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Case Compilation on Indian Customs Law

A Comprehensive compilation of Pro-Industry decided cases based upon CESTAT Tribunal, Supreme Court, and various High Court Decisions

Prepared for Legal Professionals, Importers, Exporters, Customs Brokers, Freight Forwarders, and Industry Stakeholders.

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Index

- 1. Preface
- 2. Introduction to the Case Compilation
- **3. Tribunal (CESTAT) Decided Cases**
- - Classification Matters
- - Seizure and Confiscation Matters
- - Jurisdictional Issues
- - Refunds and Interest on Refunds
- - Exemption-Related Cases
- - Valuation Disputes
- - Customs Broker License Cases
- - Miscellaneous Import/Export Disputes
- **4. Supreme Court Decided Cases**
- - Classification Disputes
- - Jurisdictional Questions (DRI, SCN Validity)
- - Valuation & Exemption Matters
- - Refunds and Transitional Tax Issues
- **5. High Court Decided Cases**
- - Provisional Release Matters
- - Confiscation and Re-Export Orders
- - Duty Drawback and Bank Guarantee Cases
- - Constitutional Writs under Customs Law
- 6. Concluding Remarks

Preface

The global trading environment is complex, dynamic, and often fraught with regulatory challenges. In India, the Customs Act, 1962, and allied laws form the cornerstone of import and export regulation, supplemented by decisions of judicial and quasi-judicial authorities.

This compendium brings together decided cases from the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), the Hon'ble Supreme Court of India, and various High Courts. It covers a wide spectrum of issues—ranging from classification disputes, valuation, seized goods, exemptions, refunds, jurisdictional challenges, to license revocations of Customs Brokers.

The purpose of this compilation is to serve as a ready reference tool for legal professionals, industry stakeholders, and trade practitioners who must constantly navigate the evolving jurisprudence in the field of customs law. By consolidating case law into a single, well-structured document, the aim is to bridge the gap between legal principles and practical compliance requirements faced by businesses engaged in cross-border trade.

Introduction to the Case Compilation

This compilation is a curated effort to present leading and recent decisions on customs law in a digestible, systematic, and indexed manner. Each case is summarized with clarity—highlighting the facts, issues, arguments, and rulings—so that readers can quickly grasp the essence without wading through voluminous judgments.

The document is designed with users in mind:

- **Legal Professionals and Advocates:** to strengthen arguments, identify precedents, and analyze emerging jurisprudential trends.

- **Importers and Exporters:** to understand compliance obligations, permissible reliefs, and potential liabilities in customs operations.

- **Customs House Agents and Freight Forwarders:** to better appreciate their responsibilities, liabilities, and avenues for defense in proceedings.

- **Industry Stakeholders and Policy Analysts:** to observe how judicial interpretation influences trade policy, customs procedures, and dispute resolution frameworks.

The compilation thus stands as a practical handbook for trade compliance, litigation strategy, and informed decision-making.

Link has been provided for Readers/Users for the source Judicial Orders, which directly opens the source PDF document.

Concluding Remarks

Customs jurisprudence in India is constantly evolving through judicial scrutiny, ensuring a balance between revenue protection and facilitation of legitimate trade. This case compilation is not only a repository of decisions but also a guiding framework that helps stakeholders:

- Predict outcomes in ongoing disputes by studying trends.

- Reduce litigation risk by aligning practices with settled principles.

- Build compliance strategies rooted in judicially tested interpretations.

- Empower professionals and businesses to proactively safeguard their interests while dealing with Customs authorities.

Ultimately, this compilation aims to enhance clarity, promote transparency, and support the ease of doing business in India's trade ecosystem. It is hoped that readers—from practicing lawyers to industry leaders—will find in these pages both guidance and confidence in navigating the complex world of customs law.

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CESTAT PRO-INDUSTRY DECIDED CASE LIST WITH DOWNLOAD LINK:

S.No	*Issue Related To*	*Case No/ Year*	*Tribunal / Court*	*Matter*	*Parties*	*Case Summary*	*View Order Link*
1	*Classification*	*50782 / 2021*	*CESTAT New Delhi*	*This case involves seven appeals filed by various companies, including M/s Vivo Mobile India Pvt. Ltd. against the orders passed by the Principal Commissioner of Customs.*	*Appeal by M/s Vivo Mobile India Pvt. Ltd. Against Principal Commissioner of Customs.*	*The Tribunal ruled in favor of the appellants, classifying the goods under CTH 85177090 and setting aside the demands and penalties imposed by the Principal Commissioner.*	Case-No-1
2	*Classification*	*50484 / 2021*	*CESTAT New Delhi*	*M/s Samsung India Electronics Pvt. Ltd. successfully appealed against the reclassification of mobile phone parts by the Commissioner.*	*Appeal by M/s Samsung India Electronics Pvt. Ltd. Against Principal Commissioner of Customs.*	*The Tribunal ruled that the parts were correctly classified under CTH 85177090, setting aside the reclassification and associated penalties.*	Case-No-2
3	*Classification*	*52262 / 2022*	*CESTAT New Delhi*	*M/s Ceramic Tableware Pvt. Ltd. appealed against the rejection of their request to amend the Bill of Entry under Section 149 of the Customs Act, 1962, due to a clerical error in the HSN code.*	*Appeal by M/s Ceramic Tableware Pvt. Ltd.Against Commissioner of Customs.*	*The Tribunal allowed the appeal, directing the Department to amend the Bill of Entries, as the error was deemed a bona fide mistake and the differential duty had been paid.*	Case-No-3

4	*Classification*	*50542 / 2021*	*CESTAT New Delhi*	*The case concerns M/s. Welkin Foods' appeal against the Customs Department's classification of their imported aluminium shelving for mushroom growing.*	*Appeal by M/s. Welkin Foods Against Commissioner of Customs.*	*The Tribunal ruled in favor of the appellant, recognizing the goods as agricultural machinery and allowing the appeal.*	Case-No-4
5	*Classification*	*50961 / 2020*	*CESTAT New Delhi*	*This case involves M/s Daxen Agritech India Pvt. Ltd. challenging the classification and confiscation of their imported goods, "Bulk Reishi Gano Powder" and "Bulk Ganocelium Powder."*	*Appeal by M/s Daxen Agritech India Pvt. Ltd. Against Principal Commissioner of Customs.*	*The CESTAT re-classified these goods as food preparations under CTH 21069099 instead of Ayurvedic medicaments, and set aside penalties and confiscation orders, remanding the case for recalculating the duty for the normal period.*	Case-No-5
6	*Classification*	*52881 / 2019*	*CESTAT New Delhi*	*Polaris India Private Limited challenged the reclassification of their imported vehicles by the Principal Commissioner of Customs, which resulted in a significant customs duty demand and penalties.*	*Appeal by Polaris India Private Limited Against Principal Commissioner of Customs.*	*The CESTAT ruled in favor of Polaris India, confirming the correct classification under CTH 8704 and CTH 8709, and set aside the previous order.*	Case-No-6

7	*Classification*	*50957 / 2021*	*CESTAT New Delhi*	*M/s Benetton India Private Limited successfully appealed against a customs order that reclassified their imported jackets and imposed a differential duty and penalty.*	*Appeal by M/s Benetton India Private Limited Against Additional Commissioner of Customs.*	*The Tribunal ruled that the misclassification was a bonafide mistake, not willful suppression, and set aside the previous order.*	Case-No-7
8	*Classification*	*50865 / 2020*	*CESTAT New Delhi*	*M/s. Ingram Micro Indian Pvt. Ltd. appealed against the reclassification of their imported Executive IP Phones under CTH 8517 69 90 by customs authorities, which denied them a 0% duty benefit.*	*Appeal by M/S Ingram Micro Indian Pvt. Ltd. Against Deputy Commissioner of Customs.*	*The CESTAT ruled in favor of the appellant, classifying the goods under CTH 8517 18 10, and set aside the previous order.*	Case-No-8
9	*Classifiaction*	*51167 / 2020*	*CESTAT New Delhi*	*In this case, Vodafone Idea Limited appealed against the classification of imported Hybrid/Pure Matrix Cards and Small Form Factor Pluggable (SFP) transceivers by the Principal Commissioner of Customs.*	*Appeal by Vodafone Idea Limited Against Principal Commissioner of Customs.*	*The CESTAT ruled in favor of Vodafone Idea, reclassifying the goods as parts under CTI 8517 70 10 and CTI 8517 70 90, respectively, and set aside the previous order.*	Case-No-9
10	*Classification*	*51172 / 2020*	*CESTAT New Delhi*	*The case involves M/s Samsung India Electronics Pvt. Ltd challenging the classification of imported IC-Codecs under CTI 8517 62 90 by the Principal Commissioner of Customs.*	*Appeal by M/s. Samsung India Electronics Pvt. Ltd Against Commissioner of Customs.*	*The tribunal ruled in favor of Samsung, reclassifying the goods under CTI 8542 39 00 and dismissing the department's appeal for confiscation and penalty.*	Case-No-10

11	*Classification*	*53942 / 2023*	*CESTAT New Delhi*	*The case concerns the classification of imported lotion dispenser pumps by M/s. Aptar Pharma India Pvt. Ltd.*	*Appeal by Principal Commissioner of Customs Against M/s. Aptar Pharma India Pvt. Ltd.*	*The Tribunal ruled that the correct classification is under CTH 84248990, as the pumps are designed for dispersing lotion, dismissing the department's appeal for classification under CTH 84132000.*	Case-No-11
12	*Classification*	*40630 to 40634 / 2024*	*CESTAT Chennai*	*The case concerned the classification of "Clear Float Glass" imported by M/s. Suraj Constructions. The appellant argued for classification under CTH 7005 1090, claiming exemption under Notification No. 46/2011-Cus, while the Department classified it under CTH 7005 2990 based on the COO certificate.*	*Appeal By Suraj Constructions Against Commissioner of Customs*	*The tribunal ruled in favor of the appellant, confirming the correct classification and granting the exemption.*	Case-No-12

13	*Classification*	*30256 / 2019*	*CESTAT Hyderabad*	*The issue in this case was the classification of the imported product, "Carbon and Sulphur Analyzer CS-800," under the Customs Tariff Heading (CTH). The Commissioner (Appeals) had classified the product under CTH 90271000, treating it as "Gas or Smoke Analysis Apparatus."*	*Appeal by Verder Scientific Pvt Ltd Against Commissioner of Customs*	*The tribunal ruled that the apparatus, used for determining carbon and sulfur content in solid metal samples, does not fall under CTH 90271000 as "Gas or Smoke Analysis Apparatus" and allowed the appeal.*	Case-No-13
14	*Classification*	*85509 / 2023*	*CESTAT Mumbai*	*The issue in this case was the classification of imported goods, specifically "Battery operated Ultrasonic/Electromagnetic Automatic Meter Reading (AMR) water meters," under the Customs Tariff Act, 1975. The dispute was whether these goods should be classified under Customs Tariff Item (CTI) 9026 1010 as "Flow meters" or under CTI 9028 2000 as "Liquid supply meters."*	*Appeal by Larsen & Toubro Limited Against Commissioner of Customs*	*The Customs, Excise & Service Tax Appellate Tribunal (CESTAT) ultimately ruled in favor of the appellants, concluding that the imported goods were "Flow meters" under CTI 9026 1010 based on their technical features, functionality, and compliance with relevant standards.*	Case-No-14

15	*Refund Claim*	*51677 / 2022*	*CESTAT New Delhi*	*The case involves an appeal filed by the Principal Commissioner of Customs against M/s Telecare Network (India) Pvt. Ltd. regarding a refund of additional customs duty paid on imported mobile phones.*	*Appeal by Principal Commissioner of Customs Against M/s Telecare Network (India) Pvt. Ltd.*	*The CESTAT dismissed the Revenue's appeal against M/s Telecare Network (India) Pvt. Ltd., upholding the refund of additional customs duty paid on imported mobile phones.*	Case-No-15
16	*Interest on Refund*	*51204 / 2022*	*CESTAT New Delhi*	*The case involves appellant, who appealed against the Commissioner of Customs regarding the entitlement to interest on a refunded amount.*	*Appeal by appellant Against Commissioner of Customs.*	*The Customs, Excise & Service Tax Appellate Tribunal, New Delhi, ruled in favor of appellant, granting him a 12% p.a.*	Case-No-16
17	*Refund*	*51330 / 2023*	*CESTAT New Delhi*	*The case involves M/s Indochem & Polymers appealing against the rejection of their refund claim for Special Additional Duty (SAD) paid on imported goods.*	*Appeal by M/s Indochem & Polymers Against Commissioner of Customs.*	*CESTAT ruled in favor of the appellant, directing the Adjudicating Authority to grant the refund with interest, as the issue was covered by favorable rulings from the Delhi High Court.*	Case-No-17

18	*Refund*	*50189 / 2021*	*CESTAT New Delhi*	*Elan Electronics India's appeal against the rejection of their refund claim for customs duty.*	*Appeal by Elan Electronics India Against Commissioner of Customs.*	*The Tribunal ruled that the refund was not time-barred under Section 27(1) of the Customs Act, 1962, as the goods were re-exported and never cleared for home consumption, entitling the appellant to a refund with interest.*	Case-No-18
19	*Refund*	*51978 / 2022*	*CESTAT New Delhi*	*M/s R S Enterprises appealed against an enhanced customs duty assessment and sought interest on the refunded differential duty.*	*Appeal by M/s R S Enterprises Against Commissioner of Customs.*	*The CESTAT granted the interest at 12% per annum, recognizing the payment was made under protest.*	Case-No-19
20	*Refund*	*51235 / 2022*	*CESTAT New Delhi*	*The case involves M/s D.D. International Pvt Ltd, which sought a refund of customs duty deposits made during an investigation and appeal regarding the import of machinery using Agri Infrastructure Incentive Scrips.*	*Appeal by M/s D.D. International Pvt Ltd Against Commissioner of Customs.*	*The CESTAT ruled in favor of the appellant, directing the refund of deposited amounts with 12% interest.*	Case-No-20
21	*Refund*	*52180 / 2022*	*CESTAT New Delhi*	*M/s. Star Aerospace Industries appealing against the rejection of a part of their refund claim for Special Additional Duty (SAD) by the Commissioner of Customs.*	*Appeal by M/s. Star Aerospace Industries Against Commissioner of Customs.*	*The CESTAT ruled in favor of the appellant, stating the refund claim was timely and directed the refund to be processed with interest.*	Case-No-21

22	*Refund*	*52191 / 2022*	*CESTAT New Delhi*	*The case involves appellant's appeal for a refund of Special Additional Duty (SAD) paid on imported goods. The initial refund claims were rejected as time-barred by the Commissioner of Customs.*	*Appeal by appellant Against Commissioner of Customs.*	*CESTAT allowed the appellant's appeal for a refund of Special Additional Duty (SAD) with 12% interest within 60 days.*	Case-No-22
23	*Refund*	*52191 / 2022*	*CESTAT New Delhi*	*M/s. S.K. Rasayan Udyog Pvt. Limited appealing against the rejection of their refund claim for Special Additional Duty (SAD) paid on imported goods.*	*Appeal by M/s. S.K. Rasayan Udyog Pvt. Limited Against Commissioner of Customs.*	*CESTAT ruled in favor of the appellant, directing the Adjudicating Authority to grant the refund along with interest.*	Case-No-23
24	*Refund*	*51330 / 2023*	*CESTAT New Delhi*	*M/s Indochem & Polymers appealing against the rejection of their refund claim for Special Additional Duty (SAD) paid on imported goods.*	*Appeal by M/s Indochem & Polymers Against Commissioner of Customs.*	*The CESTAT ruled in favor of the appellant, directing the Adjudicating Authority to grant the refund with interest, as the issue was covered by favorable rulings from the Delhi High Court.*	Case-No-24
25	*Refund*	*50460 / 2023*	*CESTAT New Delhi*	*M/s FJM Cylinders Pvt Ltd appealing against the rejection of their refund claim for Anti Dumping Duty paid on seamless steel tubes imported by Neel Metal Products Ltd.*	*Appeal by M/s FJM Cylinders Pvt Ltd Against Commissioner of Customs.*	*The Tribunal ruling that they were entitled to the refund under Section 27(1)(b) of the Act and ordering the disbursement of Rs. 40,21,173/- along with interest.*	Case-No-25

26	*Refund*	*51597 / 2022*	*CESTAT New Delhi*	*M/s. Sri Sai Imports contesting the rejection of their refund claim for an amount paid during an investigation into alleged undervaluation of imported goods.*	*Appeal by M/s. Sri Sai Imports Against Commissioner of Customs.*	*The CESTAT ruled in favor of the appellant, allowing their refund claim of the amount paid during the investigation stage, deeming it as a deposit made under protest and thus not subject to limitation.*	Case-No-26
27	*Refund*	*51655 / 2021*	*CESTAT New Delhi*	*Suzuki Motorcycle India Pvt. Ltd. appealing against the rejection of their refund claims for Additional Duty of Customs paid on imported motorcycles.*	*Appeal by Suzuki Motorcycle India Pvt. Ltd. Against Commissioner of Customs.*	*CESTAT ultimately ruled in favor of Suzuki Motorcycle India Pvt. Ltd., setting aside the rejection orders and allowing the refund claims.*	Case-No-27
28	*Refund of Service Tax*	*10214 / 2021*	*CESTAT Ahmedabad*	*The case involved Vistas Designers Private Limited seeking a refund of service tax paid on advance receipts during 2016-17, which was taxed again under the GST regime post-01.07.2017, resulting in double taxation.*	*Vistas Designers Private Limited Against CGST & Central Excise*	*The court ruled in favor of the appellant, directing the department to process the refund as per law, citing the avoidance of double taxation during the transition between tax regimes.*	Case-No-28
29	*Refund of SAD*	*3325 / 2012*	*CESTAT Bangalore*	*M/s Tommy Hilfiger Arvind Fashion Pvt. Ltd. sought a refund of Special Additional Duty (SAD) paid on imported readymade garments, which was rejected by the department*	*Appeal by Tommy Hilfiger Arvind Fashion Pvt Ltd Against Commissioner of Customs*	*The tribunal ruled in favor of the appellant, recognizing their alpha-numeric coding system and Chartered Accountant certification as reliable evidence.*	Case-No-29

30	*Seized Goods*	*55422 / 2023*	*CESTAT New Delhi*	*The case involves Tasha Gold Pvt Ltd, which appealed against the Principal Commissioner of Customs, for rejecting the provisional release of imported gold dore bars.*	*Appeal by TASHA GOLD PVT LTD Against Principal Commissioner of Customs.*	*The tribunal allowed the provisional release of 26 bars, subject to conditions, while retaining one bar as security until final adjudication.*	Case-No-30
31	*Seized Goods*	*51709 / 2021*	*CESTAT New Delhi*	*The case involves an appeal by appellant against the imposition of a penalty of Rs. 40 lakhs under Section 112(b)(i) of the Customs Act.*	*Appeal by appellant Against Commissioner of Customs.*	*The CESTAT found insufficient evidence to prove the gold was smuggled and set aside the penalty, allowing the appeal.*	Case-No-31
32	*Seized Goods*	*50146 / 2020*	*CESTAT New Delhi*	*Appellant was detained at New Delhi airport with 151 gold coins, suspected of smuggling.*	*Appeal by appellant Against Commissioner of Customs.*	*The tribunal ruled in his favor, confirming the coins were of Indian origin from the British era and ordered their return.*	Case-No-32
33	*Seized Goods*	*50873 / 2020*	*CESTAT New Delhi*	*Rudras Overseas filed an appeal against the order of the Commissioner of Customs, Indore, regarding the provisional release of seized goods.*	*Rudras Overseas Against Commissioner of Customs Which was Upheld by CESTAT.*	*The tribunal set aside the order and directed the Commissioner to issue a reasoned decision within a week, staying the disposal of the goods for eight weeks.*	Case-No-33
34	*Seized Goods*	*492 / 2006*	*CESTAT New Delhi*	*The case involves the seizure of 59 gold bars from appellant by the Directorate of Revenue Intelligence (DRI).*	*Appeal by Shri appellant Against Commissioner of Customs.*	*The Customs Tribunal ruled in favor of the appellants, finding they had sufficiently proven the licit acquisition of the gold, and ordered the return of the*	Case-No-34

						seized gold and vehicle.	
35	*Seized Goods*	*51057 / 2020*	*CESTAT New Delhi*	*The case involves three jewellery businesses accused of smuggling foreign-origin gold, which they claimed was legally acquired and sent for job work.*	*Appeal by M/s DI GOLD DESIGNER JEWELLERY Against Commissioner of Customs.*	*The Tribunal set aside the Customs Department's order, citing procedural lapses and insufficient evidence of smuggling, and allowed the appeals.*	Case-No-35
36	*Seized Goods*	*50643 / 2020*	*CESTAT New Delhi*	*M/s. Veera Fragrance Pvt. Ltd. and its Director, Mr. Vaibhav Jain, were accused of misdeclaring and undervaluing imported aromatic chemicals.*	*Appeal by M/s. Veera Fragrance Pvt. Ltd. Against Commissioner of Customs.*	*The CESTAT ruled in favor of the appellants, finding no evidence of misdeclaration or intent to evade duty, and set aside the penalties imposed by the Adjudicating Authority.*	Case-No-36
37	*Seized Goods*	*51266 / 2023*	*CESTAT New Delhi*	*M/s. The Craft Harvest's export of 59 Pashmina shawls was challenged when 6 shawls were suspected to contain prohibited Tibetan antelope hair.*	*Appeal by M/s. The Craft Harvest Against Commissioner of Customs.*	*The tribunal found the testing methods outdated and reports insufficient, leading to the setting aside of the confiscation and penalties, and allowing the appeal.*	Case-No-37

38	*Seized Goods*	*51095 / 2020*	*CESTAT New Delhi*	*Appellant's consignment of Chinese mobile phones was seized by the Customs Department on suspicion of smuggling.*	*Appeal by appellant Against Principal Commissioner of Customs.*	*The tribunal ruled in favor of appellant, finding insufficient evidence of smuggling, and ordered the release of the goods.*	Case-No-38
39	*Seized Goods*	*54958 / 2023*	*CESTAT New Delhi*	*The case involves M/s Mahakaal Jewels Pvt. Ltd. appealing against a customs duty and penalty imposed for undeclared rough diamonds found in their consignment of rough emeralds.*	*Appeal by M/s Mahakaal Jewels Private Limited Against Commissioner of Customs.*	*The tribunal set aside the penalties, allowing the re-export of the diamonds without fines, citing lack of evidence for deliberate mis-declaration and procedural errors in valuation.*	Case-No-39
40	*Seized Goods*	*55296 / 2023*	*CESTAT New Delhi*	*The case involves M/s Raajhans Spices Private Limited, an exporter of readymade garments, appealing against the imposition of redemption fine and penalty by the Commissioner of Customs (Export), New Delhi.*	*Appeal by M/s Raajhans Spices Private Limited Against Commissioner of Customs.*	*The Customs, Excise & Service Tax Appellate Tribunal, New Delhi, found procedural flaws in the investigation and market survey, setting aside the penalties and allowing the appeal.*	Case-No-40
41	*Seized Goods*	*50782 / 2020*	*CESTAT New Delhi*	*This case involves an appeal by the Revenue against the order of the Commissioner (Appeals) which had set aside a penalty imposed on respondent.*	*Appeal by Principal Commissioner of Customs Against respondent.*	*The Tribunal dismissed the Revenue's appeal, maintaining the Commissioner (Appeals) order.*	Case-No-41

42	*Seized Goods*	*86762 / 2019*	*CESTAT Mumbai*	*Apex International challenged the imposition of redemption fine and penalty for not fulfilling export obligations under an advance authorization scheme.*	*Appeal by Apex International Against Commissioner of Customs.*	*The CESTAT ultimately ruled in favor of Apex International, determining that the import conditions had been regularized, thus nullifying the penalties.*	Case-No-42
43	*Amendment of BOE*	*85509 / 2022*	*CESTAT Mumbai*	*Pacific Cyber Technology Pvt. Ltd. filed an appeal challenging the decision of the Commissioner of Customs (Appeals), Mumbai Zone III, which set aside reassessment and refund orders related to excess customs duty paid due to a clerical error in the Bill of Entry.*	*Appeal by PACIFIC CYBER TECHNOLOGY PVT LTD Against Commissioner of Customs*	*The Tribunal upheld the reassessment under Section 149 of the Customs Act, allowing amendments based on existing documentary evidence.*	Case-No-43
44	*Confiscation of Imported Goods*	*70199 / 2021*	*CESTAT Allahabad*	*This case involves the importation of dry dates allegedly originating from Pakistan but declared as UAE origin to evade the 200% customs duty imposed on Pakistan-origin goods under Notification No. 05/2019-Cus dated 16.02.2019.*	*Appeal by Shakti Traders Against Commissioner of Customs.*	*The Tribunal found insufficient evidence to prove misdeclaration, upheld the validity of UAE-issued certificates, and quashed penalties and confiscation orders against the appellants.*	Case-No-44

45	*Confiscation*	*646 / 2012*	*CESTAT Hyderabad*	*The issue in this case revolved around the confiscation of an imported motorcycle and the imposition of a penalty on the appellant, under Section 112(b) of the Customs Act, 1962.*	*Appeal by Appellant Against Commissioner of Customs*	*While the tribunal upheld the penalty due to the appellant's lack of due diligence, it reduced the amount from Rs. 25,000 to Rs. 10,000, citing mitigating factors.*	Case-No-45
46	*Confiscation*	*70448 / 2024*	*CESTAT Allahabad*	*The case involved the confiscation of 2 kgs of gold and a penalty imposed on the appellant, alleging smuggling from Bangladesh.*	*Appeal by Appellant Against Commissioner of Customs*	*The tribunal ruled that the revenue failed to provide sufficient evidence, including non-compliance with Section 138B of the Customs Act, and ordered the release of the seized gold.*	Case-No-46
47	*Confiscation*	*75804 / 2023*	*CESTAT Kolkata*	*The matter in this case concerned the seizure and confiscation of 474.250 grams of gold from Shri Sanjay Kumar Mallick (Appellant No. 1) at Shalimar Railway Station on 15.09.2019. The Customs Department alleged that the gold was of foreign origin and smuggled into India without payment of customs duties.*	*Appeal by Appellant Against Commissioner of Customs*	*The Tribunal ruled that the Customs Department failed to establish "reasonable belief" or provide evidence of smuggling, and the confiscation and penalties were set aside.*	Case-No-47

48	*Customs Duty*	*51070 / 2022*	*CESTAT New Delhi*	*The case involves M/s LDPE India, which imported four consignments of PVC Resin from China between July 2018 and March 2019. The issue is whether the appellant is liable to pay Anti-Dumping Duty (ADD) under serial number 14 or 21 of Notification No. 21/2014-CUS (ADD).*	*Appeal by M/s LDPE India Against Commissioner of Customs.*	*The CESTAT ruled in favor of the appellant, confirming that the correct duty was paid under the applicable notification, and set aside the previous order.*	Case-No-48
49	*Customs Duty*	*53938 / 2023*	*CESTAT New Delhi*	*M/s. Vijex Vyapaar Private Limited successfully appealed against the imposition of anti-dumping duty on their imported 'Printer Color Toner' from China.*	*Appeal by M/s. Vijex Vyapaar Private Limited Against Commissioner of Customs.*	*The CESTAT ruled that the black toner, being part of a color toner, is excluded from the anti-dumping duty as per the relevant notification.*	Case-No-49
50	*Exemptions*	*50224 / 2020*	*CESTAT New Delhi*	*M/s. Mann Tourist Transport Service Pvt. Ltd. successfully appealed against the confiscation of their imported Mercedes Benz vehicles by the Customs Department.*	*Appeal by M/s. Mann Tourist Transport Against Commissioner of Customs.*	*CESTAT ruled in favor of the appellant, stating that the vehicles' registration and certification by Delhi authorities amounted to substantive compliance with the import policy, and ordered the release of the confiscated vehicles.*	Case-No-50

51	*Exemption*	*50013 / 2020*	*CESTAT New Delhi*	*M/s. Yadav Agro Industries challenged a customs duty demand for failing to submit the Export Obligation Discharge Certificate (EODC) within the stipulated time under the EPCG Scheme.*	*Appeal by M/s. Yadav Agro Industries Against Commissioner of Customs.*	*The tribunal ruled in favor of the appellant, noting that the show cause notice was issued prematurely and the delay in obtaining the EODC was due to the DGFT, not the appellant.*	Case-No-51
52	*Exemption*	*51608 / 2022*	*CESTAT New Delhi*	*The case involves the Principal Commissioner of Customs, New Delhi, and M/s. Micromax Informatics Limited regarding the refund of Countervailing Duty (CVD) paid on imported mobile handsets.*	*Appeal by Principal Commissioner of Customs Against M/s. Micromax Informatics Limited.*	*The tribunal upheld the decision to refund the amount to Micromax, rejecting the department's claim that the burden of duty was passed on to customers, and dismissed the department's appeals.*	Case-No-52
53	*Exemption*	*50719 / 2020*	*CESTAT New Delhi*	*The case involves the Principal Commissioner of Customs (Import), New Delhi, appealing against an order that allowed M/s. Go IP Global Services Pvt. Ltd. to claim customs duty exemption on imported MIMO products.*	*Appeal by Principal Commissioner of Customs Against M/s. Go IP Global Services Pvt. Ltd.*	*The Tribunal upheld the original order, interpreting that the exemption exclusion applies only to products with both MIMO and LTE technologies, thus dismissing the Department's appeal.*	Case-No-53

54	*Exemption*	*50903 / 2020*	*CESTAT New Delhi*	*The case involves a dispute between the Commissioner of Customs and M/s. S.S. Automotive Pvt. Ltd. regarding the refund of Rs.18,68,000/-.*	*Appeal by Commissioner of Customs Against M/s. S.S. Automotive Pvt.Ltd.*	*The Tribunal upheld the refund decision, dismissing the Revenue's appeal and directing the refund with interest.*	Case-No-54
55	*Exemption*	*88657 / 2014*	*CESTAT Mumbai*	*The case involved the National Sport Club of India challenging the confiscation and penalties imposed by Customs authorities for an erroneous exemption claim on imported SVPS Chillers.*	*The National Sports Club of India Against Commissioner of Customs*	*The Tribunal ruled in their favor, stating that the goods were correctly declared and not liable for confiscation under Sections 111(m) and 111(o) of the Customs Act.*	Case-No-55
56	*Exemption*	*10717 / 2023*	*CESTAT Ahmedabad*	*The issue in this case was whether AMNS Ports Hazira Ltd. and its employee were eligible to claim IGST exemption under Customs Notification No. 16/2015-Cus, as amended, for capital goods imported under the EPCG scheme.*	*Appeal by AMNS Ports Hazira Ltd Against Commissioner of Customs*	*The Customs, Excise & Service Tax Appellate Tribunal set aside the demand of IGST, confiscation of goods, and penalties imposed on AMNS Ports Hazira Ltd.*	Case-No-56

57	*Exemption*	*50098 / 2017*	*CESTAT New Delhi*	*This case involved determining whether "digital still image video cameras" imported by Sony India, Canon India, Nikon India, and Samsung India qualified for Basic Customs Duty exemption under a specific notification. Which was rejected by Commissioner of Customs*	*Appeal by Sony India, Canon India, Nikon India, and Samsung Against Commissioner of Customs*	*The Tribunal ruled in favor of the appellants, granting the exemption and setting aside earlier orders denying it.*	Case-No-57
58	*Exemption*	*77389 / 2019*	*CESTAT Kolkata*	*The case involved M/s. Sunrise International's import of Power Tillers/Rotary Tillers from China, initially granted exemption under Notification No. 12/2012-Cus. Upon reassessment, the exemption was denied by Commissioner of Customs.*	*Appeal By Commissioner of Customs Against Sunrise Internationl*	*The Tribunal upheld the Commissioner (Appeals)'s decision, confirming the goods are the same and eligible for exemption.*	Case-No-58

59	*Exemption*	*40979 / 2015*	*CESTAT Chennai*	*The issue in this case was whether M/s. Tamilnadu Cricket Association (TNCA) violated condition (ii) of the Adhoc Exemption Order No.338/95 dated 21.12.1995, which stated that the imported floodlighting equipment "shall not be used for any commercial purpose whatsoever."*	*Appeal by Tamilnadu Cricket Association Against Commissioner of Customs*	*The Tribunal ruled in favor of TNCA, finding no violation of the exemption conditions and holding the demand time-barred. The appeal was allowed with consequential relief.*	Case-No-59
60	*Import*	*51287 / 2022*	*CESTAT New Delhi*	*M/s. Indulge Sign and Graphics' imported LED Module Lights branded as "Samsung" were confiscated by Customs for being counterfeit, violating IPR rules.*	*Appeal by M/s. Indulge Sign and Graphics Against Commissioner of Customs.*	*The Tribunal found procedural violations by Customs and lack of valid IPR registration by Samsung, leading to the order being set aside and the goods' release.*	Case-No-60
61	*Jurisdiction*	*50195 / 2020*	*CESTAT New Delhi*	*This case involves appeals against a customs duty demand and penalties imposed on M/s Venus Industries and its partner.*	*Appeal by appellant Against Principal Commissioner of Customs.*	*The tribunal set aside the impugned order, ruling that the show cause notice issued by the Additional Director General of DRI was invalid, as per the Supreme Court's decision in the Canon India Pvt. Ltd. case.*	Case-No-61

