuation based on contemporaneous imports of identical goods while Rule 5 provides for valuation based on contemporaneous imports of similar goods. The Additional Commissioner recorded that since **Thorn** was a restricted item, there were no contemporaneous imports of identical or similar goods. Valuation Rule 6 is not a method of valuation and it only states that if the value cannot be determined under Valuation Rules 3,4 or 5, it shall be determined under Valuation Rule 7 or Valuation Rule 8 and at the request of the importer, Valuation Rule 8 can be applied without applying Valuation Rule 7 first. Valuation Rule 7 is a deductive method and it provides for determination of value based on the value of such goods sold in India and after making certain deductions. Valuation Rule 8 provides for computed value based on the cost of production of such goods in India. The Additional Commissioner, having recorded that these were not

possible in this case, followed Valuation Rule 9 which is the residual method. He determined the value as per the method recommended by the Directorate General of Valuation in such cases based on the aluminum content of the imported scrap and the London Metal Exchange (LME) prices of the metal.

24. We find that the method followed by the Additional Commissioner for determining the value is correct and proper and this decision has been correctly upheld by the Commissioner (Appeals) in the impugned order. We find no reason to interfere with the valuation.

Absolute confiscation of the imported Thorn

25. Absolute confiscation of the goods under Sections 111(d), 111(m) and 111(o) is assailed by the importer and according to it, the confiscated goods should have been allowed to be redeemed on payment of fine. Revenue, on the other hand, asserts that import of **Thorn** was restricted and even when the importer was given adequate opportunity to produce any licence from the DGFT to import **Thorn**, it could not.

26. Before us, learned counsel also made a submission that '**Thorn** can be imported by actual users' and since the importer was an actual user, it can import it. We find this claim baseless. Restriction in import is under the FTP as indicated in the **ITC (HS) classification** of aluminium scrap. Nothing in this supports the claim that Thorn can be imported by Actual

Users. Learned counsel also could not produce any evidence to support his claim. It therefore, appears to be more of his opinion as to what the law should be and not what the law is.

27. Since the appellant also claimed that the confiscated **Thorn** should have been allowed to be redeemed on payment of fine under section 125, we now proceed to examine this issue. Section 125 reads as follows:

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

(1) Whenever confiscation of any goods is authorised by this Act, **the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods,** give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, **an option to pay in lieu of confiscation such fine as the said officer thinks fit:**

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply:

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, **such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.**

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

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

Explanation.—For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received.

28. Thus, if the confiscated goods are 'prohibited', the option of redemption may be given and if they are not, the option shall be given. As discussed earlier, the term 'prohibited' under section 2(33) of the Customs Act includes those goods where the import is permitted subjected some conditions and such conditions are not fulfilled. If the conditions are fulfilled then they will not be 'prohibited goods'. **Thorn** is a restricted good, i.e., it could be imported with a licence from DGFT. Since the importer had not obtained the licence, the imported **Thorn** was 'prohibited good' and the option of redemption under section 125 may be given or may not be given as per the law. To examine this prayer that redemption should have been allowed and take a balanced view, it would be necessary to examine why the **Thorn** was confiscated. This requires us to examine the sections under which **Thorn** was confiscated under sections 111(d), (m) and (o). These sections read as follows:

111. Confiscation of improperly imported goods, etc.—The following goods brought from a place outside India shall be liable to confiscation:—

.....

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

.....

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

.....

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

29. According to the Revenue, the goods were liable to confiscation under three clauses (d), (m) and (o) of section 111. We find that clause (d) makes the goods imported into India contrary to any prohibition under the Customs Act or under any other law for the time being in force. Import of **Thorn** was restricted under the FTP and therefore, it could not have been imported without a licence. Since **Thorn** was imported in violation of the prohibition under FTP, it was liable to confiscation under section 111(d).