62	*Jurisdiction*	*50948 / 2020*	*CESTAT New Delhi*	*This case involves appeals by Toyota Material Handling India Pvt. Ltd. and its Senior against demands and penalties imposed by the Principal Commissioner of Customs.*	*Appeal by Toyota Material Handling India Private Limited Against Principal Commissioner of Customs.*	*The Tribunal found that the Principal Additional Director General, DRI, lacked jurisdiction to issue the show cause notice, referencing the Supreme Court's decision in Canon India Pvt. Ltd. vs. Commissioner of Customs.*	Case-No-62
63	*Jurisdiction*	*75015 / 2015*	*CESTAT Kolkata*	*The case involves M/s Beriwala Impex Pvt. Ltd. appealing against an order by the Commissioner of Customs, Kolkata, which confirmed a demand for differential duty and imposed penalties based on allegations of undervaluation of imported LDPE granules.*	*Appeal by M/s Beriwala Impex Pvt. Ltd. Against Commissioner of Customs.*	*The CESTAT ruled that the Show Cause Notice issued by the Directorate of Revenue Intelligence (DRI) was invalid, following the Supreme Court's judgment in Canon India.*	Case-No-63
64	*License*	*52789 / 2019*	*CESTAT New Delhi*	*This case involves an appeal by M/s. ICS Cargo, a Customs House Agent (CHA), against the revocation of its customs broker license, forfeiture of its security deposit, and imposition of a penalty by the Commissioner of Customs (Airport & General), New Delhi.*	*Appeal by M/s. ICS Cargo Against Commissioner of Customs.*	*The tribunal found the revocation and penalties unjustified, setting aside the order and allowing the appeal with consequential benefits.*	Case-No-64

65	*License*	*55801 / 2023*	*CESTAT New Delhi*	*The case involves M/s Pushpanjali Logistics, a licensed Customs Broker, appealing against an order by the Commissioner of Customs (Airport & General), New Delhi, which revoked their Customs Broker Licence, forfeited their security deposit, and imposed a penalty of Rs. 50,000.*	*Appeal by M/s Pushpanjali Logistics Against Commissioner of Customs.*	*The CESTAT found no violation of the Customs Brokers Licensing Regulations, 2018, and set aside the impugned order, granting relief to the appellant.*	Case-No-65
66	*License*	*51001 / 2021*	*CESTAT New Delhi*	*This case involves M/s. Jetset Shipping Pvt. Ltd., a Customs Broker (CB), challenging the revocation of their license, forfeiture of their security deposit, and imposition of a penalty of Rs. 50,000 under the Customs Brokers Licensing Regulations, 2018 (CBLR).*	*Appeal by M/s.Jetset Shipping Pvt.Ltd. Against Commissioner of Customs.*	*The Tribunal ruled in their favor, finding no violation of the Customs Brokers Licensing Regulations, 2018.*	Case-No-66
67	*License*	*50231 / 2024*	*CESTAT New Delhi*	*The case involves M/s Global Links appealing against the revocation of their Customs Broker License and penalties imposed by the Commissioner of Customs.*	*Appeal by Global Links Against Principal Commissioner of Customs.*	*The Tribunal found that the show cause notice lacked specific allegations and that the appellant did not violate the cited regulations, leading to the setting aside of the revocation and penalties.*	Case-No-67

68	*License*	*50944 / 2021*	*CESTAT New Delhi*	*This case involves appeals by M/s Freight Logistics and the Commissioner of Customs regarding penalties and license revocation related to the mis-declaration of prohibited export goods.*	*Appeal by M/s Freight Logistics Against Commissioner of Customs.*	*The Tribunal upheld a Rs. 50,000 penalty on M/s Freight Logistics but set aside the forfeiture of their security deposit and dismissed the appeal for license revocation, citing lack of evidence of their involvement in the fraud.*	Case-No-68
69	*License*	*50863 / 2020*	*CESTAT New Delhi*	*M/s Perfect Cargo and Logistics filed an appeal to set aside an order dated June 26, 2020, by the Commissioner of Customs (Airport and General), which revoked their Customs Broker Licence, forfeited a security deposit of Rs. 5 lakhs, and imposed a penalty of Rs. 50,000.*	*Appeal by M/s Perfect Cargo and Logistics Against Commissioner of Customs.*	*The CESTAT ruling that they had complied with KYC norms and the Commissioner had erred in concluding regulatory violations. The Tribunal reinstated the licence and set aside the penalties imposed.*	Case-No-69
70	*License*	*51471 / 2022*	*CESTAT New Delhi*	*The issue in this case was the revocation of the Customs Broker (CB) license of M/s Friends Cargo Services, forfeiture of their security deposit, and imposition of a penalty of Rs. 50,000 by the Commissioner of Customs*	*Appeal by Friends Cargo Services Against Commissioner of Customs*	*The tribunal set aside the order, ruling that the appellant fulfilled its obligations under the regulation using valid documents.*	Case-No-70

71	*License*	*86621 / 2024*	*CESTAT Mumbai*	*The issue in this case was the revocation of the customs broker license of M/s M D Ruparel & Sons and the forfeiture of their security deposit, along with the imposition of a penalty of ₹50,000 under the Customs Broker Licensing Regulations, 2018.*	*Appeal by MD Ruparel & Sons Against Commissioner of Customs*	*The tribunal found no evidence of delays caused by the customs broker and noted the absence of justification for the delays in the impugned order. Consequently, the tribunal set aside the revocation order and allowed the appeal.*	Case-No-71
72	*Limitation*	*52739 / 2019*	*CESTAT New Delhi*	*The case involves Cisco Systems India Private Limited appealing against the rejection of their refund claim by the Commissioner of Customs (Appeals), New Delhi.*	*Cisco Systems India Private Limited Against Commissioner of Customs.*	*The CESTAT ruled in favor of Cisco, stating that filing an appeal implies payment under protest, thus exempting the claim from the six-month limitation period, and allowed the refund.*	Case-No-72
73	*Limitation*	*51171 / 2020*	*CESTAT New Delhi*	*This case involves M/s Whirlpool of India Limited appealing against an order that denied them the benefit of a DEPB license and imposed customs duty, confiscation of goods, and penalties.*	*Appeal by M/s WHIRLPOOL OF INDIA LIMITED Against Commissioner of Customs.*	*The CESTAT set aside the demand due to the improper invocation of the extended period of limitation, as there was no evidence of collusion or misstatement by Whirlpool.*	Case-No-73

74	***Limitation***	***51776 / 2022***	***CESTAT New Delhi***	***The case involves M/s. Artex Textile Pvt. Ltd. appealing against the rejection of their refund claim for Special Additional Duty (SAD) by the Commissioner of Customs, ICD Tughlakabad, New Delhi.***	***Appeal by M/s. Artex Textile Privat Limited Against Commissioner of Customs.***	***The CESTAT, following the Delhi High Court's decision in Thermoking, set aside the rejection, ruling that such a time limit cannot be imposed by a notification.***	Case-No-74
75	***Mis-Declaration***	***10436 / 2024***	***CESTAT Ahmedabad***	***The issue in this case was whether M/s Aeromar Logistics (I) Pvt Ltd, acting as an intermediary in forwarding export documents, could be penalized under Sections 114(iii) and 114AA of the Customs Act, 1962, for alleged abetment and submission of false documents in a fraudulent export transaction***	***Appeal by Aeromar Logistics Pvt Ltd Against Commissioner of Customs***	***The Tribunal found no evidence of their active involvement or intent and set aside the penalties, ruling that the appellant acted merely as an intermediary in forwarding documents.***	Case-No-75

76	*Valuation*	*50185 / 2020*	*CESTAT New Delhi*	*The case involves M/s D M Marketing Inc, New Delhi, appealing against an order by the Commissioner of Customs (Appeals), New Delhi, which upheld the rejection of the declared value of imported food supplements by the Deputy Commissioner.*	*Appeal by M/S D M MARKETING INC Against Principal Commissioner of Customs.*	*The CESTAT found the rejection improper and set aside the order, granting relief to the appellant.*	Case-No-76
77	*Valuation*	*50988 / 2020*	*CESTAT New Delhi*	*This case involves M/s Royal Industries, a partnership firm engaged in import, manufacturing, and export of goods, appealing against an order by the Commissioner of Customs (Appeals).*	*Appeal by M/S Royal Industries Against Commissioner of Customs.*	*The Tribunal ruled in favor of the appellant, setting aside the penalties and confiscation, as there was no evidence of malafide intent or collusion.*	Case-No-77

78	*Valuation*	*70395 / 2023*	*CESTAT Allahabad*	*The case involved allegations of over-invoicing by M/s Shree Venkateswara Exports and penalties imposed on both the exporter and M/s Surya Jyoti Global Logistics (Customs Broker) under Sections 114 and 114AA of the Customs Act, 1962. The Department claimed that the goods were overvalued to claim inadmissible drawback benefits*	*Appeal By Both Appellants Against Commissioner of Customs*	*The Tribunal found no evidence to substantiate the claims and ruled in favor of the appellants, setting aside the fines and penalties.*	Case-No-78
79	*Pre- Import Condition*	*10228 / 2024*	*CESTAT Ahmedabad*	*This case involved Chiripal Poly Films Ltd.'s liability for duty (IGST), interest, redemption fine, and penalty due to alleged violations of the "Pre-Import Condition" under the Advance Authorization scheme.*	*Appeal by CHIRIPAL POLY FILMS LTD Against commissioner of Customs*	*The tribunal ruled that interest, fine, and penalty were unsustainable due to the absence of statutory provisions and the revenue-neutral nature of the situation.*	Case-No-79
80	*Re-Import*	*50006 / 2022*	*CESTAT Ahmedabad*	*This case involves an appeal by Shri Balaji Ceramic Products against the confiscation of re-imported calcined petroleum coke (CPC) and the imposition of penalties by the Commissioner of Customs, Indore.*	*Appeal by Shri Balaji Ceramic Products Against Commissioner of Customs.*	*The CESTAT ruling that the re-import was legitimate and within permissible guidelines, thus allowing the appeal and granting consequential benefits.*	Case-No-80

Supreme COURT DECIDED CASE LIST WITH DOWNLOAD LINK :

S.No	*Issue Related To*	*Case No / Year*	*Court / Bench*	*Matter*	*Parties*	*Case Summary*	*View Order Link*
1	*Classification*	*CA - 5373 / 2019*	*Supreme Court*	*The case involves the correct classification of Automatic Data Processing Machines, specifically 'All-in-One Integrated Desktop Computers,' under the Central Excise Tariff Act, 1985.*	*Appeal by Hewlett Packard India Sales Pvt. Ltd. Against Commissioner of Customs.*	*The Supreme Court of India ruled in favor of Hewlett Packard India Sales Pvt. Ltd. and Lenovo (India) Pvt.*	Case-No-1
2	*Classification*	*CA - 2360 / 2009*	*Supreme Court*	*The case involves the classification of dried pomegranate seeds, known as 'anardana,' under the Customs Tariff Act, 1975.*	*Appeal by Commissioner Of Customs Against M/S D.L. STEELS ETC.*	*The Supreme Court of India ruled that dried pomegranate seeds, known as 'anardana,' should be classified under Heading 1209 of the Customs Tariff Act, 1975, as seeds used for sowing, rather than under Heading 0813 as dried fruits, thereby attracting a lower customs duty.*	Case-No-2
3	*Classification*	*SLP(C) 6470 / 2022*	*Supreme Court*	*The issue in this case was whether the imported goods should be classified as "Base Oil," as claimed by the appellants, or "High-Speed Diesel (HSD)," as determined by the Customs Authorities.*	*Appeal by Gastrade International Against Commissioner of Customs*	*The Supreme Court of India ruled in favor of the appellants, finding the evidence inconclusive to classify the goods as HSD and quashed the confiscation and penalties imposed by the Customs Authorities.*	Case-No-3

4	*Exemption*	*CA - 1049 / 2008*	*Supreme Court*	*The case involves Fortis Hospital Ltd., which imported medical equipment in 1990 and sought exemption from import duty under a specific notification.*	*Appeal by Fortis Hospital Pvt Ltd. Against Commissioner of Customs.*	*The Supreme Court allowed the appeal, setting aside the High Court's order, but left the door open for the Department to take independent action for duty payment if within the limitation period.*	Case-No-4
5	*Exemption*	*CA - 7570 / 2004*	*Supreme Court*	*The case involves M/S. Swastika Enterprises & Anr. (appellants) versus the Commissioner of Customs & Ors. (respondents) and revolves around the interpretation of the Kar Vivad Samadhan Scheme under the Finance (No.2) Act of 1998.*	*Appeal by M/S. SWASTIKA ENTERPRISES & ANR. Against Commissioner of Customs.*	*The Supreme Court ruled in favor of M/S. Swastika Enterprises, allowing them to benefit from the Kar Vivad Samadhan Scheme for settling tax arrears, by determining that the endorsement on their Bill of Entry constituted a sufficient notice of demand.*	Case-No-5
6	*Jurisdiction*	*CA - 4294 / 2002*	*Supreme Court*	*The case involves the Commissioner of Customs challenging the jurisdiction of the Commissioner of Customs (Preventive), Mumbai, to issue show cause notices under Section 28 of the Customs Act, 1962.*	*Appeal by Commissioner of Customs Against respondent.*	*The appeals by the revenue were dismissed, and the appeals by the importers were allowed.*	Case-No-6
7	*Jurisdiction*	*CA - 1827 / 2018*	*Supreme Court*	*Can DRI issue Show Cause Notice (SCN)*	*Appeal by Canon India Pvt Ltd Against Commissioner Of Customs.*	*Entire proceeding in the*	Case-No-7

8	*Jurisdiction & Exemption*	*CA -1827 / 2018*	*Supreme Court*	*Can DRI issue Show Cause Notice (SCN)*	*Appeal by Canon India Pvt Ltd Against Commissioner of Customs.*	*The Supreme Court has held that the officers of Directorate of Revenue Intelligence (DRI) can issue SCN under Section 28(4) of the Customs Act.*	Case-No-8
9	*Refund*	*CA - 4897 / 1990*	*Supreme Court*	*The case involves M/S Sun Export Corporation, Bombay, which imported consignments of a premix of vitamin AD-3 (feed grade) and paid countervailing duty on them.The corporation later sought a refund.*	*Appeal M/s SUN Export Corporation Against Collector of Customs.*	*The Supreme Court ruled in favor of the corporation, stating that animal feed supplements qualify for the exemption under Notification 234/82 CE.*	Case-No-9
10	*Seized Goods*	*CA - 4663 / 2009*	*Supreme Court*	*The case involves M/S. BISCO Limited, which imported second-hand steel mill machinery and parts under a Project Import Facility and stored them in a public bonded warehouse within their factory premises.*	*Appeal by M/S. BISCO LIMITED Against Commissioner of Customs.*	*The Supreme Court of India partially upheld the Commissioner of Customs and Central Excise's order against M/S. BISCO Limited for unauthorized removal and improper warehousing of imported goods.*	Case-No-10
11	*Seized Goods*	*CA - 1633 / 2004*	*Supreme Court*	*The case involves the import of alcohol by M/s. Finacord Chemicals (P) Ltd. and others, who were accused of under-invoicing the goods and importing them*	*Appeal by Commissioner of Customs Against M/S. FINACORD CHEMICALS (P) LTD. & ORS.*	*The Supreme Court upheld CESTAT's decision, dismissing the appeals by the Revenue Department.*	Case-No-11

				against invalid licenses.			
12	*Valuation*	*CA - 4735 / 2009*	*Supreme Court*	*The Commissioner of Customs (Imports), Mumbai, appealing against a decision by the Customs, CESTAT that set aside the enhancement of the value of imported goods and penalties imposed on M/s Ganpati Overseas.*	*Appeal by Commissioner of Customs Against M/s Ganpati overseas.*	*The Supreme Court of India upheld the CESTAT's decision to set aside the enhancement of the value of imported goods and penalties imposed on M/s Ganpati Overseas.*	Case-No-12
13	*Valuation*	*CA - 9766 / 2003*	*Supreme Court*	*The case involves Wipro Ltd. challenging the constitutional validity of a proviso in Rule 9(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, which was amended by a notification in 1990.*	*Appeal by WIPRO LTD. Against Collector of Customs.*	*The Supreme Court of India ruled in favor of Wipro Ltd., declaring that the proviso in Rule 9(2) of the Customs Valuation Rules.*	Case-No-13

HIGH COURT DECIDED CASE LIST WITH DOWNLOAD LINK :

S.No	*Issue Related To*	*Case No / Year*	*Court / Bench*	*Matter*	*Parties*	*Case Summary*	*View/Download Order Link*
1	*Provisional Release of restricted Goods*	*WP - 16288 / 2014*	*Madras High Court*	*The petitioner requested the court to direct the respondents to assess and permit the clearance of 129 units of second-hand Digital Multifunction Print and Copying Machines.*	*M/s. City Office Equipments, represented by its proprietor, against the Commissioner of Customs (Seaport-Import) and the Joint Commissioner of Customs.*	*The court directed the respondents to provisionally release the goods upon payment of applicable duties, subject to eventual adjudication.*	Case-No-1
2	*Provisional Release of restricted Goods*	*WP- 1242 / 2020*	*Madras High Court*	*In the case of M/S. Black Gold Technologies vs. Union of India, the petitioner, Black Gold Technologies, sought the release of imported goods consisting of 824.900 MT of "Used Rubber Tyre Cut in Two Pieces" valued at USD 24,747.*	*M/S. Black Gold Technologies vs. Union of India and Commissioner of Customs, Additional Commissioner of Customs.*	*The court ruled in favor of the petitioner, allowing the release upon payment of duties and compliance with conditions, while also waiving demurrage and detention charges.*	Case-No-2

3	*Confiscation*	*CUSAP - 4 / 2024*	*HIGH COURT OF PUNJAB AND HARYANA*	*In this case concerned the import of Areca Nuts by M/s Star Spices and M/s Sherry Network Private Limited, which were confiscated by the Customs Department on allegations of misdeclaration of origin and substandard quality.*	*Appeal by Commissioner of Customs Sherry Network Private Limited, Star Spices*	*The High Court upheld the CESTAT's decision allowing re-export of the goods on payment of a fine, citing industrial uses and avoidance of financial loss to the importer.*	Case-no-3
4	*Invocation of expired bank guarantees*	*WA NO - 2183 / 2023*	*High Court of Kerla*	*This case concerns the invocation of expired bank guarantees by the Customs Department against M/S ITMA Hotels India Private Limited, which was under insolvency proceedings.*	*Appeal by ITMA HOTELS INDIA PRIVATE LIMITED Against Commissioner Customs*	*The Kerala High Court ruled that the expired guarantees could not be legally enforced and set aside the Customs Department's invocation, allowing the appellant's writ appeal.*	Case-no-4
5	*Put on hold the consignment of exported goods*	*W.P.(C) - 3711 / 2025*	*Delhi High Court*	*Backbone Overseas filed a writ petition under Articles 226 and 227 of the Constitution, seeking the provisional release of its export consignment of PVC slippers detained by the Customs Department since 13th January 2025 without justification or a seizure memo.*	*Appeal by Backbone Overseas Against Assistant Commissioner of Customs*	*The court directed the Customs Department to decide on the matter and release the goods within seven days, subject to reasonable conditions.*	Case-no-5

6	*Rejected the claim of Duty Drawback*	*W.P.(C) - 3675 / 2025*	*Delhi High Court*	*The issue in this case was whether Vedanta Limited could claim duty drawback for the clean energy cess paid on coal consumption during manufacturing, despite the claims being rejected as time-barred*	*Appeal by Vedanta Limited Against CBIC & ORS*	*The court directed the CBIC to reconsider Vedanta's representations and pass a reasoned order.*	Case-no-6
7	*Classification*	*CA - 582 / 2024*	*Bombay High Court*	*In this case, the customs authorities had confiscated imported "Caresmith Wave Body Massagers" alleging they were obscene goods prohibited under Notification No. 1/1964-Cus and Section 292 IPC.*	*Appeal by Commissioner of Customs vs. Doc Brown Industries LLP*	*The Court dismissed the customs department's appeal challenging CESTAT's order that allowed the import of body massagers.*	Case-No-7

This Case Compilation has been written by Shri Ravi Shekhar Jha, Advocate based in New Delhi. The views expressed are based on his interpretation of the law. He can be reached at his email id intelconsul@gmail.com or on his Mobile +91-9999005379.

Sources Referred: CESTAT, Supreme Court, Delhi High Court, Madras High Court, Bombay High Court, High Court of Kerala, High Court of Punjab and Haryana

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH, COURT NO. I

CUSTOMS APPEAL NO. 50782 OF 2021

[Arising out of the Order-in-Original No. 65/2020-2021/C.J./Pr. Commr. dated 16.02.2021 passed by Principal Commissioner of Customs, Air Cargo Complex (Import), New Delhi.]

M/s Vivo Mobile India Pvt. Ltd. **...Appellant**
10th – 11th Floor, Palm Springs Plaza,
Golf Course Road, DLF Phase 5, Sector 54,
Gurugram, Haryana – 122 003.

Versus

Principal Commissioner of Customs, **...Respondent**
Air Cargo Complex (Import),
New Customs House, Near I.G.I. Airport,
New Delhi – 110 037.

APPEARANCE:
Shri Kishore Kunal and Shri Ankit Prakash, Advocates for the appellant.
Shri Nagendra Yadav, Authorised Representative for the Department

WITH

CUSTOMS APPEAL NO. 50795 OF 2021

[Arising out of the Order-in-Original No. 63/2020-21/C.J./Principal Commissioner dated 15.02.2021 passed by Principal Commissioner of Customs, Air Cargo Complex(Import), New Delhi.]

M/s DBG Technology (India) Pvt. Ltd. **...Appellant**
Plot No. 02, Sector – 8, Bawal,
Haryana – 123 501.

Versus

Principal Commissioner of Customs, **...Respondent**
Air Cargo Complex(Import),
New Customs House, Near I.G.I. Airport,
New Delhi – 110 037.

APPEARANCE:
Shri V. Lakshmikumaran and Shri Subham Jaiswal, Advocates for the appellant.
Shri Nagendra Yadav, Authorised Representative for the Department

WITH

CUSTOMS APPEAL NO. 50796 OF 2021

[Arising out of the Order-in-Original No. 61/2020-21/C.J./Principal Commissioner dated 15.02.2021 passed by Principal Commissioner of Customs, Air Cargo Complex(Import), New Delhi.]

M/s Padget Electronics Pvt. Ltd. **...Appellant**
C-33, Phase – II, Gautam Budh Nagar,
Noida.

Versus

Principal Commissioner of Customs, ...Respondent
Air Cargo Complex(Import),
New Customs House, Near I.G.I. Airport,
New Delhi – 110 037.

APPEARANCE:
Shri V. Lakshmikumaran and Shri Subham Jaiswal, Advocate for the appellant.
Shri Nagendra Yadav, Authorised Representative for the Department

WITH

CUSTOMS APPEAL NO. 50797 OF 2021

[Arising out of the Order-in-Original No. 71/2020-21/C.J./Principal Commissioner dated 17.02.2021 passed by Principal Commissioner of Customs, Air Cargo Complex(Import), New Delhi.]

M/s Bhagwati Products Limited ...Appellant
SP1-1, Industrial Area, Karoli, Tapukara Extn.,
Bhiwadi, Rajasthan – 301 019.

Versus

Principal Commissioner of Customs, ...Respondent
Air Cargo Complex(Import),
New Customs House, Near I.G.I. Airport,
New Delhi – 110 037.

APPEARANCE:
Shri V. Lakshmikumaran and Shri Subham Jaiswal, Advocates for the appellant.
Shri Nagendra Yadav, Authorised Representative for the Department

WITH

CUSTOMS APPEAL NO. 50888 OF 2021

[Arising out of the Order-in-Original No. 67/2020-21/C.J./Principal Commissioner dated 15.02.2021 passed by Principal Commissioner of Customs, Air Cargo Complex(Import), New Delhi.]

M/s Intex Technologies Pvt. Ltd. ...Appellant
Kh. No. 1747/1274/1-19, 1277/3-0, 1278/1-18,
Dehla Road, VPO – Manpura, Tehsil – Baddi,
H.P. – 173 205.

Versus

Principal Commissioner of Customs, ...Respondent
Air Cargo Complex(Import),
New Customs House, Near I.G.I. Airport,
New Delhi – 110 037.

APPEARANCE:
Shri V. Lakshmikumaran and Shri Subham Jaiswal, Advocates for the appellant.
Shri Nagendra Yadav, Authorised Representative for the Department

WITH

CUSTOMS APPEAL NO. 50921 OF 2021

[Arising out of the Order-in-Original No. 66/2020-21/C.J./Principal Commissioner dated 16.02.2021 passed by Principal Commissioner of Customs, Air Cargo Complex(Import), New Delhi.]

M/s Oppo Mobiles India Pvt. Ltd. ...Appellant
05th Floor, Building 8, Tower B, DLF Cyber City,
Gurgaon – 122 002.

Versus

Principal Commissioner of Customs, ...Respondent
Air Cargo Complex(Import),
New Customs House, Near I.G.I. Airport,
New Delhi – 110 037.

APPEARANCE:
Shri V. Lakshmikumaran and Shri Subham Jaiswal, Advocates for the appellant.
Shri Mihir Ranjan, Special Counsel for the Department

WITH
CUSTOMS APPEAL NO. 50275 OF 2022

[Arising out of the Order-in-Original No. 68/2020-21/S.J./Principal Commissioner dated 15.02.2021 passed by Principal Commissioner of Customs, Air Cargo Complex(Import), New Delhi.]

M/s Transsion India Private Limited ...Appellant
(presently known as Ismartu India Pvt. Ltd.)
B-198, Sector – 63, Noida, Gautam Budh Nagar,
Uttar Pradesh – 201 301.

Versus

Principal Commissioner of Customs, ...Respondent
Air Cargo Complex(Import),
New Customs House, Near I.G.I. Airport,
New Delhi – 110 037.

APPEARANCE:
Ms. Madhumita Singh, Advocate for the appellant.
Shri Nagendra Yadav, Authorised Representative for the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS. 50226-50232 /2024

DATE OF HEARING : 12/01/2024
DATE OF DECISION: 09/02/2024

P. V. SUBBA RAO:

These seven appeals involve the common issue of classification of the front cover, middle cover and back cover and few other parts of the mobile phones imported by the appellants. Hence, these are being disposed of together by this common order.

2. Customs **Appeal No. 50921 of 2021** is filed by **M/s. Oppo Mobiles India Pvt. Ltd.**[1] to assail the Order-in-Original dated 16.02.2021 passed by the Principal Commissioner of Customs, Air Cargo Complex, New Delhi, whereby he confirmed the demand of differential duty of Rs. 143,97,78,121/- on the appellant and imposed penalty of Rs. 14,00,00,000/- under Section 112 (a) (ii) of the Customs Act, 1962[2] for the period 23.02.2018 to 31.12.2019.

3. **Customs Appeal No. 50782 of 2020** is filed by **M/s. Vivo Mobile India Pvt. Ltd.**[3] to assail the Order-in-Original dated 16.02.2021 passed by the Principal Commissioner of Customs, Air Cargo Complex, New Delhi, whereby he confirmed the demand of differential duty of Rs. 75,31,26,652/- on the appellant and imposed penalty of Rs. 7,50,00,000/- under Section 112 (a) (ii) of the Act for the period 24.02.2018 to 30.12.2019.

4. **Customs Appeal No. 50795 of 2021** is filed by **M/s. DBG Technology (India) Pvt. Ltd.**[4] to assail the Order-in-Original dated 15.02.2021 passed by the Principal Commissioner of Customs, Air Cargo Complex, New Delhi, whereby he confirmed the demand of differential duty of Rs. 58,33,513/- on the appellant and imposed penalty of Rs. 5,80,000/- under Section 112 (a) (ii) of the Act for the period 20.08.2019 to 31.12.2019.

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1 Oppo
2 Act
3 Vivo
4 DBG

5. **Customs Appeal No. 50796 of 2021** is filed by **M/s. Padget Electronics Private Limited**[5] to assail the Order-in-Original dated 15.02.2021 passed by the Principal Commissioner of Customs, Air Cargo Complex, New Delhi, whereby he confirmed the demand of differential duty of Rs. 48,66,251/- on the appellant and imposed penalty of Rs. 4,80,000/- under Section 112 (a) (ii) of the Act for the period 09.03.2018 to 31.12.2019.

6. **Customs Appeal No. 50797 of 2021** is filed by **M/s. Bhagwati Products Limited**[6] to assail the Order-in-Original dated 17.02.2021 passed by the Principal Commissioner of Customs, Air Cargo Complex, New Delhi, whereby he confirmed the demand of differential duty of Rs. 77,18,811/- on the appellant and imposed penalty of Rs. 7,50,000/- under Section 112 (a) (ii) of the Act for the period 10.03.2018 to 31.12.2019.

7. Customs **Appeal No. 50888 of 2021** is filed by **M/s. Intex Technologies Pvt. Ltd**.[7] to assail the Order-in-Original dated 15.02.2021 passed by the Principal Commissioner of Customs, Air Cargo Complex, New Delhi, whereby he confirmed the demand of differential duty of Rs. 67,37,708/- on the appellant and imposed penalty of Rs. 6,70,000/- under Section 112 (a) (ii) of the Act for the period 27.02.2018 to 31.12.2019.

8. Customs **Appeal No. 50275 of 2022** is filed by **M/s. Transsion India Private Limited**[8] (Presently known as Ismartu India Pvt. Ltd.) to assail the Order-in-Original dated 15.02.2021 passed by the Principal Commissioner of Customs, Air Cargo Complex, New Delhi, whereby he confirmed the demand of

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differential duty of Rs. 36,25,405/- on the appellant and imposed penalty of Rs. 3,60,000/- under Section 112 (a) (ii) of the Act for the period 01.03.2018 to 31.12.2019.

9. The appellants imported the aforesaid parts and sub-parts of cellular mobile phones, self-assessed and paid duty and cleared them. Show cause notices[9] were issued by the Principal Commissioner of Customs, Air Cargo Complex New Delhi proposing to reclassify under CTH 39209999 the following goods and recover the differential duty along with interest:

(a) **DBG-** Battery cover and front cover (classified by the appellant under 85177090) and camera lens (classified by the appellant under 90021100/ 85177090)

(b) **Padget-** Battery cover and front cover(classified by the appellant under 85177090), main lens and camera lens (classified by the appellant under 90021100/85177090)

(c) **Bhagwati-** Front cover housing, middle cover housing and rear cover housing (classified by the appellant under 85177090)

(d) **Intex-** Battery cover, middle cover and front cover (classified by the appellant under 85177090) and camera lens (classified by the appellant under 90021100/85177090)

(e) **Oppo-** Battery cover, middle cover back cover and front cover (classified by the appellant under 85177090) and camera lens (classified by the appellant under 90021100/85177090)

(f) **Vivo-** Battery cover (classified by the appellant under 86177090) and camera lens (classified by the appellant under 90021100)

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9 SCN

(g) **Transsion-** Front cover, middle cover and back cover (classified by the appellant under 85177090) and camera lens (classified by the appellant under 90021100)

It was also proposed to confiscate the goods under Section 111 (m) of the Customs Act, 1962 and impose penalty under Section 112(a) (ii) of the Customs Act, 1962.

10. The grounds on which the SCNs proposed to reclassify the goods are as follows :-

(i) the goods Battery cover, Front cover, Middle cover, Back Cover and Camera Lens' (which are part/sub-part or accessories of cellular mobile phones) are classifiable under CTH 39209999 and attract BCD @ 15% in terms of S. No. 10 of notification No. 57/2017-Cus dated 30.06.2017, as amended;

(ii) Chapter note 10 to Chapter 39 of the Schedule to the Customs Tariff Act, 1975 mentions that in headings 3920 and 3921, the expression plates, sheets, film, foil and strip applies only to plates, sheets, film and foil and strip (other than those in Chapter 54) and to blocks of regular geometrical shape, whether or not printed or otherwise surface worked uncut or cut into regular rectangles but not further worked even if when cut they became articles ready for use,

(iii) As per the policy notified by the Ministry of Electronics and Information Technology (MeITY) by notification F.No. 33(5) 2017-IPHW dated 1.8. 2018, the front covers, middle covers and back covers are classifiable under HS Code 39209999.

11. The ground for proposing that the imported goods were liable to confiscation under Section 111 of the Act is that it provides for confiscation of various categories of goods. Clause (m) of this section provides for confiscation of '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 refer to in the proviso to sub-section (i) of Section 54'. According to the SCNs, the appellants had misclassified the goods to evade customs duty which is recoverable from them

under Section 28 (1) (a) and the imported goods were liable for confiscation because the appellants had mis-declared their classification.

12. According to the SCNs, since the appellants had misclassified the goods which rendered them liable to confiscation under section 111, the appellants thereby rendered themselves liable to penalty under Section 112(a) (ii).

13. The appellants contested the proposals in the SCNs to reclassify the goods, recover the differential duty, hold the imported goods liable to confiscation and to impose penalty. However, the Principal Commissioner passed the impugned orders confirming the proposals in the SCNs.

Submissions on behalf of the appellants

14. Shri Lakshmikumaran, learned counsel for **Oppo, DBG, Padget, Bhagwati** and **Intex** made the following submissions.

(i) The issue in these appeals is identical to the one in the case of **Samsung India Pvt. Ltd**. in **Customs appeal no. 50484 of 2021** which was decided in favour of the importer by this Tribunal's Final Order No.51665/2023 dated 20.12.2023. Therefore, these appeals may also be decided accordingly.

(ii) The appellants had imported front covers, middle covers and back covers of cellular phones which house various components of the phone and also provide for dissipation of the heat. The details of these types of covers are as follows:

> **Back Covers**: These help in providing safety to the battery and internal components. They also provide

ingress protection, structural support and save internal PCB, sub-components and battery from dust, moisture and other foreign particles. When a PCB or battery is exposed to such particles, it gets damaged resulting in malfunctioning of mobile phone. In some models, the back covers are also layered with zinc, aluminum and other metallic alloys for heat dissipation. Back covers may also have rubber gasket and glass for sealing the camera lens.

Front Covers: These form the basic structures wherein the camera, buttons, infrared sensors, amongst others are embedded.

Middle Covers: These are layered with zinc and provide housing and protection to sub-parts. The layering helps in heat dissipation.

(iii) These phone covers, in general, undergo similar processes of manufacturing. These are as under:

a. **Extrusion**: Two layers of Polymethyl Methacrylate (PMM) and Polycarbonate (PC) are layered using extrusion machine to form a sheet of thickness of 0.64 mm.

b. **Printing**: In this step, various forms of printing take place on the sheet. This includes Logo Silk Print, Offset Print, and Nano Pattern Imprinting.

c. **Physical Vapor Disposition (PVD)**: This step takes place in a high vacuum chamber to form a thin film coating. This is akin to lamination to give the desired finish to the back cover.

d. **Second set of Printing**: In this stage, the resultant sheet undergoes two kinds of color silk print and dyne silk print depending on the model of the phone.

e. **Hard coating**: In this step, the sheet is layered, levelled and UV dried.

f. **Thermoforming**: Thereafter, the resultant sheets undergo thermoforming process, wherein by a process using vacuum and air pressure, the sheet is pulled over a solid mold to obtain desired shape. This gives grooves and ground edges to the uncut phone cover to enable such a cover to be clipped to the specific phone for which it is made so that the phone is protected from dust and moisture.

g. **CNC Milling**: In this step, specific cuts, speaker

> grills, and other compartments, are milled in the cover, thereby giving it the final shape.

(iv) These phone covers have been correctly classified under CTH 85177090 as these are parts of mobile phones and are not merely articles of plastic. Hence, there is no misclassification at all as held in the impugned orders.

(v) CTH 3920 covers —other plates, sheets, film, foil and strip of plastics, not cellular and not re-imposed, laminated, supported a similarly by with other materials. Chapter note 10 to Chapter 39 reads as follows:-

> (10)In headings 3920 and 3921, the expression -plates, sheets, film foil and strips applies only to plates, sheets, film, foil and strip (other than those of Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if whenso cut they become articles ready for use).

(vi) It is evident from this chapter note that for any goods to fall under CTH 3920 they must be plastic sheets or plates etc. of regular geometric shapes and should not be reinforced or laminated with other materials. In this case the middle cover is laminated with zinc and hence clearly gets excluded from CTH 3920. The use of these metals not only enhanced the strength of the plastic, but also helps in dissipations of the heat.

(vii) Further, for the goods to fall under CTH 3920 they should not be further worked. The phone covers in their case have ground edges, thermos-formed with grooves, drilled and CNC milled and, therefore, they do not qualify as goods 'not further worked'.

(viii) The phone covers were correctly classifiable under CTH

85177090 in view of section note (ii) to Section XVI which provides for classification of the parts of the goods falling under chapter 85. Part is defined as one without which a machine is not operational or does not suitably discharge its function. Thus the parts can perform either an electronic function or a mechanical one. In this case, the front covers, middle covers and back covers of cellular phones performed mechanical function as well as provide for heat dissipation. The covers also protect the parts from dust, moisture etc. They correctly merit classification under CTH 8517 7090 which reads as follows :-

Chapter 8517	**Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528**
	- Telephone sets, including telephones for cellular networks or for other wireless networks :
8517 11	--
8517 11 10	--
8517 11 90	--
8517 12	--
8517 12 10	--
8517 12 90	--
8517 18	--
8517 18 10	--
8517 18 90	--
8517 61 00	--
8517 62	--
8517 62 10	--
8517 62 20	--
8517 62 30	--
8517 62 40	--
8517 62 50	--
8517 62 60	--
8517 62 70	--
8517 62 90	--
8517 69	--
8517 69 10	--
8517 69 20	--
8517 69 30	--
8517 69 40	--
8517 69 50	--

8517 69 60	--
8517 69 70	--
8517 69 90	--
8517 70	- Parts
8517 70 10	-- Populated, loaded or stuffed printed circuit boards
8517 70 90	-- Others

(ix) Reliance is also placed on WCO Harmony System Company Session May 2022 which classified cover glass for the manufacture of a mobile phone, touch screen under 8517.70. Although WCS classification is not binding but it has highly persuasive value and may be considered.

(x) Since, the Department has proposed to reclassify the goods, the burden is on it to prove that the goods not fall under CTH 8517 and fall under CTH 39209999 and this burden has not been discharged by the Department.

(xi) The appellants have been importing these products for a long time and has been classifying them under 85177090 and the Department has been accepting this classification.

(xii) Notification No. 57/2017-CUS dated 30.06.2017 and the Meity notification dated 14.09.2017 cannot form the basis of classification of the goods. Classification has to be only based on the customs tariff read with the general interpretative rules. Reliance is placed on **Commissioner of Central Excise, Bombay versus Oswal Petro Chemicals Ltd.**[10] which was affirmed by the Supreme Court[11].

(xiii) As far as the lenses and lens covers of the mobile phones

10 2000 (126) E.L.T. 1232 (Tri)
11 2007 (127) E.L.T. 857 (S.C.)

> are concerned, they were correctly classified by the appellants under CTH 90021100/85177090 and they have been wrongly re-classified in the impugned order under 39209999 for the reason that CTH pertains to articles of plastic and include plates, sheets, film, foil and strip (other than those of Chapter 54) and blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked even if when so cut they become articles ready for use. Evidently, lenses cannot fall in this definition because they are not in geometrical shapes. Revenue's contention that lenses need to be classified under CTH 39209999 cannot be sustained.

15. Shri Kunal Kishore, learned counsel for **Vivo** reiterated the submissions of Shri Lakshmikumaran. He further submitted that **Vivo** had also imported lenses which form part of the camera of the mobile phones and classified them under CTH 90021100 which the Commissioner incorrectly re-classified under CTH 39209999 as articles of plastic. In fact, the lenses imported by **Vivo** were not made of plastic at all but were made of crystal and therefore, they can never be classified as articles of plastic under Chapter 39. In support of the claim that they were made of crystal, **Vivo** had submitted test certificate from M/s. SGS- a reputed testing agency confirming that the lenses were made of crystal. The Commissioner, however, dismissed this report without giving any reason or without providing any other test report of any other testing agency. It is his submission

that if Revenue was of the opinion that the test certificate from SGS was incorrect, samples could have been drawn and sent for testing to Central Revenue Control Laboratories or any other laboratory but neither were any samples drawn nor were they tested. Therefore, the Commissioner ought to have accepted its declaration that the lenses were made of crystal in the absence of any evidence to the contrary. In this case, **Vivo** went a step further and even produced a test report from M/s. SGS which the Commissioner has dismissed without giving any reason.

16. He further submitted that the demand was, in any case, revenue neutral because if the appellant had paid higher IGST as proposed by the Revenue, it would have got the entire IGST as input tax credit[12] under GST because all the imported parts were used in the manufacture of mobile phones on which GST was paid.

17. Ms. Madhumita Singh, Learned counsel for **Transsion** reiterated the submissions made by Shri Lakshmikumaran and further submitted that once the self-assessment was completed, it was open to the Revenue to assail it by filing an appeal before Commissioner (Appeals) as laid down by the Supreme Court in **ITC Ltd versus Commissioner of Central Excise Kolkata**[13] but without filing an appeal and getting the assessment modified by the Commissioner (Appeal), demand under Section 28 cannot be issued. In support, she relied on the Final Order passed by a division bench of this Tribunal in **Rajib Saha vs Commissioner of Customs (Preventive) Shillong**[14]**.**

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12 ITC.
13 2019 (368) E.L.T. 216 (S.C.)

14 Final Order no. 76465-76466/2023 dated 24 August 2023 passed in CESTAT Kolkata Appeals C75278 and 75279 of 2016

18. On behalf of the Department, Shri Mihir Ranjan, learned Special Counsel and Shri Nagendra Yadav, learned authorised representative for the Revenue made the following submissions:

a. The phone covers are correctly classifiable under CTH 39209999 as held by the Principal Commissioner in the impugned order. They are made of plastic and the sub-components are embedded at proper places in the front cover and back cover. The purpose of the back cover is to reduce the amount of dust on battery terminals and it is also made of plastic. The middle cover fixes the inner components and protects the battery from moisture and dust and it is also made of plastic, therefore, the impugned order was correct in holding that they are classifiable under CTH 39209999. These three covers do not contribute to the functionality of the mobile per-se and, therefore, do not deserve to be classified as parts of the mobile phones and should be classified under Chapter 39. He placed reliance on the following case laws:-

i. **Ipea Paramount Pvt. Ltd. versus Commissioner of**
ii. **C. Ex., New Delhi[15]**

iii. **Commissioner versus Ipea Paramount Pvt. Ltd.[16]**

iv. **P.R. Packagings Pvt. Ltd. versus Commissioner of C. Ex., New Delhi – II[17]**

v. **Hariram Govindram versus Collector of CentralExcise, Bombay[18]**

vi. **Karnataka Power Corporation Ltd. versus Commr.of Cus., Chennai[19]**

vii. **General Mills India Ltd. versus Commr. of Cus.(Import), JNCH, Nhava Sheva[20]**

viii. **Atul Kaushik versus Commissioner of Customs(Export), New Delhi[21]**

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15 2002 (143) E.L.T. 632 (Tri. – Del.)
16 2008 (228) E.L.T. A136 (S.C.)
17 2002 (139) E.L.T. 495 (Tri. – Del.)
18 1997 (94) E.L.T. 574 (Tribunal)
19 2016 (337) E.L.T. 104 (Tri. – Chennai)
20 2019 (368) E.L.T. 705 (Tri. – Mumbai)
21 2015 (330) E.L.T. 417 (Tri. – Del.)

ix. Towa Ribbons Pvt. Ltd. versus Collector ofCustoms[22]

x. Speedway Rubber Co. versus Commissioner ofCentral Excise, Chandigarh[23]

b. Each part of a machine does not merit being classified along with the machine or as its part under Chapter 85. As hasbeen held in the above cases some parts or machine can alsobe classified under Chapter 39.

c. On the question of whether the specific entry should prevail over the general entry, since the impugned goods do not merit classification under 8517 at all and, therefore, the question of general or specific entry does not arise.

d. The products in this case and in of Bhagwati Products Ltd, in which the Principal Commissioner of Customs, Chennai held that the front housing and part housing of a mobile phone deserve to be classified under CTH 85177090 are different. In this case, the appellant itself has declared them as front cover, middle cover and back cover not as housing and, therefore, the ratio does not apply.

e. As far as the Notification No. 52/2017-CUS dated 30.06.2017, and the Meity Notification dated 01.08.2018 is concerned, these were relied upon only as supporting evidence and the goods, in question, have always been seen by the Government as filing under Chapter 39 and not as filing under chapter 85.

f. The Department is not estopped from raising the classification in a subsequent import even if the classification was wrongly accepted during the prior imports. He relies on the follows case laws :-

General Mills India Ltd. versus Commissioner of Customs (Import) JNCH, Nhava Sheva[24]

Fitrite Packers versus Commissioner of Central Excise, Mumbai – IV[25]

Assistant Commissioner of Central Excise

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22 1993 (66) E.L.T. 320 (Tri. – Del.)
23 2002 (143) E.L.T. 8 (S.C.)

24 2019 (368) E.L.T. 705 (Tri. – Mumbai)
25 2016 (203) E.L.T. 452 (Tri. – Mum.)

Tiruchirapally versus Indian Hume Pipe Co. Ltd.[26]

g. The Department has duly discharged its responsibility in changing the classification and in confirming demands differential duty along with interest. The appellant mis-declared the classification of the goods and, therefore, they are liable for confiscation under Section 111 (m). Consequently, the penalty under Section 112 (a) has been correctly imposed upon the appellant.

h. Submission of Ms. Madhumita Singh that once a Bill of Entry is self-assessed and goods are cleared, Revenue cannot raise a demand by issuing a notice under section 28 without first filing an appeal to the Commissioner (Appeals) is not correct and is contrary to the legal position. While both sides can appeal against the self-assessment, Revenue can also issue a notice under section 28 and raise a demand. On the other hand, refund is not a quasi-judicial process but is a mechanical process of refunding the amount if it is due as per the assessment (including self-assessment). The officer sanctioning the refund cannot, in the course of such sanction, sit in judgment over or modify the assessment. The judgments of the Supreme Court in **Priya Blue Industries vs Commissioner of Customs (Prev)**[27]**, Collector of Central Excise vs Flock India**[28] **and ITC Ltd.** all pertain to the question as to if refund can be sanctioned so as to modify the assessment and the question was answered in negative. None of these judgments says that notice under section 28 cannot be issued without modifying the assessment through an appeal. The order of the Kolkata bench of this Tribunal in **Rajib Saha** is per incuriam being contrary to the law laid down by the Supreme Court.

i. The appeals may, therefore, be dismissed.

19. We have considered the submissions of the learned counsels for the appellants, learned Special Counsel for the Revenue and the learned authorised representative for the Revenue and perused the records.

Findings

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26 2009 (238) E.L.T. 230 (Mad.)

27 2004 (172) E.L.T. 145 (S.C.)
28 2000 (120) E.L.T. 285 (S.C.)

20. We have perused the records of the case and considered the submissions made by both sides. The following inter-related issues arise for determination:

a) Are the front cover, middle cover, battery cover, back cover, front cover housing, middle cover housing and back cover housing of cellular mobile phones imported by the appellants classifiable under CTH 85177090 (as claimed by the appellants) or under CTH 39209999(as held in the impugned order)?

b) Are the front lenses and camera lenses imported by the appellants classifiable under CTH 90021100/85177090 (as claimed by the appellants) or under CTH39209999 (as held in the impugned order)?

c) Can an exemption notification issued by the Government under Section 25 of the Customs Act determine the classification of the goods?

d) Can a scheme notified by the MeiTY determine the classification of the goods?

e) Can a demand be raised under section 28 by the department without filing an appeal before the Commissioner (Appeals) against the self-assessment?

f) Was the differential duty recoverable from the appellants?

g) Is interest recoverable from the appellant?

h) Were the imported goods liable to confiscation under Section 111(m) (although they were not actually confiscated) because the classification of the imported goods in the Bill of Entry is, according to the Revenue, incorrect? Consequently, was the penalty under Section 112 imposed correctly?

21. Before examining the question of classification, we examine the above questions (c) to (h) above. For this purpose, it is necessary to examine the nature of the Customs duty and the legal provisions to determine and charge it, the role of classification and who can decide the classification. The charging section, i.e., the section which empowers the Government to levyand collect duties of customs is Section 12 which reads as follows:

> **Section 12. Dutiable goods.** -
>
> (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the CustomsTariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.
> (2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

22. Thus, the taxable event, i.e., that event which triggers levy of customs duty is the act of importation (bringing into India from a place outside India) or exportation (taking to a place outside India from India) of goods. The levy is on the goods and not on any person and that levy will apply even if the goods belong to the Government.

Assessment

23. Customs duty is levied at such rates as are specified in the Schedules to the Customs Tariff Act, 1975. These rates can be based on quantity (specific rate of duty) or value (ad valorem rate of duty) and on most goods latter is the case. Based on the classification of the goods in the Schedule to the Customs Tariff Act, their value, exemption notifications, etc., the duty of customs has to be assessed.

24. Assessment is defined in Section 2(2) as follows:

> **Section 2. Definitions** -
> In this Act, unless the context otherwise requires,
>
> …..
>
> (2) "assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referredto as the Customs Tariff Act) or under any other law for thetime being in force, with reference to-
>
> **(a) the tariff classification of such goods as determined in accordance with the provisions ofthe Customs Tariff Act;**
>
> **(b)** the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;
>
> **(c)** exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefore under this Act or under the Customs Tariff Act or under any other law for the time being in force;
>
> **(d)** the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;
>
> **(e)** the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the

amount of duty, tax, cess or any other sum is affected by the origin of such goods;

(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods,

and includes provisional assessment, self-assessment, re- assessment and any assessment in which the duty assessed is nil ;

25. Thus, classification of the goods under the Customs Tariff is a part of assessment. The next question is who can do this assessment. Section 17, reads as follows:

Section 17. Assessment of duty. -

(1) An importer entering any imported goods under Section 46, or an exporter entering any export goods under Section 50, shall, save as otherwise provided in Section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the entries made under Section 46 or Section 50 and the self-assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or suchpart thereof as may be necessary.

Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re- assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be,

confirms his acceptance of the said re- assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

Explanation. - For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under Section 46 or an exporter has entered any export goods under Section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of Section 17 as it stood immediately before the date on which such assent is received.

26. Thus, as per Section 17 the importer or exporter has to self-assess duty and the proper officer can re-assess the duty. Both the self-assessment by the importer (or, as the case may be, the exporter) and the re-assessment by the proper officer fall under the definition of assessment as per Section 2(2). If the proper officer re-assesses the duty- unless the importer accepts the re-assessment in writing- he has to give a speaking order. **Thus, the importer (or exporter) and the proper officer are competent to classify the goods and assess the duty payable on them.**

27. After the duty is assessed on the imported goods and the duty is paid, the proper officer clears the goods for home consumption under Section 46. Once this action is completed, they cease to be imported goods, they cease to be dutiable goods and the importer ceases to be the importer. Sections 2(14), 2(25) and 2(26) which explain this legal position read as follows.

2. Definitions

(14) "**dutiable goods**" means any goods which are chargeable to duty and **on which duty has not been paid;**

(25) "**imported goods**" means any goods brought into India from a place outside India but **does not include goods which have been cleared for home consumption;**

(26) "**importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption**, includes any owner, beneficial owner or any person holding himself out to be the importer;

28. These processes of self-assessment by the importer and re- assessment by the proper officer come to an end once an order permitting the clearance of goods for home consumption is issued under Section 46. Thereafter, the goods cease to be imported goods or dutiable goods and no duty can be assessed. The only exception is when the goods are cleared for home consumption after provisional assessment in which case the assessment concludes after the assessment is finalized and an order is passed by the officer. Provisional assessment is not relevant to these appeals.

29. Assessment concludes the determination of the liability of the importer to pay duty and is similar to a decree under the Civil Procedure Code, 1908[29]. Section 2 (2) of CPC defines decree as "It means the formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." Assessment differs from decree inasmuch as the determination of what is due from the importer as duty is not

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29 CPC

made by a Court of law but the duty is determined through a quasi-judicial process by the 'proper officer' who re-assesses the duty or is self-determined by the importer. Just like a decree in Civil suits, there is a provision for appeal against assessment. It is appealable by both sides to the Commissioner (Appeals) under section 128 and also to further higher judicial fora. The Commissioner (Appeals) does not assess but either affirms, modifies or annuls the assessment order. In this process, the Commissioner (Appeals) may also decide the issue of classification of the goods. Similarly, on appeals, the Tribunal or Supreme Court either sustain or set aside the orders of the Commissioner (Appeals) and in the process they may also decide the classification.

30. The **Risk Management System**[30] of the **Indian Customs Electronic Data Interchange**[31] system clears many consignments of imported goods based on self-assessment by the importer without the proper officer ever getting an opportunity to examine the self- assessment and reassess the goods. Some such cases, the Bills of Entry are subject to Post Clearance Audit[32] while others are not even subjected to such audit. A question which arises is if a Bill of Entry which is only self-assessed by the importer without any re-assessment can it also be appealed against to the Commissioner (Appeals) under Section 128. The larger bench

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30 **RMS**
31 **EDI**
32 **PCA**

of the Supreme Court held in **ITC** in the affirmative. The relevant portion of this judgment is as follows:

> **42. It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals).** Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder:
>
> **"128. Appeals to [Commissioner (Appeals)].** — (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order :
>
> [Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]
>
> [(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :
>
> Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]
>
> (2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf.
>
> **43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression "Any person" is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self- assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in caseany person is aggrieved by it.** There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against 'any order' which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in *Escorts* (supra).

Demands under Section 28

31. While both the importer and Revenue can appeal to the Commissioner (Appeals) under Section 128 against an

assessment (including self-assessment) of a Bill of Entry, the proper officer has another option of issuing a Show Cause Notice under Section 28 to demand and recover duties not levied, not paid, short levied or short paid or erroneously refunded. In all these appeals, the SCNs proposed recovery of the duty alleged to be short paid under section 28.

32. Ms. Madhumita Singh, learned counsel for **Transsion** submitted that the demands themselves are not sustainable because unless the self-assessment itself is appealed against by the Revenue and modified by the Commissioner (Appeals), no demand can be sustained. She submitted that this was the laid down by the Supreme Court **ITC.** In support, she relied on the order of the Kolkata bench of this Tribunal in **Rajib Saha.**

33. The submissions of Ms. Singh are misplaced. The question before the Supreme Court in **ITC** was whether a refund under section 27 can be sanctioned if the goods were cleared on the basis of self-assessment without filing an appeal before Commissioner (Appeals) and not if a demand could be raised under section 28.

34. To understand this issue, it is profitable to understand the law laid down by successive judgments. In **Flock India,** the Assistant Collector had, after examining the classification lists filed by Flock India (as assessees were required to during the relevant period), rejected the classification claimed and passed an order changing the classification. This order of the Assistant Collector was appealable but the assessee had not

appealed to the Collector (Appeals). Instead, it had directly filed a refund application for the differential duty. Supreme Court held that refunds can be claimed if they flow from the assessment and not so as to modify the assessment. Therefore, unless the assessment order is appealed against and is modified, no refund can be sanctioned. The ratio of **Flock India** was followed by the Supreme Court in **Priya Blue** which was a Customs matter. It needs to be pointed out that unlike an SCN for demand of duty, sanction of refund is not an adjudication procedure. The officer sanctioning the refund cannot sit in judgment or modify the assessment by the assessing officer. Since every Bill of Entry is an assessment by itself, Bills of Entry can and are often appealed against.

35. Later, the Customs procedures changed and self-assessment and selective re-assessment by the officers were introduced initially as a practice. Later, in 2011 Section 17, which deals with assessment, itself was amended and the concept of self assessment and selective re-assessment were introduced in the Customs Act itself. The question which then arose was if the goods were cleared without any assessment by the proper officer, can a refund be claimed because there is no order or assessment by the proper officer to appeal against. In **Aman Medical Products Ltd. vs Commissioner**[33] and **Micromax Informatics Ltd. vs UOI**[34]**,** Delhi High Court held that in cases where there is no

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33 2010 (250) E.L.T. 30 (Del.)
34 2016 (342) E.L.T. A183 (Del.)

assessment or order by the proper officer, refunds can be claimed without any appeal to the Commissioner (Appeals). These and several other cases were appealed against before the Supreme Court by the Revenue. The larger bench of Supreme Court in **ITC Ltd.** finally decided that all assessments including self-assessments can be appealed against before the Commissioner (Appeals) and no refund can be sanctioned unless the assessment is modified.

36. Ms. Madhumita Singh has mis-construed this requirement for sanction of refund under section 27 as the requirement for issuing an SCN demanding duty under section 28. Neither **Flock India** nor **Priya Blue** nor **Aman Medical** nor **Micromax** ever dealt with the question of demand under section 28. Even the decision of the larger bench of Supreme Court in **ITC Ltd.** is also not regarding demands under section 28 but only regarding refunds under section 27. While assessment is like a decree, refund is like its execution. Needless to say that in an execution petition, the decree cannot be changed.

37. It has been made explicit by the Supreme Court in **Flock India that the assessment can be modified either through an appeal or under section 28.** The relevant portion of this judgment are as follows:

> **6.** We are unable to accept this submission. Just such a contention has been negatived by this Court in *Flock (India)'s* case (supra). Once an Order of Assessment is passed the duty would be payable as per that order. **Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim**

is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.

7. We also see no substance in the contention that provisions for a period of limitation indicates that a refund claim could be filed without filing an Appeal. Even under Rule 11 under the Excise Act the claim for refund had to be filed within a period of six months. *It was still held, in Flock (India)'s case (supra), that in the absence of an Appeal having been filed no refund claim could be made.*

8. The words "in pursuance of an Order of Assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of Assessment to claim refund. These words do not lead to the conclusion that without the Order of Assessment having been modified in Appeal or reviewed a claim for refund can be maintained.

9. In our view, the ratio in *Flock (India)'s* case (supra) fully applies. We, therefore, see no substance in the Review Petition. Accordingly, the Review Petition stands dismissed with no order as to costs.

(emphasis supplied)

38. This legal position was quoted with affirmation in **ITC Ltd.** The relevant portion of the judgment is as follows:

40. In *Priya Blue Industries Ltd.* v. *Commissioner of Customs (Preventive)* - 2004 (172) E.L.T. 145 (S.C.) = (2005) 10 SCC 433, the Court considered unamended provision of Section 27 of the Customs Act and a similar submission was raised which was rejected by this Court observing that so long as the order of assessment stands, the duty would be payable as per that order of assessment. This Court has observed thus :

> "6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India) case (2000) 6 SCC 650. *Once an order of assessment is passed the duty would be payable as per that order.* ***Unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal, that order stands.*** *So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding.* The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. *The officer considering the refund claim cannot also review an assessment order.*
>
> 7. We also see no substance in the contention that provision for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Section 11 under the Excise Act, the claim for

> refund had to be filed within a period of six months. *It was still held, in Flock (India)'s case (supra), that in the absence of an appeal having been filed no refund claim could be made.*
>
> 8. The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim the refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained."
>
> **(emphasis supplied)**

> **41.** It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise."

39. Thus, both **ITC Ltd.** and **Flock India** make it explicit that the assessments can be modified either through an appeal to the Commissioner (Appeals) or modified under section 28. The submission of the learned counsel Ms. Singh is quite the opposite of this law laid down by the Supreme Court and hence cannot be accepted. It would also be pertinent to mention that if the learned counsel's submissions are accepted, it will result in absurd consequences. If a notice under section 28 is issued, after considering the reply and hearing the noticee, the proper officer (commissioner or additional commissioner or joint commissioner or deputy commissioner or assistant commissioner) has to adjudicate the matter and pass an order. If the assessment is already appealed against before Commissioner (Appeals) and is either affirmed or annulled or modified, the assessment order merges with the order of the Commissioner (Appeals) which

must be honoured. The question of the proper officer again issuing a notice under section 28 on the same issue after the Commissioner (Appeals) had decided the matter does not arise because the proper officer cannot sit in judgment over the Commissioner (Appeals) decision.

40. The question which may arise is if both sides can appeal against any assessment including self assessment, what is the nature of this power of 'the proper officer' to issue a Show Cause Notice under section 28 to modify the assessment and demand duty short paid, not paid, etc. The nature of this power was examined by the Supreme Court in two different judgments. In **Commissioner of Customs (Preventive) vs Sayed Ali[35],** the question before the Supreme Court was if the Commissioner of Customs (Preventive) could exercise powers under section 28 and in that context, the Supreme Court examined the nature of the power under section 28 as follows:

> "16. In the present cases, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Imports) Mumbai, the same having been assessed and clearance for home consumption having been allowed by the proper officer on importers executing bond, undertaking the obligation of export, in our opinion, **the Collector of Customs (Preventive), not being a "proper officer" within the meaning of Section 2(34) of the Act, was not competent to issue show cause notice for re-assessment under Section 28 of the Act**. Nothing has been brought on record to show that the Collector of Customs (Preventive), who had issued the show cause notices was assigned the functions under Section 28 of the Act as "proper officer" either by the Board or the Collector/Commissioner of Customs."
>
> **(emphasis supplied)**

41. This was again examined by the Constitution bench of Supreme Court as the power to review the earlier assessment

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35 2011 (265) ELT 17(S.C.)

in **Canon India Pvt. Ltd. versus Commissioner of Customs[36].** The question before the Supreme Court was if the officers of DRI could issue a notice under section 28. In that context, the Supreme Court examined the nature of the power under this section. The relevant text of this judgment reads as follows:

> 12. **The nature of the power to recover the duty, notpaid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority**. **Indeed, it has been conferred by Section 28 and other related provisions.** The power has been so conferred specifically on —the proper officer- which must necessarily mean the proper officer who,in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.
>
> **(emphasis supplied)**

42. Thus, the power under section 28 is the power to review the assessment by the proper officer himself and modify it. Such power is not inherently available to any judicial or quasi-judicial authority as once the authority passes any order, he becomes *functus officio.* But where such power is conferred on an authority by law, he can exercise it. All the four judgments of the Supreme Court in **Flock India, ITC Ltd, Sayed Ali and Canon India** make it more than explicit the nature of the power under section 28 and that an assessment can be modified by resorting to section 28 or on an appeal.

43. We now consider the order of a bench of this Tribunal

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23 2021 (376) E.L.T. 3 (S.C.)

passed in **Rajib Saha** relied upon by the learned Counsel Ms. Madhumita Singh. The relevant portion of this order is reproduced below:

> 7. The Appellant cited the decision of the Hon'ble Supreme Court in the case **of I.T.C. Vs. Commissioner of Central Excise, New Delhi [2019(368) ELT 216 (SC) wherein it has been held that the department cannot demand differential duty without challenging the self-assessment made by the importer.** Accordingly, they contended that the impugned order is not sustainable.
> …..
>
> 10. We observe that the self-assessment of the Bills of Entry by the importer was not challenged by the department. The Hon'ble Supreme Court in the case of ITC Ltd, has held as under:
>
> > When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, **we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund**; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.
>
> 11. **We observe that the ratio of the above said decision is squarely applicable in this case. We find that the impugned order passed demanding differential duty without challenging the original assessment of the Bills of entry is not sustainable. Hence, the demand is not sustainable on this count also**.
>
> **(emphasis supplied)**

44. It is self-evident from the above text of the order that while the judgment of the Supreme Court in **ITC Ltd.** was with respect to sanction of refunds under section 27, the bench had instead, agreeing with the appellant in that case, applied it to the demands under section 28. It held that a notice under section 28 cannot be issued without first filing an appeal before the Commissioner (Appeals), which, being

contrary to the explicit legal position and the law laid down by the Supreme Court in **Flock India, ITC Limited, Sayed Ali and Canon India**, is, in our opinion, *per incuriam,* and hence cannot be a binding precedent on us in this case.

45. While Section 128 does not place any restriction, other than the limitation of time, for filing an appeal against assessment, issue of SCN under Section 28 is restricted by WHEN, WHO and WHY. The notice has to be issued within the normal period of limitation (or the extended period of limitation) by 'the proper officer' and only to recover duties not paid, short paid, not levied, short levied or erroneously refunded.

46. **To sum up, the power to assess duty lies with the importer and the proper officer. Classification, valuation and applying an exemption notification, are all part of the process of this assessment. Hence, the power to decide the classification lies with the importer during self- assessment, with the proper officer during re-assessment and while issuing an SCN under Section 28 and while adjudicating, with the Adjudicating Authority and with any appellate authority in the judicial hierarchy who deals with the appeals. Classification cannot be decided by anybody else (such as a MeITY in these cases) for two reasons. First, they do not have the authority to assess under Section 17 nor have any appellate powers to modify the assessment. Second, their orders, letters,**

notifications, etc. are executive actions performed at the discretion of the government and are not quasi-judicial or appealable decisions. Therefore, any HSN code indicated against any goods in any policy of MeITY or any other Ministry cannot determine the classification of the goods under the Customs Tariff. Of the three grounds on which the classification is proposed to be changed in these SCNs, the policy of MeITY as a ground cannot, therefore, be sustained.

Exemption notifications

47. Section 25 gives the Central Government the power to issue exemption notifications exempting goods either fully or partly, conditionally or unconditionally from duty. Issuing these notifications –which are in the nature of subordinate legislation- is a quasi-legislative function of the Government. Section 25 reads as follows.

> **"Section 25. Power to grant exemption from duty. –**
>
> (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.
>
> *******
>
> (4) Every notification issued under sub-section (1) or sub-section (2A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.
>
> *******"

48. The Central Government can issue exemption notifications under Section 25 if it is satisfied that it was necessary in public interest to do so. They are not meant to determine the classification of the goods in any assessment nor are they appealable but are meant to grant exemption from duty or modify or withdraw an exemption previously granted. However, the notifications can be conditional. For instance, in the notification no. 57/2017- Cus. dated 30.6.2017 (S.No.10) referred to and relied upon in the SCN to propose classification of the goods in dispute reads as follows.

> In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, **hereby exempts the goods of the description as specified in column (3) of the Table below, as the case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate as specified in the corresponding entry in column (4)** of the said Table subject to any of the conditions, as specified in the Annexure to this notification, the condition number of which is mentioned in the corresponding entry in column (5) of the said Table.
>
> TABLE

S. No.	Chapter or Heading or Sub-heading or tariff item	Description of goods	Stan-dard rate	Condition No.
(1)	(2)	(3)	(4)	(5)
10.	3920 99 99	All goods other than the following parts or sub-parts or accessories of cellular mobile phones, namely: (i) Battery cover (ii) Front cover (iii) Front cover (with Zinc Casting) (iv) Middle cover (v) Back Cover (vi) Main Lens (vii) Camera Lens	10%	-

49. As can be seen, only such goods which match the description in column 3 of the Table and which also fall under the Tariff heading at column no. 2 are exempted. If the goods do not match the description in column 3 and/or the tariff heading does not match column 2, the goods will not be exempted. Clearly, the notification does not say that the goods of the description in column 3 shall be classified in the heading in column 2. Evidently, goods of the description in column 3 may fall in the heading in column 2 in which case, the exemption applies or the goods may not fall under the heading in column 2 in which case, the exemption does not apply.

50. During assessment, the goods must be first classified and thereafter it must be examined if the notification applies or not and not the other way round. Issue or withdrawal or modification of a notification cannot determine the classification. The proposals in the SCNs to re-classify the goods relying on a notification are not correct. The reasoning in the SCNs is that since the front cover, middle cover and back cover will be exempted under the notification if they fall under CTH 39209999, it means all front cover, back cover and middle covers fall under CTH 39209999. This logic cannot be accepted because the issue of exemption notification is a quasi-legislative function of the Government (and is not appealable) and is not a quasi-judicial function of assessment, including classification, which is appealable. A plain reading of

the exemption notification also does not show that it intends to decide the classification of the goods under any heading. It only says that if the goods which match the description also fall under the tariff heading they will be exempt.

51. **Goods must be classified under the Schedule to the Customs Tariff Act, 1975. For this purpose, the Rules of Interpretation have been provided of which Rule 1 reads as follows:**

> "1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions."

This Rule is followed by Rules of Interpretation 2 to 6 none of which provide for classification either based on any exemption notification or on the basis of any heading mentioned in any policy of any Ministry of the Government. Therefore, the goods cannot be reclassified based on the exemption notification issued under Section 25 or on the basis of any policy of any Ministry. Notifications or policies can be issued, modified or withdrawn but the classification of the goods under the tariff will remain the same. Only if the tariff itself is amended can the classification change.