30. Section 111(m) makes any goods which did not correspond in value or in any other particular with the entry made under the Act. When goods are imported or have to be exported, some papers have to be submitted to the Customs for

clearance and this process is called 'making an entry' under the Customs Act. One makes an entry by filing the Bill of Entry under section 46 to clear imported goods and makes an entry by filing the Shipping Bill under section 50 to export goods. The importer is also required to self-assess the duty payable under section 17 (1) of the Customs Act and the proper officer can re-assess the duty. There is no separate method by which the importer can self-assess duty. The Bill of Entry filed under Section 46 contains not only the details of the goods such as the nature, quality, quantity, exporter, country of origin, etc. but also contains some fields such as **Customs Tariff Item**, value of the goods, exchange rate, exemption notifications which apply, etc. Once these fields are also filled, the system calculates the amount of duty payable. Thus, the Bill of Entry contains:

- a) Facts regarding the goods- the description, quality, quantity, country of origin, etc.; and
- b) Opinions of the importer such as classification, exemption notifications which apply, etc.

31. While facts can be verified as correct or incorrect, classification, etc. are merely matters of opinion. The importer self-assesses goods as per his understanding and the officer can re-assess the duty as per his understanding.

32. Section 111(m) renders such goods liable to confiscation which do not correspond to the entry made in the Bill of Entry in any particular. For instance, if 1000 kg is imported and the

declaration in the Bill of Entry is for a lesser quantity or if gold is imported and 'silver' is declared in the Bill of Entry or a chemical of Analytical Grade is imported and what is declared is 'Industrial Grade', such goods are clearly liable to confiscation under section 111(m). Similarly, if the transaction value is, say, \$ 100,000 and the value is declared in the Bill of Entry as \$ 70,000/- the goods do not correspond in value to the declaration. However, nothing in Section 111(m) makes goods liable to confiscation for an incorrect classification of goods or claiming an incorrect exemption notification, etc.

33. It is impossible for the importer to anticipate what classification the assessing officer will find correct during re-assessment or if the assessing officer will apply or deny a particular notification or if the assessing officer will accept the declared value or reject it under Valuation Rule 12 and if he does reject, what method would he adopt to re-determine the value and how much will be re-determined value. When the importer self-assesses goods, it can only be as per his understanding and not by anticipating what the assessing officer will decide during re-assessment. Importers are not experts in assessment and may make mistakes. The remedy against incorrect self-assessment is re-assessment.

34. The imported goods cannot be confiscated under section 111(m) because of a wrong classification or claim of an ineligible exemption notification. In this case, the importer

imported **Thorn** and entered an incorrect classification at the 8-digit level in the Bill of Entry and gave a value as per its transaction value. When examining the self-assessment, the incorrect classification was discovered.

35. The importer declared the value as per its transaction value. This transaction value was rejected by the officer and its value was re-determined. Thus, the two deviations from the declaration of the importer in the Bill of Entry are- the change in classification and re-determination of value by the officer. **Simply because the officer has changed the classification and the valuation, the goods do not become liable to confiscation under section 111(m) because the goods did correspond to the declarations and only the classification and the valuation which are matters of opinion were changed by the officer.**

36. The imported **Thorn** was also confiscated under section 111(o). It provides for confiscation of any goods which are exempted from duty or any prohibition subject to conditions and where such conditions were not fulfilled. Import of **Thorn** was 'restricted' as per the FTP which meant it could be imported only if one has a licence. The appellant clearly did not have a licence to import. Therefore, it was correctly liable to confiscation under section 111(o).

37. Thus, we find that the **Thorn** imported by the appellant was correctly confiscated under section 111(d) and 111(o) but

its confiscation under section 111(m) was not correct. The question which arises is, if in this factual matrix, was the absolute confiscation of the imported **Thorn** correct or it could have been released on payment of redemption fine.

38. According to learned counsel, it should have been released on payment of redemption fine. According to learned authorised representative, it was not released on redemption fine because it might be hazardous to the society at large unless imported through a proper licence. We do not find anything in the SCN or the impugned order to show that the imported **Thorn** was hazardous. The ISRI describes **Thorn** as follows:

ISRI Code- Thorn

Item ALUMINUM BREAKAGE

Shall consist of aluminum with miscellaneous contaminants like iron, dirt, plastic and other types of contaminants. Material can either be sold based on aluminum recovery or content as agreed upon by buyer and seller. Must contain a minimum of 33% aluminum unless otherwise agreed upon by buyer and seller.