Confiscation of goods under Section 111(m) and consequent penalty under Section 112

52. The impugned orders hold that the imported goods were

liable for confiscation under Section 111(m) and consequently, imposed penalties on the appellants under Section 112. Section 111(m) and Section 112 read as follows:

> **Section 111. Confiscation of improperly imported goods,etc. –**
>
> The following goods brought from a place outside India shall beliable to confiscation: -
>
> (m) **any goods which do not correspond in respect of value or in any other particular with the entry made underthis Act** or in the case of baggage with the declaration made under Section 77in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment referred to in the proviso to sub-section (1) of Section 54;
>
> **SECTION 112. Penalty for improper importation ofgoods, 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 thousandrupees, whichever is the greater;
>
> (ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of Section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher.

53. According to the learned counsels for the appellants, even if the classification of the goods is decided against the appellants, it cannot be said that the goods were liable for confiscation under Section 111(m) because the appellants had self-assessed the goods classifying them under the Customs tariff heading, which, according to them, was correct. Since the goods were not liable to confiscation, no penalty could

have been imposed under Section 112. According to the learned special counsel and the learned authorised representative for the Revenue, classification of goods by the appellant importer is part of the entry made under Section 46 of the Customs Act, i.e., the Bill of Entry and since the goods had not matched this part of the Bills of Entry, the imported goods were squarely covered by and were liable to confiscation under Section 111(m).Since the goods were liable to confiscation, penalty can be imposed and was correctly imposed under Section 112.

54. We have already recorded that classification of the goods, their valuation and applying exemption notifications are all part of assessment of duty. This has to be done firstly by the importer (self-assessment) and can then be done by the officer (re-assessment) under Section 17. The remedy against wrong self- assessment is the re-assessment by the officer [or an appeal to Commissioner (Appeals)] and the remedy against the re-assessment is an appeal to the Commissioner (Appeals) which option is available to both sides or a notice under Section 28 (which is available only to the Revenue and only to recover duties not levied, not paid, short levied, short paid or erroneously refunded). However, there is no separate document or procedure through which the importer can self-assess the duty on the imported goods. All the elements necessary for assessing duty are filled in the Bill of Entry itself which is the entry of the goods made under Section 46. **Thus, the Bill of Entry has factual elements**

such as the nature of the goods, quality, quantity, weight, transaction value, country of origin, etc., which all need to be correctly declared and elements which are in the nature of the opinion of the importer such as classification of the goods, exemption notifications which apply, etc. While the facts are verifiable as correct or incorrect, opinions can differ. The importer may find that the goods are classifiable under one CTH while the officer re-assessing the goods may classify them under a different CTH. If appealed against, different views can be taken at different levels of judicial hierarchy from Commissioner (Appeals) all the way up to the Supreme Court. Similar will be the case with the availability of the benefit of exemption notifications.

55. Insofar as the value is concerned, it could be partly factual and partly based on the opinions. The transaction value of the goods, whether there was any other consideration for sale and if the buyer and seller were related are matters of fact and the importer is bound to truthfully declare these and assess duty accordingly. However, the proper officer is empowered to reject the transaction value under Rule 12 of the Customs Valuation Rules and re-determine the value of the imported goods based on the value of the contemporaneous imports of identical goods, similar goods, etc., following Valuation Rules 4 to 9. It needs to be pointed out that the power to reject the transaction value under Rule 12 vests in the proper officer and not in the

importer. The importer will also not have access to the values of contemporaneous imports of identical or similar goods by others. Therefore, the only way an importer can self-assess the duty on the imported goods is based on his own transaction value and any additional consideration which it may be paying.

56. It is impossible for the importer to predict if the proper officer would re-classify the goods and if the proper officer would, after rejecting the transaction value, re-determine the value based on contemporaneous imports or through other methods or what value the officer will fix. Nothing in the law requires an importer to anticipate what classification the proper officer would find proper for the goods and classify the goods or anticipate if the proper officer would reject the transaction value and anticipate what value he would determine and assess duty accordingly.

57. If Section 111(m) is read to mean that goods can be confiscated if the classification of the goods and the exemption notifications claimed by the importer self-assessing the duty under Section 17 and indicated in the Bill of Entry do not match the classification of the goods or the exemption notifications which the proper officer may apply during re-assessment or later, it would result in absurd results. The importer cannot predict the mind of the proper officer and self-assess duty so as to conform to it. Insofar as the valuation is concerned, the importer is required to truthfully declare the transaction value, any additional

consideration and relationship with the overseas seller. He is not required to predict if the proper officer will reject the transaction value under Rule 12 and if so, what value he will re-determine. *Lex non-cogit impossibilia* –the law does not compel one to do the impossible. If the classification and exemption notifications in the Bill of Entry do not match the views which the proper officer may during re-assessment or an audit party may take or later the adjudicating authority may take in any other proceedings, goods cannot be confiscated under Section 111(m). The case of the Revenue in this appeal is that the classification of the goods by the importers in self assessment was not correct. Even if the classification was not correct, it does not render them liable to confiscation under Section 111(m). Similarly, there could be cases where, according to the Revenue, the exemption notification claimed during self assessment will not be available to the imported goods. The importer self-assessing the goods must apply his mind when classifying the goods and not predict the mind of the proper officer. Classification of the goods by the importer, even if it is not in conformity with the re-assessment by the proper officer or even if it is held to be not correct in any appellate proceedings does not render the goods liable to confiscation under Section 111(m).

58. Consequently, no penalty can be imposed under Section 112 on the appellants for the alleged wrong classification. The appellants cannot be penalized for holding a different view than the proper officer.

Classification of goods

59. We now examine the question of classification of the goods, viz., front cover, middle cover, battery cover, front cover housing, middle cover housing and rear cover housing back cover of mobile phones. Of the three grounds on which these goods were re-classified in the impugned order, we have already found two grounds cannot determine the classification; these are the exemption notification issued by the Central Government and the policy notified by the MeITY. We proceed to decide the classification based on the Customs Tariff. The Rules of Interpretation of this tariff, in a nutshell are as follows:

> Rule 1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, **classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes** and, provided such headings or Notes do not otherwise require, according to the following provisions:
>
> **Rules 2 (a) which deals with incomplete or unassessmbled** or disassembled articles and **2 (b) which deals with mixtures** of substances are not relevant to this case.
>
> Rule 3. When by application of rule 2(b) or for any other reason, goods are, prima facie, **classifiable under two or more headings, classification shall be effected as follows**:
>
> (a) The heading which provides the **most specific description shall be preferred to headings providing a more general description**. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if oneof them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or madeup of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if
>
> they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to (a) or (b), they **shall be classified under the heading which occurs last**

in numerical order among those which equally merit consideration.

Rule 4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

Rule 5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitablefor long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provisions does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub headings and any related sub headings Notes and, mutatis mutandis, to the above rules, on the understanding that only sub headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

60. The two competing entries in the Tariff are CTH 85177090 (as claimed by the appellant) and CTH 39209999(as held in the impugned order). The relevant chapter notes are as follows:

"Chapter 39

2. This Chapter does not cover:
….

(s) articles of Section XVI (machines and mechanical or electrical appliances);

10. In headings 3920 and 3921, the expression —plates, sheets, film foil and strip applies only to plates, sheets, film, foil and strip (other than those of Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use)."

61. Goods should be classified under the tariff should be as per the headings and sub-headings and relevant section notes and

chapter notes. Chapter note 2 (s) to chapter 39 clearly excludes goods falling under Section XVI under which chapter 85 also falls and therefore, if the goods are classifiable under chapter 85 as claimed by the appellant, they cannot fall under chapter 39 as held in the impugned order. On the other hand, Chapter note 10 to chapter 39 includes within the ambit of heading 3920 plates, sheets, film foil and strips and blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (**even if when so cut they become articles ready for use**).

62. Reading these two notes together, goods falling under 3920 will continue to be classifiable under this heading even if they become articles ready for use and therefore, they cannot fall under chapter 85 (section XVI). Therefore, they do not get excluded by virtue of note 2(s) from Chapter 39. This leads us to the next question whether the mobile cases fall under 3920. According to the Revenue, they do because they are made of plastic and are cut into geometric shapes and are printed or surface-worked but not worked further. According to the appellants, these articles were further worked and therefore, they do not fall under 3920. They are manufactured by **extrusion** (two layers of Polymethyl Methacrylate (PMM) and Polycarbonate (PC) are layered to form a sheet of thickness of 0.64 mm), **printed,** a layer is **Physical Vapor Deposited** (to give the desired finish to the back cover), again **printed, hard coated, thermoformed** into the desired shape and then milled through CNC to cut at the right places to insert the components of the mobile phone as required. These processes,

including the lamination and CNC milling, according tothe appellants clearly take their goods out of the ambit of note 10 of Chapter 39. Further, according to the appellants, the middle cover is laminated with zinc to dissipate heat and the laminations add strength to the plastic. Since these do not fall under section note 10, they fall under chapter 85 and therefore, by virtue of note 2(s) are clearly excluded from Chapter 39.

63. Learned special counsel and learned authorized representative for the Revenue did not dispute theprocess of manufacture of these mobile cases described by the learned counsels for the appellants. They submitted that they are made of plastic and the sub-components are embedded at proper places in the front cover and back cover. The purpose of the back cover is to reduce the amount of dust on battery terminals and it is also made of plastic. The middle cover fixes the inner components and protects the battery from moisture and dust and it is also made of plastic, therefore, the impugned orders were correct in holding that they were classifiable under CTH 39209999. According to them, these three covers do not contribute to the functionality of the mobile per-se and, therefore, do not deserve to be classified as parts of the mobile phones and should be classified under Chapter 39. According to them, every part of a machine does not merit being classified along with the machine or as its part under Chapter 85 and some parts of machine can also be classified under Chapter 39. They rely on **Ipea Paramount Pvt. Ltd., P.R. Packagings Pvt. Ltd., Hariram Govindram, Karnataka Powers Corporation Ltd., General Mills India Ltd., Atul Kaushik, Towa Ribbons Pvt. Ltd.**

and **Speedway Rubber Co.** in support of this submission.

64. On the question of whether the specific entry should prevail over the general entry, learned special counsel and learned authorized representative appearing for the Revenue submitted that since the impugned goods do not merit classification under 8517 at all, therefore, the question of general or specific entry does not arise.

65. After considering the submissions on both sides on the question of classification, we find that the front cover, middle cover battery cover, back cover, front cover housing, middle cover housing and back cover housing of mobile phones are undisputedly, made of plastic and are parts of mobile phones and are not articles of general use. The case of the Revenue is that even if they become articles ready for use, if they are manufactured from plates, sheets, film foil or strips, whether or not they are printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked they should be classified under CTH 3920 in view of Chapter note 2(s) to Chapter 39. Since they are made of sheets of plastic, printed and surface worked and not further worked, they should be classified under 3920. The case of the appellants is that the manufacture of these goods involves extrusion, printing, physical vapor deposition, second set of printing, hard coating, thermoforming and CNC milling and therefore, further work has clearly been done on the plastic sheets after cutting and therefore, they do not fall under Chapter note 2(s) to Chapter 39. The manufacturing process of described by the appellants is not disputed by the Revenue and therefore, considering this manufacturing

process, we proceed to decide if these fall under 3920 by virtue of Chapter note 2(s).

66. We find that CTH 3920 covers —other plates, sheets, film, foil and strip of plastics, not cellular and not re-imposed, laminated, supported a similarly by with other materials. The first step of manufacture - extrusion, involves pressing together two sheets of plastic- Polymethyl Methacrylate (PMM) and Polycarbonate (PC) into a single sheet of plastic. What emerges after this process is still a sheet of plastic. The second and fourth steps are printing which also make no difference and Chapter note 2(s) would still apply. The third step vapor deposition, is a process of depositing a thin layer of material to give the covers the glossy finish. According to the appellants, this is similar to lamination. Lamination takes the goods out of the scope of CTH 3920 because it covers only such goods which are — "not re- imposed, laminated, supported similarly by with other materials". According to the appellants, the middle covers also have a layer of zinc to help dissipate the heat. The fifth step of thermoforming changes the shape of the article from a plain sheet of plastic to one with the required shape and dimensions including the rounded edges. Thermoforming is a common industrial process which involves heating of a plain plastic sheet and moulding it into articles –such as inner panels of a refrigerators, panels in a car or disposable food trays. In our considered view, this is a process beyond mere cutting and surface working and this process also takes it out of the purview of chapter note 2(s) to Chapter 39. The sixth and the last process is CNC milling to cut holes in these covers to install various components. CNC or

Computerised numerically controlled machines, as is well known, are modern, automated versions of lathe machines which are used to cutting, grinding, etc. to work on a piece of material to convert it into desired articles. In our considered view, CNC milling also goes beyond mere cutting and surface processing of the sheet.

67. Thus, applying the first Rule of Interpretation, they cannot be classified under CTH 3920- the vapor deposition (lamination) takes them out of the description of CTH 3920 and thermoforming and CNC milling, being processes beyond printing and surface working take them out of the scope of chapter note 2(s) . We also find that a specificentry (parts of mobile phones) prevails over a general entry (articles of plastic) as per Rule 3(a) of Interpretation and the later entry (Chapter 85) in the tariff prevails over the earlier entry (Chapter 39) as per Rule 3(c). However, it is a well settled legal principle that the Interpretative Rules must be applied sequentially. Once Rule 1 decides the classification, it is not evennecessary to go through the other Rules of Interpretation such asRule 3(a) and 3(c).

68. The case laws relied upon by the Revenue do not carry its case any further as they were on different questions of law and facts. **Ipea** decision was in the peculiar circumstances of the case. The CBEC had issued a Circular which was in favour of the assessee and it was binding on the Revenue. Therefore, theclassification was decided in favour of the assessee by the Tribunal and this decision was upheld by the Supreme Court. Relevant portion of the Tribunal‘s order is as follows:

> 5. …..The learned Advocate has placed heavy reliance on Board‘s Circular No. 6/86-CX 4, dated 25-9-1986, and in

> our view rightly, wherein the Board has considered the classification of the parts and accessories of refrigerating and air-conditioning machinery and appliances. It has been clarified therein that the parts and accessories of refrigerators for the treatment of materials by a process involving a change of temperature, as mentioned in Annexure A to the Circulars, are to be classified under Heading 84.15, 84.18 or 84.19 of the Tariff. It is not the case of the Revenue that the impugned goods find mention in the said Annexure-A. In the Circular, a very large number of parts and accessories of refrigerators etc. have been mentioned in Annexure-B but these are to be classified in their respective Headings of the Tariff and not under Heading 84.15, 84.18 or 84.19 of the Tariff. It was observed by the Tribunal in the case of *P.R. Packaging Pvt. Ltd.* that –A perusal of Annexure-B reveals that the parts mentioned therein are also suitable for use principally with refrigerators and even then these are not to be classified with Refrigerators under Heading 84.18. It goes to show that all parts of refrigerating machines are not automatically to be classified under Chapter 84. The Revenue has also not contended nor brought any evidence on record that the impugned goods are for the treatment of materials by a process involving a change of temperature. Accordingly, we hold that the impugned goods are classifiable under respective Headings in Chapters 39 and 40 of the Central Excise Tariff. We, thus allow the Appeal.

69. Similarly, the decision in the case of **RR Packaging** was based on Trade Notice No. 67/86 dated 30-9-1986 issued by the Bombay Collectorate which was in favour of the assessee and was binding on the officers. The question in **Hariram Govindram** was related to classification of the outer covers of the cassettes. Relying on Board‘s order dated 29- 7-1994 issued under Section 37B of the then Central Excises and Salt Act, 1944, the classification was decided in favour of the assessee.

70. In **Karnataka Power Corporation,** the dispute was whether imported parts of Hydro Electric Generator i.e., ‘Epoxy insulated single turn half coils with accessories and Epoxy insulated single turn half coils wave stator windings etc.‘ were classifiable under 8503 or under 8544. Applying Section note 2 (b) to Section XVI, it was held that the goods were suitable solelyor principally for the generator and hence classified along with them under 8503.

This case is on a different issue- whether the parts are to be classified as parts of mobile phones or as articles of plastic under Chapter 39.

71. In **General Mills India,** the dispute was regarding the classification of granola bars and the classification was decided in favour of the importer. In **Atul Kaushik** the question was about addition of certain elements in the valuation.

72. In **Towa Ribbons,** the question was about classification of typewriter ribbons and if the surface working of the strips of plastic including coating the surface will take them out of the purview of note 10 to Chapter 39 and the Tribunal held that surface working does not take the goods out of the ambit of note 10 to Chapter 39 and they continue to fall under 39.20 asasserted by the Revenue.

73. In **Speedway,** the question before the Supreme Court was the classification of procured treads manufactured by the appellant. Finding that the note 9 of Chapter 40 made a distinction between ‘surface working‘ and ‘further working‘, and that specific entry should prevail over general entry, it was held that the impugned goods in that case would be classified under sub-heading 4008.21 and not under sub-heading 4016.99 asclaimed by the Department.

74. **For all these reasons, we find that rejection of the appellants’ classification of the front cover, middle cover, battery cover, back cover, front cover housing, middle cover housing and back cover housing of mobile phones under CTH 85177090 in the impugned orders and their re-classification under CTH 39209999 cannot be sustained and needs to be**

set aside.

75. As far as the classification of lenses is concerned, we find no reason to even consider them as being classifiable under 39209999 as plastic sheets, blocks, etc. because, these are not in geometric shapes at all and therefore, cannot be classified under CTH 3920. In the case of **Vivo,** the appellant had even submitted test reports showing that the lenses that it had imported were made of crystal and not plastic. The learned Commissioner, however, dismissed the test report and classified them as articles of plastic under CTH 3920 without giving any reasons for doubting the assertion of the appellant that they were made of crystal or the test report produced by the appellant. No samples were drawn or tested by the Customs to demonstrate that they were made of plastic. In the absence of any evidence from the Revenue, the appellant importer's declaration regarding the nature of the goods and the test reports that it had submitted must be accepted. If Revenue had a doubt regarding the declaration or the reports, it is for the Revenue to produce evidence in support and there is none whatsoever in this case. **Thus, we find no justification whatsoever to classify lenses of mobile phones under 39209999 in the impugned orders regardless of which material they are made of. The impugned orders insofar as they relate to classification of lenses also need to be set aside.**

76. To sum up:

a. Classification of the goods is a part of assessment and the importer, the proper officer and appellate

authorities alone are competent to decide it.

b. The policy of the MeiTY, which is in the nature of an executive policy decision of that Ministry cannot determine the classification of goods under the Customs Act firstly,because the authority making the policy is not empowered under Section 17 and secondly because the policy is not a quasi-judicial, appealable decision but is a policy decision while classification of goods is a part of assessment and is a quasi-judicial and appealable function.

c. The exemption notification issued by the Government under Section 25 exempts goods and does not determine the classification. If the description of the goods and also the CTH match with the notification, its benefit is available and not otherwise. Therefore, an exemption notification cannot determine the classification but it must be applied after classifying the goods.

d. Based on the Customs tariff and the nature of the goods, we determine the classification of the goods in favour of the appellants and against the Revenue.

e. The importer assessees have no obligation under the law to anticipate under which heading the proper officer may classify the goods and match their self-assessment with it.

f. Classification of the goods in the Bill of Entry by the importer is essentially a part of the self-assessment under Section 17 which, even if found incorrect, does

not attract confiscation of the goods under Section 111(m) or the consequential penalty under Section 112.

g. The classification of none of the goods in any of the appeals under CTH 39209999 as held by the Commissioner in the impugned orders can be sustained.

77. Thus, all the seven appeals are allowed and the impugned orders are set aside with consequential relief(s) to the appellants.

[Order pronounced on **09/02/2024**]

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. IV

CUSTOMS APPEAL NO. 50484 OF 2021

[Arising out of the Order-in-Original No. 62/2020-21/C.J./Principal Commissioner dated 23/02/2021 passed by Principal Commissioner of Customs, Air Cargo Complex (Import), New Delhi.]

M/s Samsung India Electronics Pvt. Ltd. **...Appellant**
B-1, Sector 81, Phase – II,
Noida, Uttar Pradesh – 201 305.

Versus

Principal Commissioner of Customs, **...Respondent**
Air Cargo Complex (Import),
New Customs House, Near I.G.I. Airport,
New Delhi – 110 037.

APPEARANCE:

Shri B.L. Narasimhan, Ms. Nupur Maheshwari, Shri Siddharth Indrajit, Advocates and Shri Harshdeep Khurana, Chartered Accountant for the appellant.
Shri Mihir Ranjan, Special Counsel for the Department

CORAM:
HON'BLE DR. MS. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51665/2023

DATE OF HEARING : 06.07.2023
DATE OF DECISION : 20.12.2023

P.V. SUBBA RAO

M/s Samsung India Electronics Pvt. Ltd.[1] filed this appeal to assail the order-in-original dated 23.02.2021 passed by the Principal Commissioner of Customs, Air Cargo Complex, New Delhi, whereby he confirmed the demand of differential duty of

[1] appellant

Rs. 62,44,28,858/- on the appellant and imposed penalty of Rs. 6,00,00,000/- under Section 112 (a) (ii) of the Customs Act, 1962[2] for the period 06.02.2018 to 21.12.2019. The appellant imported various parts and sub-parts or accessories of cellular mobile phones, self-assessed and paid duty and cleared them. During post clearance audit, it appeared to the Department that the back covers, front covers and middle covers of the cellular phones, which were classified by the appellant under CTH 85177090 deserve to be classified under CTH 39209999 instead and accordingly the differential duty needs to be paid by the appellant. Audit issued a consultative letter dated 01.02.2020 but the issue could not be resolved through consultations. Thereafter, a show cause notice[3] dated 19.02.2020 was issued by the Principal Commissioner of Customs, Air Cargo Complex, New Delhi proposing to reclassify the front covers, middle covers and back covers of the cellular phones under 39209999 and recover the differential duty along with interest. It was also proposed to confiscate the goods under Section 111 (m) of the Customs Act, 1962 and impose penalty under Section 112 (a) (ii) of the Customs Act, 1962.

2. The three grounds on which the SCN proposed to reclassify the goods are as follows :-

> (i) the goods 'Battery cover, Front cover, Middle cover, Back Cover and Camera Lens' (which are part/sub-part or accessories of cellular mobile phones) are classifiable under CTH 39209999 and attract BCD @ 15% in terms of S. No. 10 of notification No. 57/2017-Cus dated 30.06.2017, as amended ;

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[2] Act
[3] SCN

(ii) Chapter note 10 under chapter 39 of CTA mentions that in heading 3920 and 3921, 'the expression plates, sheets, film, foil and strip applies only to plates, sheets, film, foil and strip (other than those of chapter 54) and to blocks of regular geometrical shape, whether or not printed or otherwise surface worked uncut or cut into regular rectangles but not further worked even if when cut they became articles for ready use,

(iii) As per the policy notified by the Ministry of electronics and information technology (MeITY) by Notification F. No. 33 (5) 2017 – IPHW dated 01.08.2018, the front covers, middle covers and back covers are classifiable under HS Code 39209999.

3. The ground for proposing confiscation of the imported goods is that Section 111 of the Act provides for confiscation of various categories of goods. Clause (m) of this section provides for confiscation of "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 refer to in the proviso to sub-section (i) of Section 54". According to the SCN, the appellant had misclassified the goods to evade customs duty which is recoverable from them under Section 28 (1) (a) and the imported goods were liable for confiscation because the appellant had mis-declared their classification.

4. According to the SCN, since the appellant had misclassified the goods which rendered them liable to confiscation the appellant thereby rendered itself to penalty under Section 112 (a) (ii).

5. The appellant contested the proposals to reclassify the goods, recover the differential duty, confiscate the imported goods and impose penalty. Thereafter, the Principal Commissioner passed the impugned order the operative part of which is as follows :-

> "(i) I reject the claim seeking classification of the imported goods namely battery cover, front cover, back cover, under CTH 85177090 and order that the goods, being articles of plastic, be classified under CTH 39209999 in respect of the Bills of Entry filed/presented by M/s Samsung India Electronics Pvt. Ltd. during the period
>
> (ii) I hereby confirm the demand of Customs duty to the tune of Rs. 62,44,28,858/- (Rs. Sixty Two Crore forty Four Lakh Twenty Eight Thousand Eight Hundred and fifty Eight only) on the impugned goods imported by M/s Samsung India Electronics Pvt. Ltd. against the Bills of Entry as mentioned in Annexure – A to D to the SCN under Section 28 (1) of the Customs Act, 1962.
>
> (iii) I drop the demand of Rs. 24,15,22,593/- (Rs. Twenty Four Crore Fifteen Lakhs Twenty Two Thousand five Ninety Three only) in terms of the findings at para 11.10 and 11.11.1 above.
>
> (iv) I hold that interest under Section 28AA of the Customs Act, 1962 is payable in this case by M/s Samsung India Electronics Pvt. Ltd. on the demand as confirmed at (ii) above from the due date till the duty is paid in accordance with law.
>
> (v) I hold that the goods imported and already cleared by M/s Samsung India Electronics Pvt. Ltd. against the Bills of Entry as listed in Annexure – A, C & D to the show cause notice totally valued at Rs. 367,31,62,198/- (Rs. Three Hundred Sixty Seven Crore Thirty One Lakh Sixty Two Thousand One Hundred and Ninety Eight only) are liable for confiscation under Section 111 (m) of the Customs Act, 1962. However, as the goods have already been cleared for home consumption and not available for confiscation, I refrain from imposing redemption fine under the provisions of Section 125 of the Customs Act, 1962.
>
> (vi) I impose a penalty of Rs. 6,00,00,000/- (Rs. Six crore only) upon M/s Samsung India Electronics Pvt. Ltd. under Section 112 (a) (ii) of the Customs Act, 1962".

6. Aggrieved, the appellant filed this appeal. The following submissions were made on behalf of the appellant:-

> (i) They imported front covers, middle covers and back covers of cellular phones which house various components of the phone and also provide for

dissipation of the heat. The details of these types of covers are as follows :-

"**Back Cover"**: This help in providing safety to the battery and internal components. They provide ingress protection, structural support and save internal PCB, sub-components and battery from dust, moisture and other foreign particles. When PCBs or battery is exposed to such particles, it gets damaged resulting in malfunctioning of mobile phone. In some models, they are also layered with zinc, aluminium and other metallic alloys for heat dissipation. It may also have rubber gasket and glass for sealing the camera lens.

Front Cover: This is the basic structure wherein the camera, buttons, infrared sensors, amongst others are embedded.

Middle Cover: It is layered with zinc and provides housing and protection to sub-parts. The layering helps in heat dissipation.

(ii) These phone covers, in general, undergo similar process of manufacturing before import by the Appellant. The processes are as under:

a. **Extrusion**: Two layers of Polymethyl Methacrylate (PMM) and Polycarbonate (PC) are layered using extrusion machine to form a sheet of thickness of 0.64 mm.

b. **Printing**: In this step, various forms of printing take place on the sheet. This includes Logo Silk Print, Offset Print, and Nano Pattern Imprinting.

c. **Physical Vapor Disposition (PVD)** : This step takes place in a high vacuum chamber to form a thin film coating. This is akin to lamination to give desired finish to the back cover.

d. **Second set of Printing**: In this stage, the resultant sheet undergoes two kinds of color silk print and dyne silk print. This is dependent upon specific models.

e. **Hard coating**: In this step, the sheet is layered, levelled and UV dried.

f. **Thermoforming**: Thereafter, the resultant sheets undergo thermoforming process, wherein by a process of vacuum and air pressure, the sheet is pulled over a solid mold to obtain desired shape. This gives grooves and ground edges to the uncut phone cover to enable such a cover to be clipped to the specific phone for which it is made so that the phone is protected from dust and moisture.

g. **CNC Milling**: In this step, specific cuts, speaker grills, and other compartments, are milled in the cover, thereby giving it final shape.

(iii) These three covers have been correctly classified under CTH 85177090 as these are parts of mobile phones and not merely articles of plastic. Hence, there was no misclassification at all as held in the impugned order.

CTH 3920 covers "other plates, sheets, film, foil and strip of plastics, not cellular and not re-imposed, laminated, supported a similarly by with other materials". Chapter note 10 to Chapter 39 reads as follows :-

> "10. In headings 3920 and 3921, the expression "plates, sheets, film foil and strips" applies only to plates, sheets, film, foil and strip (other than those of Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use)."

(iv) It is evident from this chapter note that for any goods fall under 3920 must be plastic sheets or plates etc. of regular geometric shades should not be reinforced or laminated with other materials. In this case the middle cover is laminated with zinc and hence clearly gets excluded from CTH 3920. The use of these metals not only enhanced the strength of the plastic, but also helps in dissipations of the heat.

(v) Further, for the goods to fall under 3920 they should not be further worked. The phone covers in their case have ground edges, thermo framed with grooms, drilled and CNC milled and, therefore, they do not qualify as goods "not further worked". These submissions were made before the Commissioner, but were ignored.

(vi) The phone covers were correctly classifiable under CTH 85177090 in view of section note (ii) to Section XVI which provides for classification of the parts of the goods falling under chapter 85. Part is defined as one without which a machine is not operational or does not suitably discharge its function. Thus the parts can were firm either for electronic function or a mechanical one. In this case, the front covers, middle covers and back covers of cellular phones performed mechanical function as well as provide for heat dissipations. The covers also protect the parts from dust, moisture etc. The correctly merit classification under which reads as follows :-

Chapter 8517	**Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528**

	- Telephone sets, including telephones for cellular networks or for other wireless networks :
8517 11	--
8517 11 10	--
8517 11 90	--
8517 12	--
8517 12 10	--
8517 12 90	--
8517 18	--
8517 18 10	--
8517 18 90	--
8517 61 00	--
8517 62	--
8517 62 10	--
8517 62 20	--
8517 62 30	--
8517 62 40	--
8517 62 50	--
8517 62 60	--
8517 62 70	--
8517 62 90	--
8517 69	--
8517 69 10	--
8517 69 20	--
8517 69 30	--
8517 69 40	--
8517 69 50	--
8517 69 60	--
8517 69 70	--
8517 69 90	--
8517 70	- Parts
8517 70 10	-- Populated, loaded or stuffed printed circuit boards
8517 70 90	-- Others

(vii) Reliance is also placed on WCO Harmony System Company Session May 2022 which classified cover glass for the manufacture of a mobile phone, touch screen under 8517.70. Although WCS classification is not binding but it has highly persuasive value and may be considered.

(viii) Since, the Department has proposed to reclassified the goods the burden is on it to prove that the goods not fall under CTH 8517 and fall under CTH 39209999 and this burden has not been discharged by the Department.

7. The appellant has been importing these products for a long time and has been classifying them under 85177090 and the Department has been accepting this classification. In the case of **Bhagwati Products**, the Principal Commissioner of Customs, Chennai accepted the classification of similar products under

85177090. The only difference between the case of Bhagwati Products they were described as front housing, back housing, etc. and in this case the appellant called them front cover, back cover etc., but they are essentially the same. This order of Principal Commissioner of Customs, Chennai in Bhagwati Products numbered in order-in-original No. 24/2020-AIR dated 13.01.2020 has been accepted by the Department as confirmed by the Assistant Commissioner of Customs letter dated 25.07.2023.Therefore, in the appellant's case the Department should not be permitted to take a different stand. For this reason also, the demand is not sustainable and needs to be set aside. After the hearing, the learned Counsel for the appellant made some additional written submissions as follows :-

> Notification No. 57/2017-CUS dated 30.06.2017 and the Meity notification dated 14.09.2017 cannot form the basis of classification of the goods. Classification has to be only based on the customs tariff readwith the general interpretative rules. Reliance is placed on **Commissioner of Central Excise, Bombay versus Oswal Petro Chemicals Ltd.**[4] which was affirmed by the Supreme Court[5].

8. On behalf of the Department, learned Special Counsel made the following submissions:-

(i) The phone covers are correctly classifiable under CTH 39209999 as held by the Principal Commissioner in the impugned order. They are made of plastic and the sub-components are embedded at proper places in the front cover and back cover. The purpose of the back cover is to reduce the amount of dust on battery terminals and it is also made of plastic. The middle cover fixes the inner components and protects the battery from moisture and dust and it is also made of plastic, therefore, the impugned order was

[4] **2000 (126) E.L.T. 1232 (Tri.)**
[5] **2007 (127) E.L.T. 857 (S.C.)**

correct in holding that they are classifiable under CTH 39209999. These three covers do not contribute to the functionality of the mobile per-se and, therefore, do not deserve to be classified as parts of the mobile phones and should be classified under Chapter 39. He placed reliance on the following case laws :-

Ipea Paramount Pvt. Ltd. versus Commissioner of C. Ex., New Delhi[6]

Commissioner versus Ilpea Paramount Pvt. Ltd.[7]

P.R. Packagings Pvt. Ltd. versus Commissioner of C. Ex., New Delhi – II[8]

Hariram Govindram versus Collector of Central Excise, Bombay[9]

Karnataka Power Corporation Ltd. versus Commr. of Cus., Chennai[10]

General Mills India Ltd. versus Commr. of Cus. (Import), JNCH, Nhava Sheva[11]

Atul Kaushik versus Commissioner of Customs (Export), New Delhi[12]

Towa Ribbons Pvt. Ltd. versus Collector of Customs[13]

Speedway Rubber Co. versus Commissioner of Central Excise, Chandigarh[14]

(ii) Each part of a machine does not merit being classified along with the machine or as its part under Chapter 85. As has been held in the above cases some parts or machine can also be classified under Chapter 39.

(iii) On the question of whether the specific entry should prevail over the general entry, since the impugned goods do not merit classification under 8517 at all and, therefore, the question of general or specific entry does not arise.

(iv) The products in this case and in of Bhagwati Products Ltd, in which the Principal Commissioner of Customs, Chennai held

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[6] **2002 (143) E.L.T. 632 (Tri. – Del.)**
[7] **2008 (228) E.L.T. A136 (S.C.)**
[8] **2002 (139) E.L.T. 495 (Tri. – Del.)**
[9] **1997 (94) E.L.T. 574 (Tribunal)**
[10] **2016 (337) E.L.T. 104 (Tri. – Chennai)**
[11] **2019 (368) E.L.T. 705 (Tri. – Mumbai)**
[12] **2015 (330) E.L.T. 417 (Tri. – Del.)**
[13] **1993 (66) E.L.T. 320 (Tri. – Del.)**
[14] **2002 (143) E.L.T. 8 (S.C.)**

that the front housing and part housing of a mobile phone deserve to be classified under CTH 85177090 are different. In this case, the appellant itself has declared them as front cover, middle cover and back cover not as housing and, therefore, the ratio does not apply.

(v) As far as the Notification No. 52/2017-CUS dated 30.06.2017, and the Meity Notification dated 01.08.2018 is concerned, these were relied upon only as supporting evidence and the goods, in question, have always been seen by the Government as filing under Chapter 39 and not as filing under chapter 85.

(vi) The Department is not estopped from raising the classification in a subsequent import even if the classification was wrongly accepted during the prior imports. He relies on the follows case laws :-

General Mills India Ltd. versus Commissioner of Customs (Import) JNCH, Nhava Sheva[15]

Fitrite Packers versus Commissioner of Central Excise, Mumbai – IV[16]

Assistant Commissioner of Central Excise Tiruchirapally versus Indian Hume Pipe Co. Ltd.[17]

(vii) The Department has duly discharged its responsibility in changing the classification and in confirming demands differential duty along with interest. The appellant mis-declared the classification of the goods and, therefore, they are liable for confiscation under Section 111 (m). Consequently, the penalty under Section 112 (a) has been correctly imposed upon the appellant.

(viii) The appeal may be dismissed.

9. We have gone through the records of the case and considered the submissions from both sides.

Findings

[15] **2019 (368) E.L.T. 705 (Tri. – Mumbai)**
[16] **2006 (203) E.L.T. 452 (tri. – Mum.)**
[17] **2009 (238) E.L.T. 230 (Mad.)**

10. We have perused the records of the case and considered the submissions made by both sides. The following inter-related issues arise for determination:

a) Are the front cover, middle cover and back cover of cellular mobile phones imported by the appellant classifiable under CTH 85177090 (as claimed by the appellant) or under CTH 39209999(as held in the impugned order)?

b) Can an exemption notification issued by the Government under Section 25 of the Customs Act determine the classification of the goods?

c) Can a scheme notified by the MeiTY determine the classification of the goods?

d) Is the differential duty recoverable from the appellant?

e) Is interest recoverable from the appellant?

f) Were the imported goods liable to confiscation under Section 111(m) (although they were not actually confiscated) because the classification of the imported goods in the Bill of Entry is, according to the Revenue, incorrect? Consequently, was the penalty under Section 112 imposed correctly?

11. Before examining the question of classification, we examine the above questions (b) to (f) above. For this purpose, it is necessary to examine the nature of the Customs duty and the legal provisions to determine and charge it, the role of classification and who can decide the classification. The charging

section, i.e., the section which empowers the Government to levy and collect duties of customs is Section 12 which reads as follows:

> **Section 12. Dutiable goods.** -
>
> (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.
> (2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

12. Thus, the taxable event, i.e., that event which triggers levy of customs duty is the act of importation (bringing into India from a place outside India) or exportation (taking to a place outside India from India) of goods. The levy is on the goods and not on any person and that levy will apply even if the goods belong to the Government.

Assessment

13. Customs duty is levied at such rates as are specified in the Schedules to the Customs Tariff Act, 1975. These rates can be based on quantity (specific rate of duty) or value (ad valorem rate of duty) and on most goods latter is the case. Based on the classification of the goods in the Schedule to the Customs Tariff Act, their value, exemption notifications, etc., the duty of customs has to be assessed.

14. Assessment is defined in Section 2(2) as follows:

> **Section 2. Definitions** -

In this Act, unless the context otherwise requires,

…..

(2) "assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to-

(a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;

(b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;

(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefore under this Act or under the Customs Tariff Act or under any other law for the time being in force;

(d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;

(e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;

(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods,

and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil ;

15. Thus, classification of the goods under the Customs Tariff is a part of assessment. The next question is who can do this assessment. Section 17, reads as follows:

Section 17. Assessment of duty. -

(1) An importer entering any imported goods under Section 46, or an exporter entering any export goods under Section 50, shall, save as otherwise provided in Section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the entries made under Section 46 or Section 50 and the self-assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self- assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re- assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

Explanation. - For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under Section 46 or an exporter has entered any export goods under Section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of Section 17 as it stood immediately before the date on which such assent is received.

16. Thus, as per Section 17 the importer or exporter has to self-assess duty and the proper officer can re-assess the duty. Both the self-assessment by the importer (or, as the case may be, the exporter) and the re-assessment by the proper officer fall under the definition of assessment as per Section 2(2). If the proper officer re-assesses the goods, unless the importer accepts the re-assessment in writing, he has to give a speaking order. **Thus, the importer (or exporter) and the proper officer are competent to classify the goods and assess the duty payable on them.**

17. After the duty is assessed on the imported goods and the duty is paid, the proper officer clears the goods for home consumption under Section 46. Once this action is completed, they cease to be imported goods, they cease to be dutiable goods and the importer ceases to be the importer. Sections 2(14), 2(25) and 2(26) which explain this legal position read as follows.

> **2. Definitions**
>
> (14) "**dutiable goods**" means any goods which are chargeable to duty and **on which duty has not been paid;**
>
> (25) "**imported goods**" means any goods brought into India from a place outside India but **does not include goods which have been cleared for home consumption;**
>
> (26) "**importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption**, includes any owner, beneficial owner or any person holding himself out to be the importer;

18. This process of self-assessment by the importer and re-assessment by the proper officer comes to an end once an order permitting the clearance of goods for home consumption is issued under Section 46. Thereafter, the goods cease to be imported goods or dutiable goods and no duty can be assessed. The only exception is when the goods are cleared for home consumption on provisional assessment in which case the assessment concludes after the assessment is finalized and an order is passed by the officer. Provisional assessment is not relevant to this appeal.

19. Assessment concludes the determination of the liability of the importer to pay duty and is similar to a decree under the Civil Procedure Code, 1908[18]. Section 2 (2) of CPC defines decree as "It means the formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." Assessment differs from decree inasmuch as the determination of what is due as Revenue by the importer is not made by a Court of law but is determined through a quasi-judicial process by the 'proper officer' who re-assesses the duty or is self-determined by the importer. Just like a decree in Civil suits, there is a provision for appeal against assessment. It is appealable by both sides to the Commissioner (Appeals) under section 128 and also to further higher judicial fora. The Commissioner (Appeals) does not assess but either affirms, modifies or annuls the assessment order. In

[18]**CPC**

this process, the Commissioner (Appeals) may also decide the issue of classification of the goods.

20. The Risk Management System[19] of the Customs Electronic Data Interchange[20]system clears many consignments of imported goods based on self-assessment by the importer without the proper officer ever getting an opportunity to examine the self-assessment and reassess the goods and this is one such case. In such cases, the Bills of Entry are subject to Post Clearance Audit[21] which happened in this case also. A question which arises is if a Bill of Entry which is only self-assessed by the importer without any re-assessment can it also be appealed against to the Commissioner (Appeals) under Section 128. The larger bench of the Supreme Court held in **ITC Ltd versus Commissioner of Central Excise Kolkata IV**[22] in the affirmative. The relevant portion of this judgment is as follows:

> **42. It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals).** Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder:
>
> **"128. Appeals to [Commissioner (Appeals)].** — (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order :
>
> [Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]

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[19] **RMS**
[20] **EDI**
[21] **PCA**
[22] **2019 (368) E.L.T. 216 (S.C.)**

> [(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :
>
> Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]
>
> (2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."
>
> **43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it.** There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no *lis*, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in *Escorts* (supra).

Demands under Section 28

21. While both the importer and Revenue can appeal to the Commissioner (Appeals) under Section 128 against an assessment (including self-assessment) of a Bill of Entry, the proper officer has another option of issuing a Show Cause Notice under Section 28 to demand and recover duties not levied, not paid, short levied or short paid or erroneously refunded. The nature of this power of 'the proper officer' was held by the larger bench of Supreme Court as the power to review the earlier assessment in **Canon India Pvt. Ltd. versus Commissioner of Customs**[23]

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[23] **2021 (376) E.L.T. 3 (S.C.)**

The relevant text of this judgment reads as follows:

> 12. **The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority**. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.
>
> **(emphasis supplied)**

22. While Section 128 does not place any restriction, other than the limitation of time, for filing an appeal against assessment, issue of SCN under Section 28 is restricted by WHEN, WHO and WHY. The notice has to be issued within the normal period of limitation (or the extended period of limitation) by 'the proper officer' and only to recover duties not paid, short paid, not levied, short levied or erroneously refunded.

23. To sum up, the power to assess duty lies with the importer and the proper officer. Classification, valuation and applying an exemption notification, are all part of the process of this assessment. Hence, the power to decide the classification lies with the importer during self-assessment, with the proper officer during re-assessment and while issuing an SCN under Section 28 and while adjudicating, with the Adjudicating Authority and with

any appellate authority in the judicial hierarchy who deals with the appeals. Classification cannot be decided by anybody else (such as a MeITY in this case) for two reasons. First, they do not have the authority to assess under Section 17 nor have any appellate powers to modify the assessment. Second, their orders, letters, notifications, etc. are executive actions performed at the discretion of the government and are not quasi-judicial or appealable decisions. Therefore, any HSN code indicated against any goods in any policy of MeITY or any other Ministry cannot determine the classification of the goods under the Customs Tariff. Of the three grounds on which the classification is proposed to be changed in the SCN, the policy of MeITY as a ground cannot, therefore, be sustained.

Exemption notifications

24. Section 25 gives the Central Government the power to issue exemption notifications exempting goods either fully or partly, conditionally or unconditionally from duty. Issuing these notifications –which are in the nature of subordinate legislation- is a quasi-legislative function of the Government. Section 25 reads as follows.

> **Section 25. Power to grant exemption from duty. –**
>
> (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally

> either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.
>
> *******
>
> (4) Every notification issued under sub-section (1) or sub-section (2A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.
>
> *******

25. The Central Government can issue exemption notifications under Section 25 if it is satisfied that it is in necessary in public interest to do so. They are not meant to determine the classification of the goods in any assessment nor are they appellable but are meant to grant exemption from duty or modify or withdraw an exemption previously granted. However, the notifications can be conditional. For instance, in this case, the notification no. 57/2017- Cus dated 30.6.2017 (S.No.10) referred to and relied upon in the SCN to propose classification of the goods in dispute reads as follows.

> In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, **hereby exempts the goods of the description as specified in column (3) of the Table below, as the case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate as specified in the corresponding entry in column (4)** of the said Table subject to any of the conditions, as specified in the Annexure to this notification, the condition number of which is mentioned in the corresponding entry in column (5) of the said Table.

TABLE

S. No.	Chapter	Description of goods	Stan-dard	Condition No.

	or **Heading or Sub-heading or tariff item**		**rate**	
(1)	(2)	(3)	(4)	(5)
10.	3920 99 99	All goods other than the following parts or sub-parts or accessories of cellular mobile phones, namely: (i) Battery cover (ii) Front cover (iii) Front cover (with Zinc Casting) (iv) Middle cover (v) Back Cover (vi) Main Lens (vii) Camera Lens	10%	-

26. As can be seen, only such goods which match the description in column 3 and which also fall under the Tariff heading at column no. 2 are exempted. If the goods do not match the description in column 3 and/or the tariff heading does not match column 2, the goods will not be exempted. Clearly, the notification does not say that the goods of the description in column 3 shall be classified in the heading in column 2. Evidently, goods of the description in column 3 may fall in the heading in column 2 in which case, the exemption applies or the goods may not fall under the heading in column 2 in which case, the exemption does not apply.

27. During assessment, the goods must be first classified and thereafter it must be examined if the notification applies or not and not the other way round. Issue or withdrawal or modification of a notification cannot determine the classification. The proposal in the SCN to re-classify the goods relying on a notification is not correct. The reasoning in the SCN is that since the front cover,

middle cover and back cover will be exempted under the notification if they fall under CTH 39209999, it means all front cover, back cover and middle covers fall under 39209999. This logic cannot be accepted because the issue of exemption notification is a quasi-legislative function of the Government (and is not appealable) and is not a quasi-judicial function of assessment, including classification, which is appealable. A plain reading of the exemption notification also does not show that it intends to decide the classification of the goods under any heading. It only says that if the goods which match the description also fall under the tariff heading they will be exempt.

28. **Goods must be classified under the Schedule to the Customs Tariff Act, 1975. For this purpose, the Rules of Interpretation have been provided of which Rule 1 reads as follows:**

> 1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

This Rule is followed by Rules of Interpretation 2 to 6 none of which provide for classification either based on any exemption notification or on the basis of any heading mentioned in any policy of any Ministry of the Government. Therefore, the goods cannot be reclassified based on the exemption notification issued under Section 25 or on the basis of any policy of the Ministry. Notifications or policies can be issued, modified or

withdrawn but the classification of the goods under the tariff will remain the same. Only if the tariff itself is amended can the classification change.

Confiscation of goods under Section 111(m) and consequent penalty under Section 112

29. The impugned order held that the imported goods were liable for confiscation under Section 111(m) and consequently, imposed penalty on the appellant under Section 112. Section 111(m) and Section 112 read as follows:

> **Section 111. Confiscation of improperly imported goods, etc. –**
>
> The following goods brought from a place outside India shall be liable to confiscation: -
>
> (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 77in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment referred to in the proviso to sub-section (1) of Section 54;
>
> **SECTION 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
>
> .....
>
> 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;
>
> (ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of Section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher.

30. According to the learned counsel for the appellant, even if the classification of the goods is decided against the appellant, it cannot be said that the goods were liable for confiscation under Section 111(m) because the appellant self-assessed the goods classifying them under the Customs tariff heading, which, according to it, was correct. Since the goods were not liable to confiscation, no penalty could have been imposed under Section 112. According to the learned special counsel for the Revenue, classification of goods by the appellant importer is part of the entry made under Section 46 of the Customs Act, i.e., the Bill of Entry and since the goods did not match this part of the Bill of Entry, the imported goods were squarely covered by and were liable to confiscation under Section 111(m).Since the goods were liable to confiscation, penalty can be imposed and was correctly imposed under Section 112.

31. We have already recorded that classification of the goods, their valuation and applying exemption notifications are all part of assessment of duty. This has to be done firstly by the importer (self-assessment) and can then be done by the officer (re-assessment) under Section 17. The remedy against wrong self-assessment is the re-assessment by the officer [or an appeal to Commissioner (Appeals)] and the remedy against the re-assessment is an appeal to the Commissioner (Appeals) which option is available to both sides or a notice under Section 28 (which is available only to the Revenue and only to recover duties

not levied, not paid, short levied, short paid or erroneously refunded). However, there is no separate document or procedure through which the importer can self-assess the duty on the imported goods. All the elements necessary for assessing the duty are filled in the Bill of Entry itself which is the entry of the goods made under Section 46. **Thus, the Bill of Entry has factual elements such as the nature of the goods, quality, quantity, weight, transaction value, country of origin, etc. which all need to be correctly declared and elements which are in the nature of the opinion of the importer such as classification of the goods, exemption notifications which apply, etc. While the facts are verifiable as correct or incorrect, opinions can differ. The importer may find that the goods are classifiable under one CTH while the officer re-assessing the goods may classify them under a different CTH. If appealed against, different views can be taken at different levels of judicial hierarchy from Commissioner (Appeals) all the way up to the Supreme Court.** Similar will be the case with the availability of the benefit of exemption notifications.

32. Insofar as the value is concerned, it could be partly factual and partly based on the opinions. The transaction value of the goods, whether there was any other consideration for sale and if the buyer and seller were related are matters of fact and the importer is bound to truthfully declare these and assess duty accordingly. However, the proper officer is empowered to reject

the transaction value under Rule 12 of the Customs Valuation Rules and re-determine the value of the imported goods based on the value of the contemporaneous imports of identical goods, similar goods, etc., following Valuation Rules 4 to 9. It needs to be pointed out that the power to reject the transaction value under Rule 12 vests in the proper officer and not in the importer. The importer will also not have access to the values of contemporaneous imports of identical or similar goods by others. Therefore, the only way an importer can self-assess the duty on the imported goods is based on his own transaction value and any additional consideration which he may be paying.

33. It is impossible for the importer to predict if the proper officer would re-classify the goods and if the proper officer would, after rejecting the transaction value, re-determine the value based on contemporaneous imports or through other methods or what value the officer will fix. Nothing in the law requires an importer to anticipate what classification the proper officer will find proper for the goods and classify the goods or anticipate if the proper officer will reject the transaction value and anticipate what value he will determine and assess duty accordingly.

34. If Section 111(m) is read to mean that goods can be confiscated if the classification of the goods and the exemption notifications claimed by the importer self-assessing the duty under Section 17 and indicated in the Bill of Entry do not match the classification of the goods or the exemption notifications

which the proper officer may apply during re-assessment or later, it would result in absurd results. The importer cannot predict the mind of the proper officer and self-assess duty so as to conform to it. Insofar as the valuation is concerned, the importer is required to truthfully declare the transaction value, any additional consideration and relationship with the overseas seller. He is not required to predict if the proper officer will reject the transaction value under Rule 12 and if so, what value he will determine. *Lex non cogitimpossibilia*–the law does not compel one to impossible things. If the classification and exemption notifications in the Bill of Entry do not match the views which the proper officer may during re-assessment or by audit party, etc. later, may take or in any other proceedings, goods cannot be confiscated under Section 111(m). The case of the Revenue in this appeal is that the classification of the goods by the importer was not correct. Even if the classification is not correct, it does not render them liable to confiscation under Section 111(m). Similarly, there could be cases where, according to the Revenue, the exemption notification claimed during self assessment will not be available to the imported goods. The importer self-assessing the goods must apply his mind when classifying the goods. Classification of the goods by the importer, even if it is not in conformity with the re-assessment by the proper officer or even if it is held to be not correct in any appellate proceedings does not render the goods liable to confiscation under Section 111(m).

35. Consequently, no penalty can be imposed under Section 112 on the appellant for the alleged wrong classification. The appellant cannot be penalized for holding a different view than the proper officer.

Classification of the goods

36. We now examine the question of classification of the goods, viz., front cover, mid cover and back cover of mobile phones. Of the three grounds on which these goods were re-classified in the impugned order, we have already found two grounds cannot determine the classification; these are the exemption notification issued by the Central Government and the policy notified by the MeITY. We proceed to decide the classification based on the Customs Tariff. The Rules of Interpretation of this tariff, in a nutshell are as follows:

> Rule 1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, **classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes** and, provided such headings or Notes do not otherwise require, according to the following provisions:
>
> **Rules 2 (a) which deals with incomplete or unassessmbled** or disassembled articles and **2 (b) which deals with mixtures** of substances are not relevant to this case.
>
> Rule 3. When by application of rule 2(b) or for any other reason, goods are, prima facie, **classifiable under two or more headings, classification shall be effected as follows**:
>
> (a) The heading which provides the **most specific description shall be preferred to headings providing a more general description**. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if

they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they **shall be classified under the heading which occurs last in numerical order among those which equally merit consideration**.

Rule 4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

Rule 5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provisions does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub headings and any related sub headings Notes and, mutatis mutandis, to the above rules, on the understanding that only sub headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

The two competing entries in the Tariff are CTH 85177090 (as claimed by the appellant) and CTH 39209999(as held in the impugned order). The relevant chapter notes are as follows:

Chapter 39

2. This Chapter does not cover:

….

(s) articles of Section XVI (machines and mechanical or electrical appliances);

10. In headings 3920 and 3921, the expression “plates, sheets, film foil and strip” applies only to plates, sheets, film, foil and strip (other than those of

Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).

37. Goods should be classified under the tariff should be as per the headings and sub-headings and relevant section notes and chapter notes. Chapter note 2 (s) to chapter 39 clearly excludes goods falling under Section XVI under which chapter 85 also falls and therefore, if the goods are classifiable under chapter 85 as claimed by the appellant, they cannot fall under chapter 39 as held in the impugned order. On the other hand, Chapter note 10 includes within the ambit of heading 3920 plates, sheets, film foil and strips and blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (**even if when so cut they become articles ready for use**).

38. Reading these two notes together, goods falling under 3920 will continue to be classifiable under this heading even if they become articles ready for use and therefore, they cannot fall under chapter 85 (section XVI). Therefore, they do not get excluded by virtue of note 2(s) from Chapter 39. This leads us to the next question whether the front cover, mid cover and back cover fall under 3920. According to the Revenue, they do because they are made of plastic and are cut into geometric shapes and are printed or surface-worked but not worked further. According to the appellant, these articles were further worked

and therefore, they do not fall under 3920. They are manufactured by **extrusion** (two layers of Polymethyl Methacrylate (PMM) and Polycarbonate (PC) are layered to form a sheet of thickness of 0.64 mm), **printed,** a layer is **Physical Vapor Deposited** (to give the desired finish to the back cover), again **printed, hard coated, thermoformed** into the desired shape and then milled through CNC to cut at the right places to insert the components of the mobile phone as required. These processes, including the lamination and CNC milling, according to the appellant clearly take the goods out of the ambit of note 10 of Chapter 39. Further, according to the appellant, the middle cover is laminated with zinc to dissipate heat and the laminations add strength to the plastic. Since these do not fall under section note 10, they fall under chapter 85 and therefore, by virtue of note 2(s) are clearly excluded from Chapter 39.

39. Learned special counsel for the Revenue did not dispute the process of manufacture of the front cover, mid-cover and back cover described by the learned counsel for the appellant. He submitted that they are made of plastic and the sub-components are embedded at proper places in the front cover and back cover. The purpose of the back cover is to reduce the amount of dust on battery terminals and it is also made of plastic. The middle cover fixes the inner components and protects the battery from moisture and dust and it is also made of plastic, therefore, the impugned order was correct in holding that they are classifiable under CTH 39209999. According to him, these three covers do

not contribute to the functionality of the mobile per-se and, therefore, do not deserve to be classified as parts of the mobile phones and should be classified under Chapter 39. According to him, every part of a machine does not merit being classified along with the machine or as its part under Chapter 85 and some parts of machine can also be classified under Chapter 39. He relies on **Ipea Paramount Pvt. Ltd., P.R. Packagings Pvt. Ltd., Hariram Govindram, Karnataka Powers Corporation Ltd., General Mills India Ltd., Atul Kaushik, Towa Ribbons Pvt. Ltd.** and **Speedway Rubber Co.** in support of this submission.

40. On the question of whether the specific entry should prevail over the general entry, learned special counsel submitted that since the impugned goods do not merit classification under 8517 at all, therefore, the question of general or specific entry does not arise. Regarding the case of **Bhagwati Products Ltd**, relied upon by the appellant, he submitted that the goods in question in that case were front housing and back housing which were parts of a mobile phone and deserved to be classified under CTH 85177090. In this case, the appellant itself has declared them as front cover, middle cover and back cover not as housing and, therefore, the ratio does not apply.

41. After considering the submissions on both sides on the question of classification, we find that the front cover, middle cover and back cover of mobile phones are undisputedly, made of

plastic and are parts of mobile phones and are not articles of general use. The case of the Revenue is that even if they become articles ready for use, if they are manufactured from plates, sheets, film foil or strips, whether or not they are printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked they should be classified under CTH 3920 in view of Chapter note 2(s) to Chapter 39. Since the front cover, middle cover and back cover of mobile phones are made of sheets of plastic, printed and surface worked and not further worked, they should be classified under 3920. The case of the appellant is that the manufacture of these goods involves extrusion, printing, physical vapor deposition, second set of printing, hard coating, thermoforming and CNC milling and therefore, further work has clearly been done on the plastic sheets after cutting and therefore, they do not fall under Chapter note 2(s) to Chapter 39. The manufacturing process described by the appellant is not disputed by the Revenue and therefore, considering this manufacturing process, we proceed to decide if the front cover, middle cover and back cover fall under 3920 by virtue of Chapter note 2(s).

42. We find that CTH 3920 covers "other plates, sheets, film, foil and strip of plastics, not cellular and not re-imposed, laminated, supported a similarly by with other materials". The first step of manufacture - extrusion, involves pressing together two sheets of plastic- Polymethyl Methacrylate (PMM) and Polycarbonate (PC) into a single sheet of plastic. What emerges

after this process is still a sheet of plastic. The second and fourth steps are printing which also make no difference and Chapter note 2(s) would still apply. The third step vapor deposition, is a process of depositing a thin layer of material to give the covers the glossy finish. According to the appellant, this is similar to lamination. Lamination takes the goods out of the scope of CTH 3920 because it covers only such goods which are "….not re-imposed, laminated, supported similarly by with other materials". According to the appellant, the middle cover also has a layer of zinc to help dissipate the heat. The fifth step of thermoforming changes the shape of the article from a plain sheet of plastic to one with the required shape and dimensions including the edges. Thermoforming is a common industrial process which involves heating of a plain plastic sheet and moulding it into articles – such as inner panels of a refrigerators, panels in a car or disposable food trays. In our considered view, this is a process beyond mere cutting and surface working and this process also takes it out of the purview of chapter note 2(s) to Chapter 39. The sixth and the last process is CNC milling to cut holes in these covers to install various components. CNC or Computerised numerically controlled machines, as is well known, are modern, automated versions of lathe machines which are used to cutting, grinding, etc. to work on a piece of material to convert it into desired articles. In our considered view, CNC milling also goes beyond mere cutting and surface processing of the sheet. To sum up, the processes of vapour deposition, being lamination, takes

the front cover, back cover and middle cover out of the purview of CTH 3920 and the processes of thermoforming and CNC milling being processes beyond cutting and surface working, take them out of the scope of chapter note 2(s) to Chapter 39.

43. Thus, applying the first Rule of Interpretation, the front cover, middle cover and back cover cannot be classified under CTH 3920- the vapor deposition (lamination) takes it out of the description of CTH 3920 and thermoforming and CNC milling, being processes beyond printing and surface working take them out of the scope of chapter note 2(s) . We also find that a specific entry (parts of mobile phones) prevails over a general entry (articles of plastic) as per Rule 3(a) of Interpretation and the later entry (Chapter 85) in the tariff prevails over the earlier entry (Chapter 39) as per Rule 3(c). However, it is well settled legal principle that the Interpretative Rules must be applied sequentially. Once Rule 1 decides the classification, it is not necessary to go through the other Rules of Interpretation such as Rule 3(a) and 3(c).

44. The case laws relied upon by the Revenue do not carry its case any further as they were on different questions of law and facts. **Ipea** decision was in the peculiar circumstances of the case. The CBEC had issued a circular which was in favour of the assessee and it was binding on the Revenue. Therefore, the classification was decided in favour of the assessee by the

Tribunal and this decision was upheld by the Supreme Court. Relevant portion of the Tribunal's order is as follows:

> 5. …..The learned Advocate has placed heavy reliance on Board's Circular No. 6/86-CX 4, dated 25-9-1986, and in our view rightly, wherein the Board has considered the classification of the parts and accessories of refrigerating and air-conditioning machinery and appliances. It has been clarified therein that the parts and accessories of refrigerators for the treatment of materials by a process involving a change of temperature, as mentioned in Annexure "A" to the Circulars, are to be classified under Heading 84.15, 84.18 or 84.19 of the Tariff. It is not the case of the Revenue that the impugned goods find mention in the said Annexure "A". In the Circular, a very large number of parts and accessories of refrigerators etc. have been mentioned in "Annexure B" but these are to be classified in their respective Headings of the Tariff and not under Heading 84.15, 84.18 or 84.19 of the Tariff. It was observed by the Tribunal in the case of *P.R. Packaging Pvt. Ltd.* that "A perusal of "Annexure B" reveals that the parts mentioned therein are also suitable for use principally with refrigerators and even then these are not to be classified with Refrigerators under Heading 84.18. It goes to show that all parts of refrigerating machines are not automatically to be classified under Chapter 84." The Revenue has also not contended nor brought any evidence on record that the impugned goods are for the treatment of materials by a process involving a change of temperature. Accordingly, we hold that the impugned goods are classifiable under respective Headings in Chapters 39 and 40 of the Central Excise Tariff. We, thus allow the Appeal.

45. Similarly, the decision in the case of **RR Packaging** was based on Trade Notice No. 67/86 dated 30-9-1986 issued by the Bombay Collectorate which was in favour of the assessee and was binding on the officers. The question in **Hariram Govindram** was related to classification of the covers of the outer covers of the cassettes. Relying on Board's order dated 29-7-1994 issued under Section 37B of the then Central Excises and Salt Act, 1944, the classification was decided in favour of the assessee.

46. In **Karnataka Power Corporation,** the dispute was whether imported parts of Hydro Electric Generator i.e., 'Epoxy insulated single turn half coils with accessories and Epoxy insulated single turn half coils wave stator windings etc.' were classifiable under 8503 or under 8544. Applying Section note 2 (b) to Section XVI, it was held that the goods were suitable solely or principally for the generator and hence classified along with them under 8503. This case is on a different issue- whether the parts are to be classified as parts of mobile phones or as articles of plastic under Chapter 39.

47. In **General Mills India,** the dispute was regarding the classification of granola bars and the classification was decided in favour of the importer. In **Atul Kaushik** the question was about addition of certain elements in the valuation.

48. In **Towa Ribbons,** the question was about classification of typewriter ribbons and if the surface working of the strips of plastic including coating the surface will take them out of the purview of note 10 to Chapter 39 and the Tribunal held that surface working does not take the goods out of the ambit of note 10 to Chapter 39 and they continue to fall under 39.20 as asserted by the Revenue.

49. In **Speedway,** the question before the Supreme Court was the classification of procured treads manufactured by the appellant. Finding that the note 9 of Chapter 40 made a

distinction between 'surface working' and 'further working', and that specific entry should prevail over general entry, it was held that the impugned goods in that case would be classified under sub-heading 4008.21 and not under sub-heading 4016.99 as claimed by the Department.

50. **For all these reasons, we find that rejection of the appellant's classification of the front cover, middle cover and back cover of mobile phones under CTH 85177090 in the impugned order and their re-classification under CTH 39209999 cannot be sustained and needs to be set aside**.

51. To sum up:

a) Classification of the goods is a part of assessment and the importer, the proper officer and appellate authorities alone are competent to decide it.

b) The policy of the MeiTY, which is in the nature of an executive policy decision of that Ministry cannot determine the classification of goods under the Customs Act firstly because the authority making the policy is not empowered under Section 17 and secondly because the policy is not a quasi-judicial, appealable decision but is a policy decision while classification of goods is a part of assessment and is a quasi judicial and appealable function.

c) The exemption notification issued by the Government under Section 25 exempts goods and does not determine the

classification. If the description of the goods and also the CTH match with the notification, its benefit is available and not otherwise. Therefore, an exemption notification cannot determine the classification but it must be applied after classifying the goods.

d) Based on the Customs tariff and the nature of the goods, we determine the classification of the goods in favour of the appellant and against the Revenue.

e) The importer assessee has no obligation under the law to anticipate under which heading the proper officer may classify the goods and match self-assessment with it.

f) Classification of the goods in the Bill of Entry by the importer is essentially a part of the self-assessment under Section 17 which, even if found incorrect, does not attract confiscation of the goods under Section 111(m) or the consequential penalty under Section 112.

g) The appeal is allowed and the impugned order is set aside with consequential benefit to the appellant.

(Order pronounced in Court on 20/12/2023.)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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

PK

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. III

Customs Appeal No. 52262 of 2022 – (SM)

(Arising out of Order-in-Appeal No. 119(SM)CUS/JPR/2022 dated 29.07.2022 passed by the Commissioner of Customs (Appeals), Jaipur)

M/s Ceramic Tableware Pvt. Ltd. **Appellant**
S-707-A, Road No. 6, V.K.I. Area,
Jaipur

VERSUS

The Commissioner of Customs (Appeals) **Respondent**
Customs Commissionerate Jodhpur Hqrs.
at Jaipur, Jaipur

Appearance

Shri Bipin Garg & Ms. J. Kainaat, Advocates – for the Appellant.

Shri Mahesh Bhardwaj, Authorized Representative – for the Respondent

CORAM :

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

Date of Hearing: 12/02/2024
Date of Decision: 29/02/2024

Final Order No. 54523/2024

Binu Tamta

The present appeal has been filed challenging the Order-in-Appeal No. 119(SM)CUS/JPR/2022 dated 29.07.2022 whereby the prayer made by the appellant under Section 149 of the Customs Act, 1962 (the Act) for amendment of the Bill of Entry was rejected.

2. The appellant herein are engaged in the manufacture of Tableware, Crockery etc. and are registered with the GST authorities. One of the raw material is Calcium Phosphate which

the appellant had been regularly importing. The appellant had imported four consignments of Calcium Phosphate under Bill of Entry No. 6174489 dated 21.12.2019, 6352795 dated 04.01.2020, 6634377 dated 25.01.2020, 6531619 dated 18.01.2020 classifying under Chapter 25 which were cleared by the Customs Authorities. The Customs (Preventive) conducted the search operation on 26.11.2020 at the premises of the appellant where they recorded statement of Shri Dinesh Chand Agarwal, Director of the appellant company where he accepted that they have mis-declared the HSN Code due to clerical error and agreed to pay the differential amount of duty. On the basis of the Panchnama along with Chart-A differential duties were calculated for a sum of Rs. 12,91,570/- which the appellant deposited vide challan dated 04.12.2020. Later on, the appellant made an application under Section 149 of the Act on 11.12.2020 to amend relevant Bill of Entries and thereafter repeated the request for amendment of the Bill of Entries vide letter dated 21.06.2021. The adjudicating authority vide order dated 14.07.2021 rejected the application observing that mis-declaration has not been revealed suo-moto by the appellant but had been revealed pursuant to the search conducted and Shri Dinesh Chand Agarwal accepted the mis-declaration of HSN Code due to clerical error. The appellant challenged the order in original before the Commissioner (Appeals) who was pleased to reject the same by the impugned order. Hence, the present appeal has been filed before this Tribunal.