39. Nothing in the description shows **Thorn** is hazardous. It is essentially aluminium breakage scrap with contaminants such as iron, dirt, plastic and other contaminants and it should have at least 33% aluminium content. The consignment in dispute, had 98.8% aluminium as per the test report relied upon by the adjudicating authority. Therefore, it has about 1.2% of other material such as iron, dirt, plastic or other contaminants. The test report also does not say that it has any

hazardous material. The importer is a manufacturer of ingots of aluminium and has a licence from the State Pollution Control Board. We find no reason to believe that aluminium scrap with only 1.2% of other material such as iron, plastic, etc. will be hazardous to the society if released into the hands of a manufacturer of ingots. On the other hand, import of **Thorn** requires a licence which the importer did not have and hence it was confiscated.

40. In the factual matrix of this case, considering all relevant factors, we find that it would meet the ends of justice if the confiscated **Thorn** valued at Rs. 27,48,405 is allowed to be redeemed by the importer under section 125 on payment of a fine of Rs. 4,00,000/-. Needless to say that as per section 125(2), if the importer opts to redeem the **Thorn**, he will have to, in addition, pay the duties on it.

Penalties under section 112(a) (i) and 114AA on the importer and Shri Jain

41. In the impugned order the following penalties were imposed.

Section	Penalty on the importer (Rs.)	Penalty on Shri Jain (Rs.)
112(a) (i)	4,00,000	2,50,000
114AA	5,50,000	3,50,000

Section 112 (a) (i) reads as follows;

112. Penalty for improper importation of goods, etc.

Any person,—

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b)...

shall be liable,—

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;

42. The importer imported **Thorn** without the required licence and therefore it is squarely covered by section 112(a). Penalty not exceeding the value of the goods could be imposed under this section. The value of the goods as determined by the impugned order is Rs. 27,48,405/- and therefore, a penalty of Rs. 4,00,000/- is within the limits and is in the factual matrix, in our opinion, just and proper.

43. It needs to be pointed out the section lays down that certain persons in certain circumstances will be liable to penalty. It does not say that a penalty shall be imposed. Discretion lies with the adjudicating and appellate authorities to impose penalty or not and also to decide the quantum of penalty.

44. As far as the penalty on Shri Jain is concerned, we find that he was a partner of the importer and in that capacity, he played the role in importing the goods. We do not find

sufficient justification to also impose penalty on Shri Jain under section 112 (a) (i). We, therefore, set aside the penalty on Shri Jain under this section.

45. Section 114AA reads as follows:

114AA. Penalty for use of false and incorrect material.—If a person **knowingly or intentionally** makes, signs or uses, or causes to be made, signed or used, any **declaration, statement or document which is false or incorrect in any material particular**, in **the transaction of any business** for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

This section provides for penalty on a person who:

- (a) Makes, signs or uses or causes to be made, signed or used a false or incorrect declaration, statement or document;
- (b) In connection with the transaction of business under this Act; and
- (c) With knowledge or intent

46. Clearly, neither the importer nor Shri Jain made any false or incorrect declaration. The importer only made an erroneous classification which is not a declaration or document but is its self-assessment. The importer also declared the value as per its transaction value which the officer deemed it necessary to re-determine. The importer can only declare the value based on what he knows and there was no mis-declaration. Thus, we find that there is no mis-declaration, let alone, one with intent either by the importer or by Shri Jain. Therefore, the penalties imposed under section 114AA on the

importer and Shri Jain cannot be sustained and need to be set aside and we do so.

47. In view of the above, both appeals are disposed of as below:

(a) **CUSTOMS APPEAL NO. 51286 OF 2023** filed by the importer is partly allowed and the impugned order is modified to the extent of allowing redemption of the confiscated goods on payment of redemption fine of Rs. 4,00,000/- under section 125 and setting aside the penalty imposed under section 114AA.

(b) **CUSTOMS APPEAL NO. 51300 of 2023** filed by Shri Jain is allowed and the penalties imposed on Shri Jain under sections 112 (a) (i) and 114AA are set aside.

(c) Both appellants will be entitled to consequential benefits, if any.

(Order pronounced in open court on 29/04/2024.)

(BINU TAMTA)
MEMBER(JUDICIAL)

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