3. The learned Counsel for the appellant has submitted that the proper officer ought to have exercised the power in terms of

section 149 of the Act for amendment of the BEs as by mistake they had wrongly mentioned the classification under CTH 25 instead of CTH 28 as their exporter suggested that they have made certain changes in the composition of the product and therefore it merits classification under chapter 25 and on such advice, the staff of the appellant filed the bill of entries under chapter 25. He further submitted that since the differential duty as well as interest and penalty has been deposited manually by challan dated 4.12.2020, so the same is not reflecting online and therefore if the bill of entries are amended, they would be able to get the IGST credit. The case of the appellant is that they have been classifying their goods prior to the import in question and even thereafter under Chapter 28 and there was no mala fide intention on their part.

4. The learned Authorized Representative for the Revenue referring to Para 7 of Chapter 3 of Customs Manual, 2018 pointed out that it is only in case of bonafide mistakes that rectification by way of amendment to the bill of entry can be allowed and in the present case, Shri Dinesh Chandra Agarwal, Director of the appellant company accepted that they have mis-declared the HSN code due to clerical error, which ultimately resulted in evasion of customs duty and therefore no interference is called for.

5. Having heard both sides and perused the records of the case, the short question which arises in the present appeal is whether the request made by the appellant for amendment of the

Bill of Entries can be allowed under the provisions of section 149 of the Customs Act, 1962.

6. It may be relevant to extract the provisions of Section 149 of the Customs Act, 1962 and Para-7 of Chapter-3 Procedure for Clearance of Imported and Exported Goods of Customs Manual, 2018 which reads as under:

> **"149. Amendment of documents.**
>
> - Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the custom house to be amended:
>
> Provided that no amendment of a bill of entry or a shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be."
>
> **Amendment of Bill of Entry: 7.1** Bonafide mistakes noticed after submission of documents, may be rectified by way of amendment to the Bill of Entry with the approval of Deputy/Assistant Commissioner. Levy of Fees (Customs Documents) Amendment Regulations, 2017, issued vide Notification No. 36/2017-Customs (N.T.) dated 11.04.2017, provides a number of amendments which can be allowed on payment of amount mentioned therein."

7. The provisions of section 149 of the Act had been the subject matter of consideration in various decisions and it has been consistently held that amendment of the bill of entry is permissible under section 149 of the Customs Act even after the goods have been cleared for home consumption provided the said amendment is based on documentary evidence which was in existence at the time when the goods were cleared. The Bombay High Court in **Dimension Data India Pvt. Ltd Vs. Commissioner of Customs, 2021 (376) ELT 192,** where similar issue had arisen

and the party had prayed to reassess the customs duty in respect of bills of entry by correcting the Custom Tariff Heading which had been incorrectly declared at the time of filing the bills of entry. On section 149 the Court observed as :

> **"18.** From a careful analysis of Section 149, we find that under the said provision a discretion is vested on the proper officer to authorise amendment of any document after being presented in the customs house. However, as per the proviso, no such amendment shall be authorised after the imported goods have been cleared for home consumption or warehoused, etc. except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, etc. Thus, amendment of the Bill of Entry is clearly permissible even in a situation where the goods are cleared for home consumption. The only condition is that in such a case, the amendment shall be allowed only on the basis of the documentary evidence which was in existence at the time of clearance of the goods."

Further distinguishing the applicability of the decision of the Apex Court in **ITC Ltd. Vs Commissioner of Central Excise, Kolkata, 2019 (368) ELT 216 (SC)** on the issue of filing an appeal, the High Court observed that:

> **"24.** In the instant case, petitioner has not sought for any refund on the basis of the self-assessment. It has sought reassessment upon amendment of the Bills of Entry by correcting the customs tariff head of the goods which would then facilitate the petitioner to seek a claim for refund. This distinction though subtle is crucial to distinguish the case of the petitioner from the one which was adjudicated by the Supreme Court and by this Court.
>
> **25.** Grievance of the petitioner is not on the merit of the self-assessment as the petitioner is aggrieved by the failure on the part of the respondents to carry out amendment in the Bills of Entry by replacing the incorrect CTH by the correct one namely by replacing CTH '8517 69 90' with '8517 69 30' which was declared inadvertently by the petitioner at the time of fling the Bills of Entry. This request of the petitioner, in our opinion, falls squarely within the domain of Section 149 read with Section 154 of the Customs Act. Upon amendment in the Bills of Entry by correcting the CTH, consequential reassessment order under Section 17(4) of the Customs Act would be in order.
>
> xxx

> **28.** In the light of the above, we are of the view that petitioner has made out a case for issuance of a direction to the respondents for correction of the mistake or error in classification of the goods from CTH '8517 69 90' to '8517 69 30' and thereby for amendment of the Bills of Entry. Refusal of the respondents to look into the aforesaid grievance of the respondents is therefore not justified."

8. The aforesaid decision of the Bombay High Court was challenged by the department and the same was dismissed by the Apex Court as reported in **2022 (379) ELT A39 (SC).**

9. I am of the considered opinion that reliance placed by the learned Counsel for the appellant on the decision of Bombay High Court is correct as it squarely applies in the facts of the case. The provisions of section 149 allows amendment of a bill of entry even in cases where the imported goods are cleared for home consumption only on the basis of the documentary evidence which was in existence at the time the goods were cleared. The Deputy Commissioner has rejected the request for amendment on the sole ground that the fact of mis-declaration of HSN was not revealed by the appellant suo-moto and therefore it would not fall in the category of bonafide mistake as provided in the Customs Manual. I do not find any valid reason to reject the application for amendment of Bill of Entries and refere to the short order passed by the High Court of Delhi in **Mohit Overseas Vs. Commissioner of Customs – 2016 (335) ELT 18 (Del.)** observing that :

> **"3.** We have heard the learned counsel for the parties. We are of the view that what the petitioner is seeking is an amendment of the Bill of Entry which is permissible under Section 149 of the Customs Act, 1962 even after the goods have been cleared for home consumption provided the said amendment is based on documentary evidence which was in existence at the time when the goods were cleared. According to the learned counsel for the petitioner, the said notification was in existence at that point of time. Consequently, we are of the view that this is a clear case where the petitioner could avail of the provisions of Section 149 of the Customs Act,

> 1962 and we, therefore, direct him to move an application before the proper officer seeking amendment of the Bill of Entry in terms of Section 149.

10. In the present case the appellant had stated that all through out they have been declaring the classification of the goods under CTH 28 and this was the solitary instance when their staff had classified the goods under CTH 25 on the advice of the supplier that there was change in the composition of the product and would therefore merit classification under Tariff Heading 25 of the Custom Tariff Act. I also take note of the fact that soon after detection on 26.11.2020, the appellant paid the differential duty along with interest and penalty on 4.12.2020 without any protest. From the nature of amendment sought by the appellant in Bills of Entry, the same is liable to be allowed since only a paper declaration was sought for amending the Customs Tariff Heading from 25 to 28. The observations made by the Delhi High Court in **CC Vs. M.D. Overseas – 2023 SCC Online Del. 6056** are relevant in the present context on the applicability of Section 149 of the Act, the same reads as :

> "7. There is no gainsaying that Section 149 of the Act has to be read in conjunction with the requirement spelt out in the above Notification dated 19th June 2012. A careful perusal of Section 149 of the Act shows that **firstly**, it provides no period of limitation for filing of an application for amendment of relevant documents in order to seek rebate or any other benefit. **Secondly**, it does not provide for any reasons that may enable an exporter to claim amendments in the shipping documents. **Thirdly**, the proposed amendment in the shipping bills can be allowed by the Proper Officer subject to the only rider that same is based on documentary evidence that must be shown to be in existence at the time the goods were exported."

11. In the circumstances, it would well be considered as a mistake which has been rectified at the first available opportunity and therefore there is no error in allowing the application made by

the appellant under section 149 of the Act seeking amendment of the bill of entries. The legislative purpose of providing the remedy by way of amendment under section 149 gets defeated by rejecting the prayer for amendment in a case where the interest of the revenue has already been protected. In so far as the element of duty, interest and penalty is concerned the same having been paid and satisfied without any protest, the application made for consequent amendment of the bill of entry needs to be allowed.

12. The amendment sought by the appellant in the facts of the present case is justified and therefore the impugned order is liable to be set aside. The Department is directed to amend the Bill of Entries by exercising power under Section 149 of the Customs Act and pass appropriate orders on the appellant depositing the requisite fee under Notification No. 36/2017-Customs (NT) dated 11.04.2017. The appeal is, accordingly allowed.

(Pronounced in open Court on 29/02/2024)

(Binu Tamta*)*
Member (Judicial)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

CUSTOMS APPEAL No. 50542 OF 2021 [DB]

(Arising out of Order in Appeal No. CC(A) CUS/D-II/Import/ICD/TKD/ 1237/2020-21 dated 28.12.2020 passed by Commissioner of Customs (Appeals), New Delhi)

M/s. Welkin Foods, **...Appellant**
Khasra No.504 & 506,
Village Sadhauli,
P.O. Jhabera, Roorkee,
Uttarakhand - 247665

Versus

Commissioner of Customs (Import) **....Respondent**
ICD, Tughlakabad,
New Delhi- 110020

APPEARANCE:
Mr. Salil Arora & Mr. Divya Ratna Singh, Advocate for the appellant
Mr. Mukesh Kumar Shukla, Authorized Representative for the Respondent

Coram: HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING : 19/12/2023
DATE OF DECISION : 19/04/2024

FINAL ORDER NO.55604/2024

DR. RACHNA GUPTA

The appellant M/s. Welkin Foods imported aluminium shelving for Mushroom growing alongwith the floor drain and automatic watering system for Mushroom growing itself (agricultural use). The Bill of Entry No.7399702 dated 09.11.2016 was filed by the appellant classifying the said goods under CTH 84369900 at 'nil rate of duty'. The Department was of the opinion that the goods imported are the kind of Aluminium structure instead of parts of any agricultural machine. Hence, proposed the goods to be classified under CTH

76109010 which attracts VCD at the rate of 10%, CVD at the rate of 12.5 %, Cess at the rate of 3% and ADC at the rate of 4%. Thus, alleging misclassification of the imported goods resulting in short levy /payment of duty amounting to Rs.21,01,983/-, is proposed to be recovered from the appellant alongwith the interest at the rate fixed by Notification issued under section 28 AA of Customs Act, 1962. The Show Cause Notice No.20190 dated 08.08.2018 was served upon the appellant proposing the same importation of penalty. The proposal has been confirmed vide Order in Original No.25/2019 dated 28.02.2019 holding that the impugned goods are classifiable under CTH 76109010 and thus are chargeable to duty at the applicable rates. Appeal against the said order has been rejected vide Order-in-Appeal No.1237/2020–21 dated 28.12.2020. Being aggrieved, the appellant is before this Tribunal.

2. We have heard Mr. Salil Arora & Ms. Divya Ratna Singh, Advocate for the appellant and Mr. Mukesh Kumar Shukla, Authorized Representative for the Respondent.

3. Ld. Counsel for the appellant has mentioned that appellant is engaged in the agricultural activity of growing mushrooms and has been importing the goods as are in question under the same CTH 84369900 from different ports. It is mentioned that the aluminium shelving including the other goods imported are the part of whole mushroom production cycles. The other machines cannot work

without using these shelving drain and watering system. Hence the goods are the part of mushroom cultivation mechanization process. It is mentioned that ICAR (**Indian Council of Agricultural Research**) directorate certificate dated 29.08.2018 also treat these goods as the mechanical devises for agriculture industry. It is further mentioned that the supplier of the goods also deals with only mushroom growing equipments. The equipments are very much necessary for climate control required for mushroom and mushroom farming mechanization is not possible without the imported shelving, drainage and watering system.

4. The compact disc provided to the Bench is mentioned to have the video representation of the process of mushroom growing involving the impugned imported goods which is sufficient to show that shelves have been so designed to allow for feeding, drainage, spraying insecticides and compost layering by other machineries as part of mushroom growing Plant, hence, by no sense can be covered under generic aluminium structures of tariff heading 7610 which otherwise is specific to such aluminium structures which are used in civil structures and which are capable of moving by dismounting screws and applicable of shipment. It is further impressed upon that explanatory notes to HSN Volume 3, 1996 exclusion clause (a) to Chapter Heading 76.10 specifically excludes assemblies identifiable as parts of articles of Chapter 84 to 88. The impugned goods are the assembly of racks with railings is therefore excluded from chapter 76. The findings in the order under challenge are not therefore,

sustainable. Order is accordingly prayed to be set aside and appeal is prayed to be allowed. Appellant has relied upon the following decisions:-

1. C.C. (Import), Mumbai Zone-II vs. Maschio Gaspardo India Pvt. Ltd. reported in 2016 (332) ELT 153 (Tri. Mum.)
2. Jai Kunkan Foods v. Commissioner of Customs, New Delhi (2023) 7 CENTAX 199 (Tri. Del.)

5. While rebutting these submissions, ld. Departmental Representative has mentioned that classification of goods under the customs tariff has to be determined strictly in terms of general rules of interpretation. The impugned imported goods admittedly are aluminium shelving. These are nothing but the aluminium structure hence, are rightly been classified under tariff item 76109010. It is further mentioned that the goods herein do not qualify to be called as machine, as defined in Note 5 to section XVI of the Customs Tariff. The goods in question have no such characteristics of a machine. These are aluminium structures only to be integrated with other machines/equipments meant for growing mushrooms but post importation. CTH 7610 cover all kinds of aluminium structure without distinguishing aluminium structures on the basis of their end use. Therefore the goods in question have rightly been classified under CTH 7610 and the duty demand has rightly been confirmed alongwith the interest. Impressing upon no infirmity in the order under challenge, appeal is prayed to be dismissed.

6. Ld. Departmental Representative has relied upon the case law in the case of **M/s. Saraswati Sugar Mills vs. Commissioner of C. Ex., Delhi-III reported in 2011 (270) E.L.T. 465 (S.C.)**

7. Having heard the rival contentions and perusing the entire record, we observe and hold as follows:-

The impugned appeal is about the controversy arising out of the applicability of Custom Tariff Entry to the imported goods i.e. mushroom growing shelving. The floor drain for mushroom growing and automatic watering system for mushroom growing both are accepted to fall under CTH 84369900 accepting that these are meant for agriculture use. To adjudicate the same we observe that Section 3 of the Central Excise Tariff Act provides the duties of excise shall be levied under the said Act on all excisable goods produced and manufactured in India at such rate as mentioned in First Schedule and the Second Schedule therein, we also observe that the Fourth Schedule of the Act contains a set of rules known as general rules for interpretation to govern the classification of goods.

Rule 1 of these Rules makes it clear that the titles of Section, Chapter and Sub-Chapters are provided for ease of reference only and that for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and provided such heading or Notes do not otherwise require, according to the provisions of the rules that follow. Rule 2 deals with incomplete or unfinished articles and mixture or combinations of material or substance. Rule 3 deals with cases when

goods are classified under two or more sub headings rule 3 reads as under:

"(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives the more complete or precise description of the goods.

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a) shall be classified as if the consisted of the material or component which gives them their essential character, in so far is this criteria is applicable.

(c) when goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

8. Thus, it is clear that as per rule 3, the heading which provides most specific description shall be preferred to the heading providing a more general description.

9. To understand the description under two heading in question, we need to see the headings of CTH 84369900 which has been declared by the appellant while importing the impugned goods and the headings of CTH 76109010 as has been held by the Department

to be the correct classification for the said goods. Chapter 84 broadly is related to machinery and mechanical appliances. The heading of 8436 reads as follows:-

8436	Other agricultural, horticultural forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment; poultry incubators and brooders

Chapter 84369900 covers other such kind of apparatus. We further observe that Chapter 76 broadly covers aluminium and articles thereof. Headings 7610 is as follows:-

7610	Aluminium structures (excluding prefabricated buildings of heading 9406) and parts of structures (for example, bridges and bridge-sections, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, balustrades, pillars and columns); aluminium plates, rods, profiles, tubes and the like, prepared for use in structures.
76109010	Includes the respective structure

10. In the light of above, we need to adjudicate as to whether the goods imported can be called as machine or mechanical appliances covered under chapter 84 or are more precisely & specifically classifiable as the aluminum structures of chapter 76. The goods imported by the appellant apparently are the aluminium shelves/ racks which are imported by the appellant for using the same after integrating with the other two imported goods (drains and automatic

watering system) for in mushroom growing. it is also nowhere been denied that the other activities essential for mushroom growing that is the climate control equipments, the compost spreading equipments, the insecticide praying equipments etc. are also to be fastened on the imported aluminium shelves. No doubt, all these machines are to be integrated subsequent to the import but we observe that the goods are imported from the person, who exclusively deals in the structures specific to mushroom growing industry. The importer-appellant is also in the business of growing mushrooms. There is also no denial to the fact that the aluminium shelves imported cannot be used as any other aluminium structures for any other purpose.

11. From the general rule of interpretation, as discussed above, it is clear that the goods have to be classified to the more appropriate category instead of being covered under the generic category. Chapter 76 is generic to all aluminium structures but chapter 84 is specific for any machine/ device of any metal which is used for agriculture purpose. There can be no denial that growing mushroom is an agricultural or horticultural activity and the product imported is crucial and specific for the said activity that the product is specifically designed part of mushroom growing apparatus.

12. No doubt, the goods under Chapter 84 have first to be a machine or mechanical appliance. For the purpose, we foremost look into the dictionary meaning of these words.

13. As per Oxford dictionary machine is a piece of equipment with moving parts that is designed to do a particular job by the use of power (any kind). Similar is the definition in the Cambridge dictionary. The dictionary meaning of mechanical device is that it is an instrument /apparatus or devise for a particular purpose or use. As already observed above, the aluminium shelves/ the impugned goods have no purpose other than a specific one of being used in the mushroom growing industry. Admittedly, the two other imported goods i.e. drain and automatic watering system have to be integrated on these aluminium shelves. Department has admitted these two to be covered under CTH 84369900. Though these two apparatuses alongwith two others are to be integrated on the mushroom shelving, post import but we observe that the aluminium shelve itself is so designed with such specifications, as may permit these specific integrations. The brochure of product Info also mentions the model of the goods as mechanization/ planting machine. Thus, we hold that the goods in question is not aluminium shelve in generic but is a mushroom growing rack specifically; though is made of aluminium but it is a mechanical appliance used for agriculture purpose.

14. Chapter 76 is all about anything made of aluminium. On the contrary chapter 84 is about mechanical appliances of whatsoever metal but specific for agricultural use. There is no denial to the fact that the aluminium shelving in question is not known to the common trade parlance as a mere aluminium structure but is specifically known as Mushroom growing rack.

15 Hence, we hold that the goods under question as imported by appellant (mushroom shelving) are classifiable under CTH 84369977. Appellant is held to have rightly classified the same under CTH 84369900. The decisions relied upon by the Department in the case of **Saraswati Sugar Mills (supra**) is about captive use of iron and steel structures in the sugar mill and the question adjudicated therein is whether or not these structures could be called as capital goods to entitle the assessee credit of duty paid on those goods. Similarly the extract that China Customs is classifying this product under CTH 7610 is also not that relevant, as the said observations are not binding on the Indian Customs or on the Indian importers. The agricultural equipments are otherwise eligible for duty benefits in Indian scenario. Hence we hold that the appellant has rightly claimed the duty exemption while importing a product which is exclusively for the purpose of agriculture and which otherwise is a mechanical device. With these findings the order under challenge is hereby set aside and the appeal is hereby allowed.

[Pronounced in the open Court on 19/04/2024]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Anita

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 50961 of 2020

(Arising out of order-in-original No. 11/2020/MKS/Pr. Commr./ ICD-Import/ TKD dated 18/21.05.2020 passed by the Principal Commissioner of Customs (Import), ICD, Tughlakabad, New Delhi).

M/s Daxen Agritech India Pvt. Ltd., **Appellant**
120, DIC Industrial Area
Baddi, Solan
Himachal Pradesh-173205.

VERSUS

Principal Commissioner of Customs (Import) **Respondent**
Inland Container Depot
Tughlakabad, New Delhi.

APPEARANCE:

Shri T. Chakrapani, Consultant with Sh. Anil Kumar, Advocate for the appellant

Shri Rakesh Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 51678/2023

DATE OF HEARING: 14.09.2023
DATE OF DECISION: 20.12.2023

BINU TAMTA:

Challenge in the present appeal is to the order in original No. 11/2020/MKS/Pr. Commr./ ICD-Import/ TKD dated 18/21.5.2022 passed by the Principal Commissioner affirming the classification and

confiscation of the goods and the consequent demand of differential duty, interest and penalty, as proposed in the show cause notice.

2. The facts of the case are that the appellant is engaged in cultivation, manufacturing and marketing of the health food supplements, especially Ganoderma business and is importing items in question, namely, "Bulk Reishi Gano Powder-100% Ganoderma and Bulk Ganocelium Powder 100% Gano Mycelium" from their related foreign supplier M/s DXN Industries, Malaysia.

3. On verification of the import data of M/s Daxen Agritech (India) Pvt. Ltd., it was noticed that the importer had imported the subject goods vide Bills of Entry as mentioned in Table-A.

BE No.	BE date	Item name	Ass. Value (INR)	Duty paid (INR)	Duty payable (INR)	Differential duty (INR)
2608299	03.07.2013	Bulk Reishi Gano Powder	8152639.2	726359	4308425.238	3582066.2
		Bulk Ganocelium Powder	7246790	645652	3829711.111	3184059.1
3421252	01.10.2013	Bulk Reishi Gano Powder	10738593	956755	5675024.243	4718269.2
		Bulk Ganocelium Powder	5206590	463881	2751526.617	2287645.6
3708747	04.11.2013	Bulk Reishi Gano Powder	7138150	441138	3772298.131	3331160.1
		Bulk Ganocelium Powder	11103788	686214	5868018.844	5181804.8
5210850	16.04.2014	Bulk Reishi Gano Powder	6937318	428726	3666164.443	3237438.4
		Bulk Ganocelium Powder	9249757	571635	4888219.082	4316584.1
6718801	10.09.2014	Bulk Reishi Gano Powder	7000436	432627	3699520.413	3266893.4
		Bulk Ganocelium Powder	9333915	576836	4932694.06	4355858.1
9286242	19.05.2015	Bulk Reishi Gano Powder	17060794	1054357	9134860.931	8080503.9

8183633	13.01.2017	Bulk Reishi Gano Powder	18240600	1127269	9766564.458	8639295.5
4305997	07.12.2017	Bulk Reishi Gano Powder	17377500	2085300	9894748.5	7809448.5
4346737	11.12.2017	Bulk Reishi Gano Powder	18344700	2201364	10445472.18	8244108.2
5700445	23.03.2018	Bulk Reishi Gano Powder	18456900	2214828	16223615.1	14008787
		Total	171588470.2	14612941	98856863.35	84243922

The importer had filed these bills of entry under self-assessment scheme through their authorized representative, M/s Challenger Cargo and M/s SMS Clearing & forwarding Pvt. Ltd., Customs Broker. It appeared that they were mis-declaring these goods as Ayurvedic proprietary Medicine and consequently wrongly classifying the same under CTH 30039011 instead of correct CTH 21069099 of food supplements thereby evading payment of appropriate customs duty.

4. The issue of classification of subject goods viz. Bulk Reishi Gano Powder -100% Ganoderma and Bulk Ganocelium Powder-100% Gano Mycelium, had come up for consideration before the concerned appraising group earlier, and had been adjudicated by Assistant Commissioner (Group-I), ICD-TKD, Delhi vide Assessment Order No. 01/2012 dated 27.07.2012 whereby the goods had been held to be wrongly classified under CTH 30039011 by the importer.

5. On appeal by the appellant, the Commissioner (Appeals) vide order dated 26.08.2012 directed the assessing authority to pass a suitable order and accordingly remanded the matter back. The Assistant Commissioner passed a fresh order dated 24.05.2013,

confirming the classification of the goods in question under CTH 2106 9099 as food supplements. The appellant once again challenged the said order before the Commissioner (Appeals) who was pleased to restore the classification of the products under CTH 30039011 as Ayurvedic Medicaments vide order dated 17.02.2024. Being aggrieved, the revenue filed an appeal before this Tribunal which was finally decided on 10.01.2018, upholding the classification as claimed by the revenue, reported in **2018 (362) ELT 713**, which is now the subject matter of challenge before the Supreme Court.

6. The Department then issued the show cause notice dated 02.07.2018 covering the bills of entry for the period from 30.07.2013 to 23.03.2018 to which the appellant filed its reply. Thereafter a supplementary, show cause notice was issued to the appellant which was also duly replied. On adjudication, the Principal Commissioner rejected the classification claimed by the appellant of the products as Ayurvedic medicaments under CTH 30039011 and affirmed the classification as proposed in the show cause notice, invoking the extended period of limitation and the consequential interest and penalty along with confiscation of goods under section 111(m) and (o) of the Customs Act, 1962 (hereinafter referred to as the Act).

7. We have heard the learned Counsel for the appellant and also the Authorised Representative for the revenue and have perused the records of the case.

8. The moot question in the present appeal is whether the product Reishi Gano and Ganocelium are classifiable as Ayurvedic medicaments under chapter 3003.9011 of the First Schedule to the

Central Excise Tariff Act, 1985 (CETA) as contended by the appellant or as food supplements under CTH 2106999 of CETA. The relevant entries relied on by the appellant and the Department is as under:-

2106	Food preparations not elsewhere specified or included
2106 90 99	---- Other
3003	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not pout up in measured doses or in
3003 9011	---- Of Ayurvedic system

8.1 The said issue is no longer rest-integra and has been decided by the Chennai Bench in **DXN Manufacturing India Private Ltd. vs. Commissioner of Central Excise and Service Tax, Pondicherry - 2018 (11) GSTL 68**, where the Tribunal reconsidered the matter at length on being remanded by the Supreme Court - **2015 (325) ELT A41** and concluded that both the impugned goods fail both the twin test for being considered as Ayurvedic medicament and therefore the products in question are nothing but food supplements promoted mainly for general health or well-being and therefore merit classification under 2108 of the CETA and more specifically under 2108.99, as it stood at the relevant time and assessed accordingly under section 4A of the Act for discharge of duty liability. The issue of classification was thus decided in favour of the revenue and against the assessee. The said order was followed by the Principal Bench subsequently in an appeal filed by the revenue in respect of the present appellant relating to the earlier round of proceedings, reported in **2018 (362) ELT 713**, and finding no reason to differ from the ratio and findings arrived by the Chennai Bench of the Tribunal, the appeal was allowed holding that the products are classified as food supplement and not as Ayurvedic medicine. We have been told that

appeal against both the orders of the Chennai Bench and the Principal Bench as referred above have been filed by the party before the Supreme Court and the same are pending consideration, however, there is no stay of the impugned orders. Therefore, the orders of the Chennai Bench and the Principal Bench of the Tribunal deciding the issue of classification in favour of the revenue are binding. Consequently, we have no hesitation in concluding the issue of classification of the products in question under CTH 21069099 as food preparation. We may also like to refer from the synopsis filed by the appellant, where it is stated :

> "Since, the issue of classification, the dispute matter is in the Hon'ble Supreme Court, the appellant is not contesting the same before this Hon'ble Tribunal, being sub-judice in nature."

Thus the issue of classification on merits stands affirmed in favour of the revenue and against the appellant.

9. The next question which arises in the present appeal is the invocation of the extended period of limitation under section 28(4) of the Act. The submission of the learned Counsel is that the issue of classification of the products in question was within the knowledge of the department at the time of clearing of the subject goods at the relevant time of imports as the department itself had filed an appeal against the Order-in-Appeal dated 17.02.2014 before the Tribunal and therefore the allegations of suppression are not made out and so the extended period of limitation cannot be invoked. The learned Authorised Representative for the revenue have submitted that the

period of limitation has been rightly invoked and cited several judgements in support thereof.

10. We find that show cause notice was issued on 2.7.2018 for the period 03.07.2013 to 03.03.2018, covering several bills of entries as given in Table-A above which is per Annexure-A to show cause notice. In the appeal filed against the first assessment order dated 27.07.2012, the Commissioner (Appeals) vide order dated 16.08.2012 remanded the matter to the adjudicating authority to pass suitable order. On remand, the Adjudicating Authority vide order dated 24.05.2013 once again confirmed the classification under CTH 21069099, however, the appellant challenged the said order and the Commissioner (Appeals) vide order dated 17.02.2014, set aside the Order-in-Original and classified the products under CTH 30039011 and thereafter till the final order dated 10.01.2018 was passed by the Tribunal that the product in question is to be classified as food supplements, the appellant was under a bonafide belief and filed the bills of entry, accordingly in terms of the order of the Commissioner (Appeals) dated 16.08.2012 and thereafter the order dated 17.02.2014. In view of the proceedings which was pending since 2012 and the department itself had preferred an appeal, it cannot be said that the department was not aware of the classification of the products as declared in the instant bills of entry by the appellant and therefore no fault can be found on the part of the appellant as 9 out of the 10 bills of entries were filed before the final order was passed by the Tribunal on 10.01.2018 and the Order-in-Appeal by the Commissioner (Appeals) was holding the field. In this regard we would like to refer to

the observations made by this Tribunal in an appeal filed by the Customs Broker of the appellant against the present impugned order as under:

> "11. In the order, the Principal Commissioner obfuscated the fact that the final order of this Tribunal was passed on an appeal by the revenue as the Commissioner (Appeals) had decided the classification in favour of the importer. Until the final order was passed by this Tribunal on 10.1.2018, the order of the Commissioner was binding on both sides. Of the bills of entry listed in the impugned order, all except one were filed before the final order was passed by this Tribunal. The last one was filed soon after the final order was passed. There is nothing on record to show that appellant was made aware of this order by the revenue and told to classify the goods accordingly. It is not unlikely that it took some time for the appellant to come to know about the final order. It may be pointed out that the SCN dated 02.07.2018 was issued in the present proceedings six months after the final order. Therefore, in respect of nine bills of entry, the importer and the appellant were correct in classifying the goods as per order of the Commissioner (Appeals) and the officers were correct in clearing the goods for home consumption accordingly. The Principal Commissioner is in error in holding in the impugned order that the importer and the appellant (in importer's behalf) should have filed bills of entry contrary to the order of the Commissioner in good faith.
>
> 12. There is a well established practice in the department to deal with cases with the order which holds the field is against the revenue and an appeal is pending with the superior court or Tribunal. SCN are issued periodically to protect revenues interest and they are transferred to the call book which are then decided after the order of the superior Court or Tribunal is received. In these bills of entry also, after the order of the Commissioner (Appeals), SCNs could have been issued and transferred to Call Book and decided after this Tribunal passed the final order. However, until the final Order of this Tribunal was issued, the order of Commissioner (Appeals) was binding both on the importer and the officers."

11. The aforesaid observations of the Tribunal (against the present impugned order), holds the field that the appellant was justified in adopting the classification while filing the bills of entry. This is sufficient to turn down the revenue's contention about the existence of wilful suppression of facts or deliberate mis-statement on behalf of the appellant. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten the liability on the appellant when the revenue is aware of the litigation with the appellant on the issue of classification of the very same products and taking

steps to challenge the same before the higher forum. Thus it cannot be said that the appellant has in any manner, suppressed or mis-stated the facts wilfully to evade the payment of duty.

12. The law on invocation of extended period of limitation is well settled. Mere omission or merely classifying the goods/services under incorrect head does not amount to fraud or collusion or wilful statement or suppression of facts and therefore the extended period of limitation is not invocable. Reliance is placed on the decision of the Tribunal in **Incredible Unique Buildcon Private Ltd. 2022 (65) GSTL 377.**

> **"17.** We are unable to find any proof of show cause notice or from the impugned order. intent to evade either from the Mere omission or merely classifying its services under an incorrect head does not amount to fraud or collusion or wilful misstatement or suppression of facts. The intention has to be proved to invoke extended period of limitation. Supreme Court has delivered the judgment in the case of *Larsen & Toubro* dated 20 August, 2015, prior to which there was no clear ruling that services which involved supply or deemed supply of goods could only be classified under WCS. The appellant had been classifying its services (which also involved supply/use of goods) under the CICS and Revenue never objected to it and, therefore, the appellant could have reasonably believed it to be the correct head and continued to file returns accordingly and paying duty. Once the returns are filed, if Revenue was of the opinion that the self-assessment of service tax and the classification was not correct, it could have scrutinized the returns and issued notices within time. The show cause notice was issued on 30 September, 2015 for the period covered October, 2010 to June, 2012, which is clearly beyond the normal period of limitation. Therefore, although Revenue is correct on merits, the demand is time barred and, therefore, cannot sustain. For the same reason, the penalties imposed upon the appellant under Sections 77 and 78 also cannot be upheld."

13. The Supreme Court in **Nizam Sugar Factory 1995 (78) ELT 401** has categorically laid down that where facts are known to both the parties, the omission by one to do what he might have done, and not that he must have done, does not render it suppression. Thus when all the facts are before the department as in the present case then there would be no wilful mis-declaration or wilful suppression of

facts with a view to evade payment of duty. The relevant para from the judgement in **Nizam Sugar Factory** (supra) is quoted below:-

> **"4.** Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

13.1 Without multiplying too many decisions on the principle justifying or rejecting the invocation of the extended period of limitation, we would just refer to the citations:

> 2004 (166) ELT 151 (SC) - Hyderabad Polymers (P) Ltd., vs. Commissioner of Central Excise, Hyderabad
>
> 2006 (197) ELT 465 (SC) – Nizam Sugar Factory vs. Collector of Central Excise, Andhra Pradesh
>
> 2004 (164) ELT 236 (SC) – ECE Industries Ltd., vs. Commissioner of Central Excise, New Delhi.
>
> 2003 (153) ELT 14 (SC) P&B Pharmaceuticals (P) Ltd., vs. Collector of Central Excise
>
> 2015 (324) ELT 8 (SC) – Caprihans India Ltd., vs. Commissioner of Central Excise, Surat

14. We have also considered the decisions cited by the learned Authorised Representative for the revenue on the issue of extended period of limitation, however, we feel that in the facts of the present case the same would not be applicable for the simple reason that the earlier proceeding on the subject matter (Order in Original dated

27.7.2012 annexed as 'Annexure B' in the Appeal paper book) was decided without allegation of suppression and mis-statement of material facts, then in the subsequent show cause notice, it cannot be said that there was any suppression on the statement of facts by the appellant. We, therefore conclude that the revenue cannot invoke the extended period of limitation under section 28(4) of the Act, hence the show cause notice dated 2.07.2018 is barred by limitation for the period beyond the normal period.

15. We now come to the issue of imposing penalty under section 114A of the Customs Act on the appellant. As we have held that it is not a case of willful suppression, mis-statement or mis-declaration by the appellant, the ingredients required for invoking the penalty being the same, we hold that penal action under the provisions of section 114A as imposed by the impugned order is not justifiable and is hereby set aside. We are also supported by the decision of this Tribunal dated 1.12.2022 (arising out of the same impugned order) refuting the observations of the Principal Commissioner on self assessment by the appellant, inter-alia observing:

> "14…….Self assessment is subject to any reassessment by the proper officer. Self assessment can also be appealed against to the Commissioner (Appeals). They can assess duty as per their understanding and the officers are free to reassess it as per section 17(4). Mis-classification or incorrect assessment of duty does not amount to mis-declaration in the bill of entry, nor does it attract any penalty.
>
> 15……..We understand that the bills of entry are cleared on the basis of self assessment, they are subjected to post clearance audit. If so, it gives sufficient time to the officers to find if any duty has escaped assessment and issue a demand under section 28. However, there can be no penalty for wrong self-assessment by the importer".

16. On similar grounds, we hold that the appellant cannot be held liable for penalty under section 114 AA of the Customs Act and

the reasoning given by the Principal Commissioner that at the time of presenting the bill of entry, the importer made and subscribed to false declaration against the contents of bills of entry, in contravention to section 46(4) of the Act is unsustainable in view of the discussion above.

17. Lastly, we would consider the issue of confiscation of goods under section 111 (m) and (o) as ordered by the Principal Commissioner. The learned counsel for the appellant submitted that the invocation of section 111(m) of the Act is not proper, for the reason that the present dispute relates to classification of goods and does not involve any valuation issue. Similarly, the confiscation under the provisions of section 111(o) is also not sustainable as the benefit of the exemption notification has been availed in accordance with law.

18. Referring to the provisions of section 111 (m), the Tribunal analysed the same in the order dated 1.12.2022 (arising out of the same impugned order) observing as:

> "20. Section 111(m) does not provide for confiscation of goods if the importer or on his behalf the Customs broker claims any wrong classification in the bill of entry. It only provides for confiscation if there is mis-declaration of goods. Even if the goods are mis-classified or duties, otherwise wrongly self-assessed by the importer, the goods do not become liable for confiscation. The remedy against wrong assessment is reassessment by the officer under section 17(4). The dispute between the revenue and the importer was with respect to the classification. At the time the bills of entry were filed, the Commissioner (Appeals) order held the field according to which the appellant filed the bills of entry. Therefore, the Principal Commissioner has erred in holding that the goods were liable for confiscation under section 111(m)".

19. In view of the aforesaid observations made, the findings in the impugned order that section 111(m) can be invoked for mis-declaration of any material particular, in respect of the goods and not necessarily only the value of the goods stands quashed and the issue

stands decided in favour of the appellant that there cannot be any confiscation of goods under section 111(m) in the case of wrong classification.

19.1 Also, as noticed by us, it is a simple case of mis-classification/incorrect classification and not mis-declaration of goods on the part of the appellant, the logical inference would be that the appellant has not wrongly claimed the exemption benefit and therefore there can be no confiscation under Section 111(o) of the Act.

20. We therefore partly allow this appeal and modify the impugned order to the following effect:

a) The goods in question are re-classified as food preparations under CTH 2106 9099

b) The revenue cannot invoke the extended period of limitation and therefore the show cause notice is barred by limitation except to the extent of the normal period.

c) The demand of differential duty is limited to the normal period, i.e. 03.07.2013 to 19.05.2015 and the same may be computed accordingly.

d) The interest under the provisions of section 28AA of the Act is also to be charged and recovered from the appellant for not paying the due customs duties in respect of the normal period of demand.

e) There cannot be any order of confiscation under section 111(m) or 111(o) of the Act.

f) No penalty can be imposed on the appellant under the provisions of section 114A or under 114AA of the Customs Act, 1962.

21. The impugned order is partly set aside as referred to above and the appeal is remanded to the Adjudicating Authority for the limited purpose of computing the differential duty to be demanded in respect of normal period only.

22. Accordingly, the appeal is partly allowed by way of remand.

(Pronounced on 20th Dec., 2023).

(Binu Tamta)
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)

Pant

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 52881 OF 2019

(Arising out of Order-in-Original No. 13/2019/MKS/Pr.Commr./ICD-Import/TKD dated 27.08.2019 passed by the Principal Commissioner of Customs (IMPORT), New Delhi)

Polaris India Private Limited **...Appellant**
Plot No. 14/6, Mathura Road,
Near Mewala Maharajpur Metro Station,
Faridabad, Haryana-121003

Versus

Principal Commissioner of Customs, **...Respondent**
Office of the Principal Commissioner
of Customs (IMPORT), Inland Container Depot,
Tughlakabad, New Delhi-110020

APPEARANCE:

Shri Harish Bindumadhavan, Advocate for the appellant.
Ms. Jaya Kumari, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 30.01.2023
Date of Decision: 03.07.2023

FINAL ORDER NO. 50803/2023

JUSTICE DILIP GUPTA:

Polaris India Private Limited[1] has filed this appeal to assail the order dated 27.08.2019 passed by the Principal Commissioner of Customs (Import), New Delhi[2]. The Principal Commissioner has confirmed the demand of customs duty of Rs. 41,61,609/- under section 28(4) of the Customs Act, 1962[3] with interest under section 28AA of the Act and penalty of Rs. 41,61,609/- under section 114A of

1. **Polaris India**
2. **the Principal Commissioner**
3. **the Act**

the Act. A redemption fine of Rs. 5,00,000/- has also been imposed in lieu of confiscation under section 125 of the Act.

2. Polaris India is a wholly owned subsidiary of Polaris Industries Inc., USA [4]. Polaris USA designs, engineers, manufactures and markets innovative high quality Off Road Vehicles, including All Terrain Vehicles [5], snowmobiles, motorcycles and electric powered vehicles for various applications.

3. Polaris India commenced import of vehicles from its parent company and through various Bills of Entry filed during the period from 23.07.2013 to 18.11.2016, imported the following models of vehicles, which shall be referred to as 'Vehicles':

1. Rangers (Non-Electric) **[cleared under CTH 8704]**
   - (i) In Ranger Crew 900 Model
   - (ii) In Ranger Crew 570 Model
   - (iii) In Ranger 570 Model
2. Ranger (Electric) **[cleared under CTH 8709]**
3. Brutus **[cleared under CTH 8709]**

4. These Vehicles, which were classified by Polaris India under Customs Tariff Heading[6] 8704 and 8709, as vehicles for the purpose of carrying goods, material shifting and pushing and hauling activities based on their features and characteristics, have been classified under CTH 8703 in the impugned order by treating them as vehicles principally designed for transportation of persons.

5. It needs to be noted that earlier the Directorate of Revenue Intelligence[7] had initiated investigations in relation to the import of

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4. Polaris USA
5. ATVs
6. CTH
7. DRI

ATVs in December 2016 and issued summons to Polaris India. DRI sent a scanned copy of the seizure memo by email dated 17.07.2017, wherein the DRI placed 16 ATVs under seizure under section 110(1) of the Act, including those already sold to dealers. Seizure memo was amended by a corrigendum dated 24.08.2017 and a revised memo was forwarded to Polaris India by email dated 24.08.2017 in relation to 12 ATVs. Subsequently, the 12 seized ATVs were provisionally released by order dated 26.09.2017.

6. A show cause notice dated 21.12.2017 was, therefore issued to Polaris India proposing:

(i) Rejection of the declared classifications of ATVs in the Bills of Entry filed and reclassifying the same under CTH 8703;

(ii) Confiscation of 12 seized ATVs under section 111(m) of the Act;

(iii) Confiscation of 22 seized ATVs imported by misclassifying, but not available for seizure under section 111(m) of the Act;

(iv) Demand and recovery of differential customs duty of Rs. 61,18,771/- and Rs. 5,66,306/- under section 28(4) of the Act; and

(v) Recovery of interest on proposed demand of differential customs duty under section 28AA of the Act and imposition of penalty under section 112(a)/section 114A of the Act.

7. Polaris India filed a detailed reply on 05.08.2019 giving reasons as to why the classification adopted by it should not be rejected.

8. The Principal Commissioner passed the impugned order upholding the classification under CTH 8703 and the demand

proposed in the show cause notice. The findings recorded by the Principal Commissioner in regard to the two set of Vehicles are as follows:

(i) **Ranger (non electric), Brutus and Ranger (electric)**: There is no evidence from the product literature and Polaris USA's website that the vehicles are meant for transportation of goods. Hence the vehicles would be classified under CTH 8703 for transportation of passengers; and

(ii) The penalty on Aftab Alam under section 112 of the Act is not imposable since he cannot be held responsible for the acts prior to his joining and there is no allegation of any personal gain to him.

9. Shri Harish Bindumadhavan, learned counsel for the appellant made the following submissions:

(i) The Principal Commissioner has not discharged the burden to prove that the correct classification is Customs Tariff Item[8] 8703 10 10/ 8703 10 90. A perusal of CTI 8703 10 10 and CTI 8703 10 90 shows that for a motor vehicle to be classified under CTH 8703, it must be principally designed for transport of persons first. The fact that the vehicle is principally designed for transport of persons is required to be proved by the Department upon scrutiny and examination of the vehicles in dispute, if the Department intends to classify the Vehicles under CTH 8703 by rejecting the classification adopted by the appellant;

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8. CTI

(ii) The Vehicles in dispute have not been designed principally for transportation of persons;

(iii) Incidental use by passengers does not make the Vehicles as one which are principally designed for transportation of passengers; and

(iv) There is no suppression or mis-statement or declaration with intent to evade payment of service tax and so the extended period of limitation could not have been invoked, nor could penalty have been imposed.

10. Ms. Jaya Kumari, learned authorized representative appearing for the Department supported the impugned order and made the following submissions:

(i) ATVs which are having off road use are for recreational purpose and principally designed for transportation of persons and not for the transportation of goods. As such the classification of the imported goods under CTI 8704 31 90, CTI 8704 90 12 and CTI 8704 90 90 is not appropriate. These goods are specially designed vehicles for transport of persons and accordingly as appropriately classifiable under CTI 8703 10 90 and CTI 8703 10 10;

(ii) ATVs Rangers have different models as two-seater, three-seater and crew, which shows that they are for recreational purpose only and principally designed for transportation of persons and not for the transportation of goods;

(iii) As per the website of the parent company and the owner Manual of Ranger Models, there is no mention

that Ranger is meant for transportation of goods. However, it contains guidelines regarding safety and other information regarding transportation of passengers;

(iv) Serial No. 6 of Explanatory Notes to Harmonized System of Nomenclature[9] 87.03 further reveals that ATVs for off road use which have steering system based on Ackerman principle are specifically covered under HSN 87.03;

(v) In view of the Explanatory Note to HSN 87.09, the imported goods i.e. ATVs of BRUTUS Model do not have essential characteristic required for classification under HSN 87.09; and

(vi) By resorting to willful mis-statement and suppression, the appellant rendered itself liable to penalty under section 114A of the Act and confiscation under 111(m) of the Act.

11. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

12. It would be necessary to first reproduce the Notes of Chapter 87 of the Customs Tariff Act and CTH 8703, CTH 8704 and CTH 8709 as contained in Chapter 87 and they are as follows:

CHAPTER 87

Vehicles other than railway or tramway rolling-stock, and parts and accessories thereof

NOTES:

1. This Chapter does not cover railway or tramway rolling-stock designed solely for running on rails.

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9. HSN

2. For the purpose this Chapter, "tractors" means vehicles constructed essentially for hauling or pushing another vehicle, appliance or load, whether or not they contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilizers or other goods.

Machines and working tools designed for fitting to tractors of heading 8701 as interchangeable equipment remain classified in their respective headings even if presented with the tractor, and whether or not mounted on it.

3. Motor chassis fitted with cabs fall in heading 8702 to 8704, and not in heading 8706.

4. Heading 8712 includes all children's bicycles. Other children's cycles fall in heading 9503.

Tariff Item		Description of goods	Unit	Rate of duty	
				Standard	Preferential Areas
(1)		(2)	(3)	(4)	(5)
8701		**Tractors (Other Than Tractors of Heading 8709)**			
8702		**Motor Vehicles for the Transport of ten or more persons, including the Driver**			
8703		**Motor Cars and Other Motor Vehicles Principally Designed for the Transport of Persons (Other than those of Heading 8702), Including Station Wagons and Racing Cars**			
8703 10	-	Vehicles specially designed for travelling on snow; golf cars and similar vehicles:			
8703 10 10	---	Electrically operated	u	125%	-
8703 10 90	---	Other	u	125%	-
8704		**Motor Vehicles for the Transport of Goods**			
8704 10	**-**	Dumpers designed for off-			

		highway use			
	-	Other, with spark-ignition internal combustion piston engine:			
8704 31	--	g.v.w. not exceeding 5 tonnes:			
8704 31 10	---	Refrigerated	u	40%	-
8704 31 20	---	Three-wheeled motor vehicles	u	40%	-
8704 31 90	---	Other			
8704 32	--	g.v.w. exceeding 5 tonnes:			
	---	Lorries and trucks:			
8704 32 11	----	Refrigerated	u	40%	-
8704 32 19	----	Other	u	40%	-
8704 32 90	---	Other	u	40%	-
8704 90	-	Other:			
	---	Lorries and trucks:			
8704 90 11	----	Refrigerated	u	40%	-
8704 90 12	----	Electrically operated	u	40%	-
8704 90 19	----	Other	u	40%	-
8704 90 90	---	Other	u	40%	-
8709		**Works Trucks, Self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short distance transport of goods; tractors of the type used on railway station platforms; parts of the foregoing vehicles**			
	-	Vehicles:			
8709 11 00	--	Electrical	u	10%	-
8709 19 00	--	Other	u	10%	-
8709 90 00	-	Parts	Kg.	10%	-

13. It is pointed out by the learned counsel for the appellant that the models of ATVs i.e. Ranger Vehicles (electric or non-electric) and Brutus Vehicles are manufactured and designed for the purpose of

carrying goods, material shifting and pushing and hauling activities. According to the learned counsel, the design and build of the imported Vehicles are specifically for the purpose of transportation of cargo/goods to different places. The contention of the learned counsel, therefore, is that the appellant has correctly classified Ranger Vehicles (non electric) under CTH 8704, and Brutus and Ranger Vehicles (electric) under CTH 8709.

14. To substantiate this submission, learned counsel has placed the factual portion contained in the Memo of Appeal in respect of Ranger Vehicles (non-electric) and the same is produced below:

RANGER VEHICLES (NON-ELECTRIC)

a) Product Description and Usage

(i) Ranger Vehicle is a market leader providing best off-road capability and hardest working vehicle allowing cargo carrying capabilities to locations where other vehicles cannot go. All Ranger Vehicles come with four wheel drive to offer ability to work in wet and muddy regions.

(ii) The build and design of the Ranger Vehicle focus on cargo and hitch toe capabilities along with offering features which are relevant for transporting goods to off road places. Ranger Vehicles have a separate cargo area, platform and a drop-down tailgate offering easier cargo transportation. Ranger Vehicles also have a tilt dump box for easier unloading of the cargo.

(iii) The Ranger Vehicle is manufactured with an intent to transport cargo and therefore offers various options to install utility accessories such as winches, cargo and bed storages, and plow systems. The Vehicle provides spaces and fittings, which allows easy installation of these utility accessories, and therefore provides the flexibility to the customers to customize the Vehicle as per their requirements and needs depending upon the job or work to be performed.

(iv) Ranger Vehicles are ATVs primarily used for off road applications inter alia by the State Forest Departments, Border Security Force, State Police for patrolling in forests or along border or by other users for material/ waste movement, transportation of goods in large farm houses, etc. Ranger Vehicles are not meant for transport on roads.

(b) Technical Features and Specifications

(i) Ranger Vehicles have two sections which are separated by way of a barrier or a panel:

- Front Area/Section – This is meant for the seating of driver and passengers

- Rear Area/Section – This is meant for loading and carrying of cargo or material.

(ii) **********

(iii) Ranger Vehicles have a box capacity ranging from 226 kg to 453 kg which is used to load, store and transport cargo.

(iv) Ranger Vehicles have a payload capacity ranging from 453 kg to 794 kg which offers the Vehicle to carry heavy loads to places where other vehicles cannot go.

(v) Additionally, Ranger Vehicles have a hitch toe capacity ranging from 680 Kg to 1134 kg which provides ease in transportation of heavy weighted goods.

(vi) Ranger Vehicles have high engine capacities ranging from 44 HP to 82 HP which allow the vehicle to carry loads to off road regions.

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(c) Special Features of standard Ranger Vehicles

(i) **No seating comfort-** Ranger Vehicles have bench type seating allowing for easy ingress and egress for work/cargo carrying capabilities. Hence, passenger comfort is compromised for cargo/goods carrying capabilities.

(ii) **********

(iii) **Hauling/ Trailer Capabilities -** Ranger Vehicles have Trailer Hitch attachment as part of frame, which allows the Vehicle to have additional cargo carrying ability. Ranger has an available winch, which increases the hauling capabilities. The Appellant humbly submits that presence of such features clearly demonstrates that the Ranger Vehicles are designed and imported with an intent to transport goods, more so, by also providing additional cargo handling features.

(iv) **No passenger comfort -** Ranger Vehicles do not come standard with roofs to protect passengers from extreme weather conditions such as rain or sunlight. Further, dash, floor, seats, all are made from waterproof plastics and vinyl allowing vehicle to be an open cab

vehicle for work applications, garden which can be washed with a hose.

15. The contention of the learned counsel for the appellant, based on the features, specifications, technical capabilities and usage as described above, is that:

(i) The Ranger Vehicles (non-electric) are primarily designed and intended for transportation of cargo on off road surfaces;

(ii) Various Ranger Vehicle models are four- wheel, light-weight vehicles with a top speed of 60 mph or less having different payload abilities ranging from 454 kg to 907 kg and incorporate a segregated large rear box or cargo area that tilts to facilitate unloading of goods;

(iii) Although various models can carry anywhere from 2-6 passengers, primarily seats and vehicle configurations are designed for work and cargo hauling, depending upon users' requirements;

(iv) Further, seating area in Ranger Vehicle is smaller and generally not protected with doors or similar safety features, as in passenger vehicles, in order to facilitate easy ingress and egress;

(v) Ranger Vehicles have more weight carrying capacity for goods as compared to the weight carrying capacity for passengers; and

(vi) Additionally, Ranger Vehicle is primarily marketed by the appellant to support cargo transport and similar work functions, highlighting payload capacity, including some models with more fuel-efficient diesel engines and enhanced

heavy duty suspensions, brake systems, and calibration clutch.

16. Learned counsel, therefore, submitted that it is evident that the construction, build and usage of the Vehicle are meant for material shifting and transportation of cargo. Thus, according to the learned counsel, the Ranger Vehicles deserve classification under CTH 8704, which covers vehicles primarily meant for transportation of goods.

17. With regard to Brutus and Ranger Vehicles (electric), learned counsel for the appellant placed the following position as enumerated in the Memo of Appeal.

BRUTUS AND RANGER VEHICLES (ELECTRIC)

(a) <u>Product Description and Usage</u>

(i) Brutus Vehicles and Ranger Electrical Vehicles are work utility vehicles predominantly used in factories, warehouses and other places by the customers. Ranger Electric vehicles are the electric vehicles which are run on AC induction motors whereas Brutus Vehicles are light-weight diesel powered vehicles with hydrostatic transmission. These Vehicles also have all season climate control functions and come with optional front attachments to create new levels of productivity outdoors.

(ii) The build and design of the Brutus/Ranger Electric vehicles focus on cargo and hitch toe capabilities along with offering features which are relevant for transportation of goods and performing various work applications like plow, lift, scoop, blow etc. as shown in the images below. These Vehicles have a separate cargo area, platform and a drop-down tailgate offering easier cargo transportation. Further, they also have a tilt dump box for easier unloading of the cargo.

(iii) These Vehicles are manufactured with an intent to transport cargo and therefore, offer various options to install utility accessories such as winches, cargo and bed storages, and plowing systems. These Vehicles provide spaces and fittings, which allow easy installation of these utility accessories, and therefore gives the flexibility to the customers to customize the Vehicle as per their requirements.

(iv) Brutus is predominantly used in floods and other disaster hit areas wherein the Vehicle assists in clearing the roads, plowing off snow after a major disaster, etc.

(b) <u>Special features of standard Brutus Vehicles and Ranger (Electric) Vehicles</u>

(i) <u>No seating comfort</u> - These Vehicles have bench style seating allowing easy ingress and egress with transport of goods as focus. Passenger comfort is compromised (as shown in the image below) in these Vehicles for cargo/ goods carrying capabilities. The set-up of these Vehicles is ergonomically different than a people carrier.

(ii) <u>Rear Suspension</u> – These Vehicles have suspension designed to increase load carrying capability while keeping ground clearance allowing vehicle to carry goods to locations which other vehicles cannot carry. Similar to Ranger Vehicles, the suspension in Brutus is specifically designed to be able to carry massive loads while maintaining ground clearance.

(iii) <u>Hauling/Trailer Capabilities</u> **–** These Vehicles have Trailer Hitch attachment which allows the Vehicles to have additional cargo carrying ability. Hitch receivers are standard on all Brutus vehicles to tow cargo long distances.

(iv) <u>Passenger comfort removed</u> – Brutus Vehicles do not come standard with roofs to protect passengers from extreme weather conditions such as rain or sunlight. Further, dash, floor, seats, all are made from waterproof plastics and vinyl allowing vehicle to be an open cab vehicle for work applications. Also, vehicle can be washed with a garden hose.

(v) <u>Focus on cargo carrying</u> - These Vehicles have separate cargo area, platform and a drop-down tailgate offering easier cargo transportation. These Vehicles also have an electric bed lift allowing for easier unloading of heavy cargo.

(c) <u>Technical Features and Specifications of standard Brutus Vehicles and Ranger Electric Vehicles</u>

(i) These Vehicles have two sections which are separated by way of a barrier or a panel:

<u>Front Area/Section</u> - This is meant for the seating of driver and passengers

<u>Rear Area/Section</u> - This is meant for loading of cargo or goods

(d) These Vehicles have a small area for seating of passengers and can carry up to two to three passengers only.

(e) Brutus Vehicles and Ranger EVs have a cargo box capacity of 447 Kg and 226.80 Kg, respectively, which is used to load, store and transport the cargo.

(f) Brutus Vehicles and Ranger EVs have a payload capacity of 793.80 Kg and 453.60 Kgs, respectively, which allows the Vehicles to carry heavy loads.

(g) Brutus Vehicles and Ranger EVs have a hitch toe capacity of 907.2 Kg and 680.40 Kg respectively which provides ease in transportation of heavy weighted goods.

(h) Brutus Vehicles have a top speed of 30 mph or less and Ranger EVs have a top speed of 25 mph or less.

(i) These Vehicles have a bench type seating to allow easy ingress and egress and do not have any passenger comfort amenities, that are provides in vehicles designed for transportation of persons.

(e) These Vehicles focus on cargo and hitch toe capabilities and are marketed on work/ cargo/ hitch toeing capabilities for work related jobs, similar to the Ranger Models elaborated above. In addition, these Vehicles have separate cargo area, platform and a drop-down tailgate offering easier cargo transportation and also have an electric bed lift allowing for easier unloading of heavy cargo. Brutus has more weight carrying capacity for goods as compared to the weight carrying capacity for passengers.

18. Learned counsel for the appellant contented that it is evident from technical literature, product features, images and videos that Brutus and Ranger Electric Vehicles are meant for transportation of goods and not passengers. Thus, according to the learned counsel, special features of Brutus and Ranger Electric Vehicles completely fit within the scope of Work Trucks and Vehicles covered under CTH 8709 and, accordingly, appropriately classifiable under CTH 8709.

19. Learned authorised representative appearing for the department submitted that the Vehicles imported by Polaris India deserve to be classified under CTI 87031010 CTI 87031090 and in this connection placed reliance on the website of Polaris USA. Learned authorised representative submitted that the Vehicles are principally

designed for transportation of persons and not for transportation of goods. In this connection learned authorised representative also placed reliance upon serial no. 6 of Explanatory Notes to HSN 87.03 and HSN 87.09.

20. It would be useful to compare the salient features for classification under CTH 8703 as per HSN and the feature of the Vehicles and they are as follows:

Salient features for classification under CTH 8703 as per HSN	**Features of the Vehicles**
Presence of permanent seats with safety equipment (safety seat belts or anchor points and fittings for installing safety seat belts) for each person	The vehicles have bench type seats for providing easy ingress and egress for work/ cargo carrying capabilities. Passenger comfort is compromised.
Presence of rear windows along two side panels	There are no rear doors or windows along the two side panels. Rear section of the vehicles contain cargo box meant for loading, storing and carrying goods and material. They also have a drop-down tailgate and tilt dump box for convenient cargo transportation.
Presence of sliding, swing-out or lift-up door or doors with window, on side panels or in rear	Vehicles do not have doors, windows or similar safety features on the front or rear section. However, the customer is given an option to install doors, side panels, etc.
Increased windows and sight capacity especially in rear of the vehicle	There are no windows in the front or rear section. Rear section contains cargo boxes and do not have windows/doors attached to it.
Absence of a permanent panel or barrier between area for driver and front passengers and rear area that may be used for transport of both passengers and cargo	The Vehicles have two sections – front for driver and passengers and rear for loading of cargo. The sections are separated by a defined physical separation in the form of a panel or a barrier.
Lack of substantial cargo room	Vehicles have separate cargo area, platform and a drop-down tailgate for loading and unloading of cargo.
Ability to drive at high speeds	They do not have the ability to run at high speeds. For ranger, top speed is 60 mph and for Ranger EV/Brutus it is 30 mph and 25 mph or less.
Diminished cargo capacity and hauling	Vehicles focus on hauling, pushing and hitch tow capabilities and come with

capabilities	enhanced cargo box capacity, payload capacity and hitch toe capacity.
Presence of comfort features and interior finish and fittings throughout vehicle interior associated with passenger areas of vehicles (floor carpeting, ventilation, interior lighting, ashtrays etc.)	They lack comfort features and interior fitting which are prevalent in vehicles meant for passengers. There is no door, windows or roofs. However, an option to install them is given to the customers.
Uni-body construction without defined separation between passenger and cargo locations	They do not have uni-body construction. There is a defined separation between driver and passenger section and cargo section.

21. Similarly, it would be appropriate to compare the salient features for classification under CTH 8704 with the features of the Vehicles and the same are as follows:

Salient features for classification under CTH 8704	**Features of the Vehicles**
Presence of bench-type seats without safety equipment for each person or passenger amenities in the area behind the area for the driver and front passengers.	These vehicles have bench type seats for providing easy ingress and egress for work/ cargo carrying capabilities. They come with only basic safety features which are to be present in all vehicles like seat belts for drivers and passengers.
Presence of separate cabin for driver and passenger and a separate open platform with side panels and a drop-down tailgate (pick-up vehicles)	Ranger Vehicles have two sections – Front section/area is meant for seating of driver and passengers, whereas the rear is for loading and carrying cargo. The two sections are separated by a panel/barrier. Rear section contains a cargo box meant for loading, storing and carrying goods and material. Additionally, the vehicles have a drop down tailgate and tilt dump box for convenient cargo transportation.
Presence of sliding, swing-out or lift-up door or doors with window, on side panels or in rear for loading and unloading of cargo	No door or windows are present in the Ranger Vehicles un order to allow easy ingress and egress for smooth transportation of goods.
Absence of rear windows and inclusion of side panels to contain cargo	The rear section of vehicles contains cargo boxes for loading, storing and carrying of cargo and does not have windows or doors to it.
Presence of a permanent panel or barrier between the area for the driver and front passenger and the rear area	Ranger Vehicles have two sections – Front section/area is meant for seating of driver and passengers, whereas the rear is for loading and carrying cargo. The two sections are separated by a

	panel/barrier.
Absence of comfort features and interior finish and fittings in cargo bed area which are associated with passenger areas of vehicles (E.g. floor carpeting, ventilation, interior lighting, ashtrays)	In the cargo area, there are no comfort features such as floor carpeting, interior lighting etc. The Rangers do not have roofs or frames or ashtrays.

22. Brutus and Ranger Vehicles (electric) classified by the appellant under CTH 8709 are classifiable under CTH 8709 as works trucks and the same is evident from a perusal of their characteristics and features. The Vehicles do not have the features that a vehicle for transportation of persons is required to have as per the HSN Explanatory Notes.

23. From the aforesaid comparison, it clearly transpires that the appellant has correctly classified Ranger Vehicles (non electric) under CTH 8704, and Brutus and Ranger Vehicles (electric) under CTH 8709.

24. Even otherwise, it is a settled principal of law that if the department wishes to change the classification proposed by an assessee then it is for the department to discharge the burden and prove that the Vehicles fall under CTH 8703, which includes within its scope motor cars and other motor vehicles **principally designed for transport of persons**. The department has merely relied upon the website of Polaris USA to conclude that the classification adopted by Polaris India is not correct. It was imperative for the department to have established that the Vehicles are primarily designed for transport of persons. Only when the department discharges the burden of proof, that the burden of proof would shift to the assessee. In this connection reliance can be placed on the decision of the

Supreme Court in **H.P.L Chemicals** vs. **CCE., Chandigarh** [10] , wherein the following observations have been made:

> "29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue."

25. The reason assigned in the impugned order passed by the Principal Commissioner for holding that the classification would be under CTH 8703 is as follows:

> "31. Thus, the evidence shows that these ATVs may perform a wide variety of functions for a diverse buying public. Some of the utility ATVs may, no doubt, be purchased primarily as personal or corporate workhorses to perform pushing or hauling functions….
>
> In other words, the evidence shows that the ATVs in issue have many different uses, some of which have nothing to do with carrying goods, some of which do."

26. Even this paragraph would indicate that Principal Commissioner has noted that the Vehicles may perform a wide variety of functions, some of which would be pushing or hauling functions.

27. For a vehicle to be classified under CTH 8703, it is required to be 'principally designed' for transportation of persons. The Vehicles in dispute, namely, the Ranger (non-electric) and the Ranger (electric) and Brutus Vehicles are not designed principally for transportation of persons. It would, therefore be necessary to determine what would constitute 'principally designed for transportation of persons'.

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10. 2006 (197) E.L.T. 324 (SC)

28. In **Commissioner of Central Excise** vs. **Telco Ltd**[11], the Tribunal observed:

> "(f) In absence of any other criteria available to determine 'principally designed and on a plain reading of logic of the classification ruling of HSN Committee now adopted by us indicates to us, **if vehicle weight is used up in the design, in favour of the passengers inasmuch as a major portion of the same is used for the passengers transportation, then the vehicle would be classified as one which is 'principally designed for transport of persons'. If, on the other hand, this gross vehicle weight is so distributed by designing features on a major portion of difference is used for transportation of goods then the vehicle would not classify in the classification Heading 8303, but would classify in the classification as classified for transportation of goods i.e. under Heading 8704.**
>
> *******
>
> (h) ********. In case of 8703 the term "Other motor vehicles principally designed for the transport of not more than six persons", may imply reading of an 'end use' stipulation to mean that Design of the vehicle for purpose of transport of passengers and not cargo. ********
>
> 5. **********. **We therefore conclude, that an incidental use by crew/family members/farm labour, should not over-ride the essential characteristic of the vehicles herein which is for transport of goods/spare parts & tools/goods-farm produce for which it is designed put to use. The transport of person is incidental.** That farm labour/crew/family members could travel in relative comfort of a Tractor/Trolley one encounters in the Rural Indian Scene, will not contribute to be a factor to determine those transports as 'principally designed for persons'. ***********
>
> **Therefore any intended/isolated advertised use by the manufacturer, does not induce us to conclude that the entity under dispute, are 'principally designed for transport of person'.** A single isolated

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11. 2002 (143) ELT 548 (Tri.-Mumbai)

> advertisement cannot be a cause to classify the entity under 8703. The substantial normal use, as it appears, from the documents in the Miscellaneous Application of Revenue is for transport of goods."
>
> **(emphasis supplied)**

29. In **Mahindra and Mahindra Ltd.** vs. **CCE & ST, Hyderabad-I**[12], the Tribunal observed:

> "6.5 In the event, we have no hesitation in holding that the test laid down in the earlier Tribunal decision viz; that a motor vehicle would be classifiable under 8703 or 8704, depending on how the gross vehicle weight in design of the vehicle was distributed and whether the major portion of it was used for transportation of passengers or for transportation of goods, is still the settled yardstick to be applied in such a controversy."

30. Thus, it is the gross weight usage that determines whether the vehicle is principally designed for transportation of persons.

31. The documents filed by the appellant establish that the design and build of the imported Vehicles are not principally meant for transportation of passengers, as from the distribution of the payload capacity between the area designed for passengers and cargo, it can be seen that out of the total capacity, more is designed to be used for carrying of cargo only and not passengers. This shows that the principal design is not for transportation of passengers but for transportation of goods.

32. This apart, the Ranger and Brutus Vehicles imported by the appellant over the years have been sold to the TN Coastal Security, NIM/UK-SDRF- Disaster Relief Forces, Border Security Surveillance and Utility Support, primarily for the purpose of transportation of goods and utility purposes. Therefore, applying the usage/functionality test, which can be applied in the instant case as

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12. 2019 (367) E.L.T. 465 (Tri.- Hyd.)

CTH 8703 uses the words 'principally designed for transportation of passengers' which implies reading of an 'end use' stipulation in the Tariff as held in **Telco**, it is clear that the said Vehicles are not vehicles designed for transportation of passengers.

33. The incidental use by passengers would not make Vehicles as one which are principally designed for transportation of passengers. In this connection it would be useful to refer to the decision of the Tribunal in **Nicholas D'Souza Garage** vs. **Commissioner of C. Ex., Thane**[13], wherein the Tribunal held:

> "2.9 ****** the cash delivery vans should not be classified under CTH 8703, since the vehicles are not exclusively used for transportation of persons. The Tribunal while placing emphasis on the facts that for the purpose of determining the appropriate classification, exclusive use of the vehicle is not required, held that the disputed vehicles are used for carrying cash/ valuables which are goods, and hence, the finding of the Commissioner that the security guards also travel in the same vehicles cannot be a reason to classify the cash delivery vans to be vehicles meant for transportation of passengers. On appeal by the department in **Commissioner** v. **Nicholas D'Souza Garage** [14] , dismissed the appeal and upheld the decision of the Tribunal.

34. In **Mahindra and Mahindra,** the answer to the question posed by the Tribunal is as follows:

> "Can a vehicle which is capable of transporting not just goods but also passengers, qualify for inclusion in CETH 8704?":
>
> "We note that while the main qualification for Heading 8703 is that the vehicle should be principally designed for the transportation of passengers", there is no such underlying requirement for CETH 8704."

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13. 2015 (320) E.L.T. 579 (Tri.-Mumbai)
14. 2015 (320) E.L.T. A251 (S.C.)

35. Thus, even if passengers are transported in the Vehicles, it would not mean that the Vehicles cannot be classified under CTH 8704 and CTH 8709.

36. In such circumstances, it would not be appropriate to refer to the website of Polaris USA. The information conveyed therein may not mention the Vehicles are for transportation of goods, but that would not conclusively prove that the Vehicles are not for transportation of goods.

37. In view of the aforesaid discussion, it has to be held that the Ranger (non-electric) Vehicles deserve to be classified under CTH 8704 and Ranger (electric) and Brutus Vehicles deserve to be classified under CTH 8709.

38. It, is, therefore, not possible to sustain the order dated 27.08.2019 passed by the Principal Commissioner. It is, accordingly, set aside and the appeal is allowed.

(Order pronounced on **03.07.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

JB, Shreya

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH, COURT NO. I

E-HEARING

CUSTOMS APPEAL NO. 50957 OF 2021

[Arising out of the Order-in-Appeal No. CC (A)/CUS/D-II/Prev./NCH/205/2021-2022 dated 21/06/2021 passed by The Commissioner of Customs (Appeal), New Customs House, New Delhi – 110 037.]

M/s Benetton India Private Limited **Appellant**
Plot No. 25, Infocity, Sector – 34,
Gurgaon, Haryana – 122 001.

VERSUS

Additional Commissioner, Customs (Preventive), **Respondent**
New Customs House,
New Delhi.

APPEARANCE

Shri Ayush A. Mehrotra, Shri Upkar Aggarwal, Advocates – for the appellant.
Shri Girijesh Kumar, Authorized Representative (DR) – for the Department

CORAM : **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 56047/2024

DATE OF HEARING/DECISION : 11.07.2024

JUSTICE DILIP GUPTA

This appeal filed by M/s Benetton India Private Limited[1] seeks to assail the order dated 21.06.2021 passed by the Commissioner of Customs (Appeals[2]) by which the order dated 07.11.2019 passed by the Additional Commissioner has been

1. **the appellant**
2. **the Commissioner (Appeals)**

upheld and the appeal has been dismissed. The Additional Commissioner by the order dated 07.11.2019 classified the goods imported by the appellant under Customs Tariff Item[3] 6102 30 10, CTI 6202 9390 and CTI 6210 5000 of the First Schedule to the Customs Tariff Act, 1975[4] and confirmed the demand of differential duty of Rs. 12,71,462/- under section 28 (4) of the Customs Act, 1962[5] with penalty. The Additional Commissioner also confiscated the goods under section 111 (m) of the Customs Act, but gave an option to the appellant to redeem the confiscated goods on payment of fine of Rs. 1.50 lakhs.

2. The appellant is engaged in the business of manufacture and distribution of apparel, footwear and accessories in India. It imported a consignment of goods containing women's 100% Polyester Knitted Jackets, 100% Polyester Woven Jackets and 100% PU Woven Jackets for which a Bill of Entry dated 14 September 2019 was filed. The goods were classified in the following manner :-

(a) Knitted Jackets under HSN Code 6104 33 00; and

(b) Woven Jackets and PU Jackets under HSN Code 6204 33 00.

3. However, the Officers of the Customs detained the consignment of the goods and on examination it was noted by

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3. CTI
4. the Tariff Act
5. the Customs Act

them that the goods had a full opening front with a zipper fastener and, therefore, were required to be reclassified as :

(a) Knitted Jackets under HSN (T) 6102 3010 instead of HSN Code 6104 3300 ;

(b) Woven Jackets under HSN (T) 6202 9390 instead of HSN Code 6204 3300 ; and

(c) PU Jackets under HSN Code (T) 6210 5000 instead of HSN Code 6204 3300.

4. The appellant paid the differential duty amount and requested for clearance of goods and the goods were cleared. Thereafter, the appellant also requested for waiver of show cause notice.

5. On 07.11.2019, the Additional Commissioner passed the order under section 28 (4) of the Customs Act. This order was assailed by the appellant before the Commissioner (Appeals). The appeal has been dismissed by an order dated 21.06.2021.

6. It is this order dated 21.06.2021 that has been assailed in this appeal.

7. Shri Ayush A. Mehrotra, learned counsel for the appellant assisted by Shri Upkar Aggarwal submitted that in the facts and circumstances of the case, the provisions of section 28 (4) of the Customs Act could not have been invoked. Elaborating this submission, learned counsel pointed out that the error in the classification of subject goods was a bonafide mistake and as

soon as this was pointed, the appellant accepted the classification suggested by the department and paid the differential duty amount. To support this contention that the provisions of section 28 (4) of the Customs Act could not have been invoked, learned counsel relied upon an order passed by the Commissioner in respect of a similar matter where a categorical finding has been recorded that the provisions of section 28 (4) of the Customs Act could not have been invoked.

8. Shri Girijesh Kumar, learned authorized representative appearing for the department, however, supported the impugned order and submitted that it does not call for any interference in this appeal.

9. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

10. The contention that has been advanced by the learned counsel for the appellant is that the term “jacket” has not been defined in Chapter 61 or Chapter 62 of the First Schedule to the Tariff Act. However, the Explanatory Notes for Chapter 61, which have also been made applicable to Chapter 62, do define ‘jackets’ and ‘Blazers’ and it is on the basis of the Explanatory Notes that the department proposed re-classification of the goods. Once the department suggested this classification, it was accepted by the appellant and the differential duty amount was paid.

11. It is, therefore, clearly a case of interpretation of the Tariff entries and willful suppression of facts cannot be attributed in such a situation for section 28 (4) of the Customs Act to be applicable. The appellant had declared the details of the imported goods which were also physically examined. It is also stated that earlier the Customs Authorities had also examined the previous classification of subject goods on several occasions and permitted clearance under the classification adopted by the appellant.

12. The appellant has placed on record the order dated 24.02.2023 passed by the Commissioner in respect of a show cause notice dated 01.10.2022 issued to the appellant for the past consignment of goods imported from September 2015 in which invoking the provisions of section 28 (4) of the Customs Act were also invoked.

13. The Commissioner, however, not only held that the provisions of section 28 (4) could not have been invoked, but also held that sections 111 and 114A could also has not been invoked. The relevant portion of the order dated 24.02.2023 passed by the Commissioner is reproduced below :-

> "41. **Consistent with the acceptance regarding mis-classification, Shri Abhik Saha undertook that they would pay the differential duty, along with fine and penalty which arises due to mis-classification. On this issue, during the personal hearing held before me on 23.01.2023, it was submitted that they have accepted the change in classification, discharged the differential duty liability and interest on delayed payment thereof**.

42. In view of the above, it is evident that the impugned goods were mis-classified even during the past period of five years covered by this SCN. Based on the HSN Notes, the impugned goods merit re-classification under CTH 6101, instead of 6103 and 6104, as was done during the self-assessment. The noticee has accepted the proposed re-classification.

43. As highlighted earlier, the critical factor resulting in the proposed reclassification is the fact of the impugned jackets having full front opening with a closure of slide fastening (zipper). It is a fact that the presence of the zipper was not mentioned in the bills of entry filed by the noticee. However, it has been submitted by the noticee that the Company's error in classification of goods was inadvertent and technical in nature in light of the Explanatory Notes to the HSN classification issued by World Customs Organization, which do not form part of the First Schedule to the Tariff Act and was without any intention to evade the payment of Customs duty. **I find merit in the submission made by the noticee, that there is nothing available on file to suggest that the presence of zipper was required to be disclosed by the noticee, and failure to do so could be considered as willful suppression of fact, required to invoke extended period under section 28 (4). In coming to this conclusion, I also take note of the fact that atleast select consignments were physically examined by the department during the cargo clearance process and the precise nature of the jackets, including presence of zipper would have become evident during the said examination**. I observe that upon being informed of the correct classification as per the HSN, the noticee have accepted the same and discharged the differential liabilities promptly, thereby supporting the position that non-disclosure of the presence of zipper was not a willful suppression of fact. **Therefore, this is a simple case of mis-classification, wherein provisions of section 28 (4) cannot be invoked**.

……

> 48. **Since this is a simple case of mis-classification, with no mis-declaration and willful suppression of fact with intent to evade the duty, the impugned goods are not liable for confiscation, also noting that these relate to past clearances** and are not available for confiscation under section 111 (m) as proposed in the SCN.
>
> 49. Since the impugned goods are not liable for confiscation under provisions of section 111, no penalty can be imposed on the noticee either under section 114A in case of section 28 (4) invocable or under section 112, this being a simple case of mis-classification".
>
> (emphasis supplied)

14. The Commissioner has noted in the aforesaid order that there was nothing to suggest presence of willful suppression of facts so as to enable the department to take recourse to the provisions of section 28 (4) of the Customs Act as it was a case of mis-classification only. The Commissioner also noted that once informed, the correct classification was accepted and the differential duty was paid.

15. In view of the findings recorded by the Commissioner in the order dated 24.02.2023, which findings would be applicable in the present case, the impugned order dated 21.06.2021 passed by the Commissioner (Appeals) cannot be sustained and is set aside. The appeal is accordingly allowed.

(Dictated and pronounced in open court.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

Custom Appeal No. 50865 of 2020

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-I/Import/NCH/956/2019-20 dated 17.03.2020 passed by the Commissioner of Customs (Appeals) New Custom House, New Delhi.)

M/s. Ingram Micro Indian Pvt. Ltd. **…… Appellant**
Empire Plaza, Building A, Fifth floor,
Lal Bahadur Shastri Road, Chandan Nagar,
Vikhroli (West), Mumbai-400083

Versus

Deputy Commissioner of Customs, **…… Respondent**
Appraising Group VA, O/o The Principal Commissioner
Of Customs (Import), New Customs House,
Near IGI Airport,
New Delhi-110037

APPEARANCE:

Shri Amit Kumar, Advocate for the Appellant
Shri Sunil Kumar, Authorized Representative for the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.ANJANI KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING: 10 December, 2020
DATE OF DECISION: 17 December, 2020

FINAL ORDER NO. 51640/2020

JUSTICE DILIP GUPTA

This appeal seeks the quashing of the order dated March 17, 2020 passed by the Commissioner of Customs (Appeals)[1]. The order rejects the appeal filed by the appellant to assail the order dated November 19, 2019 passed by the Deputy Commissioner of

1. **the Commissioner (Appeals)**

Customs, New Delhi. The appellant had filed a Bill of Entry dated February 21, 2019 for clearance of goods declared as "Executive IP Phone with 7" colour touch screen, 100 programmable keys, POE and 10/100/100 LAN and PC connections- FON 670i (VoIP Telephone)[2] under Customs Tariff Heading[3] 8517 18 10 and claimed the benefit of Customs Notification 024/2005 dated March 1, 2005[4] for payment of 0% basic customs duty. The custom authorities, however, by order dated November 19, 2019, classified the goods imported by the appellant under CTH 8517 69 90 and ordered for re-assessment of the goods.

2. The issue, therefore, that is involved in this appeal is regarding classification of the goods under CTH 8517 18 10 (as claimed by the Appellant) or under CTH 8517 69 90 (as contended by the Department).

3. The appellant had imported one consignment of the goods from a manufacturer in Taiwan under a Commercial Invoice dated February 12, 2019. In the said invoice of the manufacturer, the goods were declared classifiable under H.S. Code 8517.18.0020. Goods were imported at the IGI Airport, New Delhi and a Bill of Entry dated February 21, 2019 was filed by the appellant, classifying the goods under CTH 8517 18 10. The goods were examined under the first check, after which a query dated February 23, 2019 was raised by the Assessing Group requiring the appellant to justify the CTH under which the appellant had classified the goods. The appellant submitted letters dated

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2. the goods
3. CTH
4. Notification dated March 1, 2005

February 25, 2019, March 1, 2019 and March 15, 2019 justifying the classification.

4. The Deputy Commissioner, however did not accept the explanation offered by the appellant and held that the goods would be classifiable under CTH 8517 69 90. The relevant portion of the order of the Deputy Commissioner is reproduced below:

> **"3. DISCUSSIONS AND FINGDINGS**
>
> 3.1 ******
>
> The issue before me is to determine whether the goods declared as '(IP Phone) executive IP Phone with 7" colour touch screen, 100 Programmable keys-FON-670I' are classifiable under tariff item 85171810 with notification benefit 024/2005 sl. no.13G as claimed by the importer or under tariff item 85176990.
>
> 3.2 ******
>
> **This is a executive phone with programmable appearance keys and the features we need at the our fingertips. With an optional HD video camera and HDMI out port to compliment these features, this phone is a power house.** Combined with the powerful features of the FortiVoice PBX, the FortiFone delivers
>
> a) Call forwarding
> b) Voicemail notification
> c) One-touch transfers
> d) Do not disturb
> e) Conference calling
> f) Speed dial
> g) PoE (Power over Ethernet) support
> h) Auto-discovery for easy setup
>
> 3.3 I find that the declared CTH 85171810 covers push button phones which are different from VoIP Phones in the following terms:-
>
> - When comparing VoIP v/s. Push Button type phones, it's important to note that the sound can travel in different ways. Push Button type phones are regular phones and the systems communicate with the help of analog signals. These signals travel through a twisted pair of cables with continuously changing frequency and altitude which is decoded at the receiving end. On the other hand, IP phones communicate voice over Internet protocol. The data travels in digital form through wired or wireless networks.

- VoIP (IP Phones) has the caller ID, which is not provided by a regular phone.
- The communications in IP Phones are digitally encrypted unlike the complex circuitry of regular push button type phones.
- Push button type phones systems receive their power from the telephone exchange whereas VoIP phones require external power supply.

3.4 Further, Customs Notification No. 57/2017 dated 30.06.2017 amended as 02/2019 dated 29.01.2019 vide sl. no. 20 classified the VoIP phones under CTH 85176990 without benefit of this notification.

ORDER

4. In view of discussion & findings hereinabove, I order re-assessment of goods imported under B/E no. 2146635 dated 21.02.2019 under, CTH 85176990 in terms of provisions contained in sub-section (4) of Section 17 of the Customs Act, 1962."

[emphasis supplied]

5. Feeling aggrieved by the aforesaid order passed by the Deputy Commissioner, the appellant filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) also did not accept the submissions made on behalf of the appellant and rejected the appeal. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below:

"5.2 ******

The IP Phone works on voice over Internet protocol. The product catalogue also indicates that the product has various network features like power over Ethernet, network access control etc. and also works over Web management portal. Thus the product is an apparatus for transmission and reception of data also besides working as apparatus for transmission and reception for voice. Thus the impugned goods are classifiable under "Other apparatus, for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network):" **which is a separate single '-' heading under CTH 8517.**

5.3 It is also noted that the phone has HD video camera compatibility and the ability to connect to the PC, and thus is usable for video calling and transfer of data as Voice over

> **Internet Protocol is a category of hardware and software that enables people to use the Internet as the transmission medium for telephone calls by sending voice data in packets using IP rather than by traditional circuit transmission of the PSTN. These facts simply place the phone in second single '-' head under CTH 8517.**
>
> 5.4 Further when we refer to the General Rules for the Interpretation of the first schedule to the Custom Tariff Act, 1975, it is noted that when by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> *****
>
> **Accordingly the heading 85176990 which occurs later in numerically order vis a vis contesting heading 85171890 is required to be adopted.**
>
> 5.6 Thus in view of the findings above, I find that item '(IP Phone) executive IP Phone with 7th colour touch screen, 100 Programmable keys-FON-670i' imported by the appellant is rightly covered under tariff heading no. 85176990 as held by the Adjudicating Authority in impugned order."
>
> **[emphasis supplied]**

6. This appeal has been filed to assail the aforesaid order dated March 17, 2020 passed by the Commissioner (Appeals).

7. Shri Amit Kumar, learned Counsel appearing for the appellant made the following submissions:

(i) Goods are classifiable under CTH 8517 18 10 as per the scheme of classification under Heading 8517 and by application of the General Rules for the Interpretation of the First Schedule to the Customs Tariff Act, 1975 relating to Import Tariff [5];

(ii) It is evident from a reading of the entry of Heading 8517 that all types of telephone sets

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5. the General Rules.

are covered by the first entry at single dash "-" level. The goods imported undisputedly being an IP Phone are therefore, covered by CTH 8517 18 10, which falls under the first entry at single dash "-" level;

(iii) The second entry at single dash "-" level starts with the words "Other apparatus ……". Use of the words 'Other apparatus' indicates that only those goods which are not covered by the first entry at the single dash "-" level are covered under the second entry at single dash "-" level. Reliance has been placed on the judgement of Supreme Court in **Collector of Central Excise** vs. **Delton Cables Ltd.**[6];

(iv) The Commissioner (Appeals) decided classification of the goods by straightaway resorting to rule 3(c) of the General Rules, which is impermissible as it is settled law that they have to be considered sequentially. The goods in question are, therefore, clearly classifiable under CTH 8517 18 10;

(v) The findings of the Commissioner (Appeals) are factually incorrect; and

(vi) Similar goods have been held to be classifiable under CTH 8517 18 10 by the Commissioner (Appeals) at Chennai.

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6. 2005 (181) E.L.T. 373 (S.C.)

8. Shri Sunil Kumar learned Authorized Representative of the Department made the following submissions:

(i) The first sub-heading (i.e. first single dash '-') of CTH 8517 covers 'Telephone sets, including telephones for cellular networks or for other wireless networks'. It would be incorrect to contend that all kinds of telephones are covered under the said sub-heading only and that the next sub heading (i.e. second single dash '-') does not cover telephones. In support of this contention reliance has been placed on the HSN Explanatory Notes;

(ii) In the scheme of classification, the second sub-heading of 8517 also covers telephones, which because of their functionality, have not been covered under first sub-heading. HSN Explanatory Notes are not only of persuasive value, but are also entitled to a great consideration in classifying the goods;

(iii) The appellant has placed heavy reliance upon two orders of Commissioner (Appeals-I) at Chennai. It would not be correct to say that matter has attained finality because the goods were reassessed and cleared as per direction of the Commissioner (Appeals-I). Even after clearance of goods, the issue of classification

remains open to challenge and the relied upon orders may have been challenged;

(iv) Both audio and video IP Phone functions on the principle of Internet Protocol (IP) telephony and hence share common functionality. The only difference is that video IP phone, in addition to transmission/reception of digital voice signal, transmits/receives digital video signal also;

(v) The goods are Internet Protocol (IP) Phone that works on the principle of Voice over Internet Protocol (VoIP) telephony, also commonly referred to as IP telephony or Internet telephony. In a VoIP call, voice (an analog signal) is converted into a digital signal at source, travels over the Internet, and digital signal is again converted to voice at the destination. VoIP calls can be directly made from a computer, a special VoIP phone like the impugned goods, or a traditional phone connected to a special adaptor;

(vi) Keeping the functionality of VoIP phone in consideration and in view of coverage of similar communication apparatus under Paragraph (G) of HSN Explanatory Notes, classification of impugned goods as 'Other apparatus for

transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network) under CTI 85176990 is justifiable. It is settled that functional utility is more important than name used in trade or common parlance, and hence the former needs also to be considered while determining classification of an item. Reliance has been placed on the judgement of Supreme Court in **O.K.Play (India) Ltd vs. Commissioner of Customs Excise, Delhi-III, Gurgaon** [7] **.** It is for this reason that the Commissioner (Appeals) applied rule 3(c) of the General Rules and accorded preference to CTI 8517 69 90 over CTI 8517 18 90; and

(vii) The contention of the appellant that the Exemption Notification grants exemption to goods and the same cannot be relied upon for the classification of goods is not correct.

9. The contentions advanced by learned counsel for the appellant and the learned Authorized Representative of the Department have been considered.

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7. **2005 (180) E.L.T. 300 (S.C.)**

10. The classification of the goods under CTH 8517 18 10, as contended by the appellant, or under CTH 8517 69 90, as contended by the Department, is the issue in this appeal.

11. It would, therefore, be necessary to first refer to the scheme of classification as contained in Chapter 85 of the Customs Tariff. Heading 8517, contained in Chapter 85, is reproduced below:-

Tariff Item	**Description of goods**	**Unit**	**Rate of Duty**	
			standard	Preferential Areas
(1)	(2)	(3)	(4)	(5)
8517	**Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525,8527 or 8528**			
	- Telephone sets, including telephones for cellular networks or for other wireless networks:			
8517 11	-- Line telephone sets with cordless handsets:			
8517 11 10	--- Push button type	u	Free	-
8517 11 90	--- Other	u	Free	-
8517 12	-- Telephones for cellular networks or for other wireless networks:			
8517 12 10	--- Push button type	u	20%	-
8517 12 90	--- Other	u	20%	-
8517 18	-- Other:			
8517 18 10	--- Push button type	u	Free	-
8517 18 90	--- Other	u	Free	-
	- Other apparatus for transmission			

	or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network) :			
8517 61 00	-- Base stations	u	10%	-
8517 62	-- Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:			
8517 62 10	--- PLCC equipment	u	Free	-
8517 62 20	--- Voice frequency telegraphy	u	Free	-
8517 62 30	--- (modulators-demodulators)	u	Free	-
8517 62 40	--- High bit rate digital subscriber line system (HDSL)	u	Free	-
8517 62 50	--- Digital loop carrier system (DLC)	u	Free	-
8517 62 60	--- Synchronous digital hierarchy system (SDH)	u	Free	-
8517 62 70	--- Multiplexers, statistical multiplexers	u	Free	-
8517 62 90	--- Other	u	20%	-
8517 69	--- Other :			
8517 69 10	--- ISDN System	u	Free	-
8517 69 20	--- ISDN terminal adaptor . . .	u	Free	-
8517 69 30	--- Routers	u	Free	-
8517 69 40	--- X 25 Pads	u	Free	-
8517 69 50	--- Subscriber end equipment .	u	Free	-
8517 69 60	--- Set top boxes for gaining access to internet	u	Free	-
8517 69 70	--- Attachments for telephones .	u	Free	-
8517 69 90	--- Other	u	10%	-
8517 70	- Parts :			
8517 70 10	-- Populated, loaded or stuffed printed circuit boards	u	Free	-
8517 70 90	-- Other	Kg	15%	-

(emphasis supplied)

12. Before proceeding to analyse this Heading, it would also be necessary to refer to section 2 of the Tariff Act. It provides that

the rates at which the duties of customs shall be levied under the Customs Act 1962 are specified in the First and Second Schedules. The General Rules with the General Explanatory Notes also need to be examined. They are reproduced below:-

"THE FIRST SCHEDULE- IMPORT TARIFF
GENERAL RULES FOR THE INTERPRETATION OF THIS SCHEDULE

Classification of goods in this Schedule shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to

part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

THE GENERAL EXPLANATORY NOTES TO IMPORT TARIFF

1. Where in column (2) of this Schedule, the description of an article or group of articles under a heading is preceded by "-", the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of articles is preceded by "--", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-". Where the description of an article or group of articles is proceeded by "---" or "----", the said articles or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "--".

2. The abbreviation "0%" in any column of this Schedule in relation to the rate of duty indicates that duty on the goods to which the entry relates shall be charged on the basis of the value of the goods as defined in section 14 of the Customs Act, 1962 (52 of 1962), the duty being equal to such percentage of the value as is indicated in that column.

3. In any entry, if no rate of duty is shown in column (5), the rate shown under column (4) shall be applicable."

13. The product under consideration is an Executive Level IP Phone-FON-670i. The various brands of FortiFone IP Telephones, as mentioned in the literature contained in the Appeal, are FON-175, 375, 475, 570, 670i/675i, C71, D71, H25, H35, and FortiFone soft client. The literature contained in the Appeal memo relating to FON-670i/675i is as follows:

> **FON-670i/675i**
> Introducing the FON-670i/675i, a great combination of business-class features and vivid touchscreen. An executive phone with programmable appearance keys and the features you need at your fingertips. With an optional HD video camera and HDMI out port to compliment these features, this new FortiFone is a power house.

14. The **Specifications** are also contained in the literature. These mention the telephone features of various brands. The relevant features relating to display and voice activity detection are reproduced below :

SPECIFICATIONS

	FON-175	FON-375	FON-475	FON-570	FON-670i/675i	FON-C71	FON-D71	FON-H25	FON-H35	FortiFone Softclient
Telephone Features										
Display	2.4" color display	2.8"+2.4 color display	4.3" color display	7"color touch screen	7"color touch screen	3.1"248*120 pixel graphic display	2.4"240*320 pixel graphic display		3.5 color display	
xxxxx			xxxxx		xxxxx	xxxxx	xxxxx		xxxxx	
xxxxx			xxxxx		xxxxx	xxxxx	xxxxx		xxxxx	
xxxxx			xxxxx		xxxxx	xxxxx	xxxxx		xxxxx	
Audio Features										
xxxxx			xxxxx		xxxxx	xxxxx	xxxxx		xxxxx	
H.263, H.264 video codec support					**FON-675i only**					
Voice activity detection (VAD)	•	•	•	•	•	•	•	•	•	•
xxxxx			xxxxx		xxxxx	xxxxx	xxxxx		xxxxx	
xxxxx			xxxxx		xxxxx	xxxxx	xxxxx		xxxxx	

15. The **Order Information** is also contained in the literature. What is important to the notice is that there is no video facility

provided in FON-670i, though video facility is provided in FON-750i. The relevant portion of the Order Information is reproduced below:

ORDER INFORMATION

PRODUCT	SKU	DESCRIPTION
Desktop phones		
FortiFone FON-670i	FON-670i	Executive IP phone with 7-inch color touchscreen, 100 programmable keys, PoE and 10/100/1000 LAN and PC connections
FortiFone FON-675i	FON-675i	Executive video IP phone with 7-inch color touchscreen, 100 programmable keys, PoE and 10/100/1000 LAN and PC connections

16. It would, therefore, be seen from the aforesaid that Model No. FON 670i imported by the appellant is an executive IP Phone with 7-inch color touchscreen. It works on Voice over Internet Protocol [8]. It does not have a video camera facility as it only FON-675i Executive IP Phone that has this facility. It is these features of Model No. FON-670i that have to be kept in mind for classification of this Executive IP Phone.

17. It needs to be noted that the manufacturer has classified the goods in the invoice under H.S. Code 8517.18.

18. The relevant portion of Heading 8517 to the Explanatory Notes of Harmonized System of Nomenclature [9] is reproduced below:

Harmonized Commodity

Description and Coding System

Explanatory Notes

---

8. VoIP
9. HSN

8517- Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28(+).

	-	Telephone sets, including telephones for cellular networks or for other wireless networks:
8517.11	--	Line telephone sets with cordless handsets
8517.12	--	Telephones for cellular networks or for other wireless networks
8517.18	--	Other
	-	Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network):
8517.61	--	Base stations
8517.62	--	Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus
8517.69	--	Other
8517.70	-	Parts

This heading covers apparatus for the transmission or reception of speech or other sounds, images or other data between two points by variation of an electric current or optical wave flowing in a wired network or by electro-magnetic waves in a wireless network. The signal may be analogue or digital. The networks, which may be interconnected, include telephony, telegraphy, radio-telephony, radio-telegraphy, local and wide area networks.

(1) TELEPHONE SETS, INCLUDING TELEPHONES FOR CELLULAR NETWORKS OR FOR OTHER WIRELESS NETWORKS

This group includes:

(A) Line telephone sets.

Line telephone sets are communication apparatus that convert voice into signals for transmission to another device. Upon receipt of a signal, a line telephone set will convert the signal back to voice. They consist of:

(1) The transmitter,
(2) The receiver,
(3) The anti-sidetone circuit,
(4) The ringer,
(5) The switching device or “switchhook”,

(6) The dialing selector,

When separately presented, microphones and receivers (whether or not combined as hand-sets), and loudspeakers are classified in heading 85.18 while bells and buzzers are classified in heading 85.31.

Telephone sets may incorporate or have fitted: a memory for storing and recalling telephone numbers; a visual display for showing the number dialed, incoming caller's number, date and time, and duration of call; an extra loudspeaker and microphone to enable communication without using the hand-set; devices for automatically answering calls, transmitting a recorded message, recording incoming messages and playing back the recorded message on command; devices for holding a connection on line while communicating with a person on another telephone. Telephone sets incorporating these devices may also have keys or push-buttons which enable their operation, including a switching key which enables the telephone to be operated without removing the hand-set from the cradle. Many of these devices utilize a microprocessor or digital integrated circuits for operation.

The heading covers all kinds of telephone sets including:

(i) Cordless telephone sets.

****

(ii) Telephones sets.

****

(B) Telephones for cellular networks or for other wireless networks.

This group covers telephones for use on any wireless network. Such telephones receive and emit radio waves which are received and retransmitted, e.g., by base stations or satellites.

These include, inter alia:

(1) Cellular phones or mobile phones.
(2) Satellite phones.

19. Reverting back to the classification under the Customs Tariff, it is seen that perusal of Heading 8517 indicates that it contains three entries at single dash '-' level and they are:

(a) Telephone sets, including telephones for cellular networks or for other wireless networks;

(b) Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or a wireless network (such as a local or wide area network); and

(c) Parts.

20. The First single dash covers telephone sets, while the second single dash starts with the words "other apparatus". The third single dash relates to "Parts."

21. Only those goods which are not covered by the first single dash entry are covered under the second dash entry, as has been held by the Supreme Court in **Delton Cables**. It would, therefore, be necessary to first examine whether this particular IP Phone would be covered by the first single dash entry and only if it is found that it is not covered by this entry that it has to be examined whether it would be covered by the second single dash entry.

22. The description of goods under the first single dash of Tariff Item 8517 is telephone sets, including telephones for cellular networks or for other wireless networks. The description of goods under the Sub-Heading 8517 11 (first double dash) are line telephone sets with cordless sets, while under Sub-Heading 8517 12 (second double dash) are telephones for cellular networks or for other wireless networks.

23. The appellant imported, as noticed above, an Executive Level IP Phone of model FON 670i. It is, therefore, an IP Phone. The description of the goods under consideration will not fall in either of the two Sub-Headings 8517 11 or 8517 12. Being an IP telephone it would fall under Sub-Heading 8517 18 (third double dash) under which the description of the goods is 'others'. It is a push button type telephone and, therefore, would fall under Tariff Item No. 8517 18 10.

24. Rule 1 of the General Rules also provides that the titles of Section, Chapters and Sub-Chapters are provided for ease of reference. In **Commissioner of Central Excise, Nagpur**[10] vs. **Simplex Mills Co. Ltd.,** the Supreme Court held that rule I gives primacy to the Section and Chapter Notes along with the terms of the Headings and so this rule should be applied first. It is only when a clear picture is not emerging that the subsequent rules have to be applied. The observations of the Supreme Court are as follows:

> "11. The rules for the interpretation of the Schedule to the Central Excise Tariff Act, 1985have been framed pursuant to the powers under Section 2 of that Act. According to Rule 1 titles of Sections and Chapters in the Schedule are provided for ease of reference only. But for legal purposes, classification "shall be determined according to the terms of the heading sand any relevant section or Chapter Notes". If neither the heading nor the notes suffice to clarify the scope of a heading, then it must be construed according to the other following provisions contained in the Rules. **Rule-I gives primacy to the Section and Chapter Notes along with terms of the headings. They should be first applied. If no clear picture emerges then only can one resort to the subsequent rules.** The appellants have relied upon Rule 3. Rule 3 must be understood only in the context of sub-rule (b) of Rule 2 which says inter alia that the classification of goods consisting of more than one material or substance shall be according to the principles contained in Rule 3. Therefore when goods are prima facie, classifiable under two or more headings, classification shall be effected according to sub-rules (a), (b) and (c) of Rule 3 and in that order.
>
> ******
>
> 12. Applying the Rules of Interpretation particularly Rule 1, we are of the opinion that the reasoning of the Tribunal in Jyoti Overseas is unexceptionable and in our opinion the decision in Simplex-I was correctly overruled."
>
> **(emphasis supplied)**

25. The second entry at single dash level starts with the words "other apparatus". This clearly indicates that only those goods which are not covered by the first single dash entry will be

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[10]. **2005 (181) E.L.T. 345 (S.C.)**

covered under the second single dash entry. Thus, as the product under consideration is covered by the first single dash entry, it is not necessary to examine the second single dash entry.

26. The Explanatory Notes to HSN describe what would be covered by the second single dash entry for 85.17 as follows:

> **(II) Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)**
>
> **(A) Base stations.**
>
> The most common types of base stations are those for cellular networks, which receive and transmit radio waves to and from cellular telephones or to other wired or wireless networks. Each base station covers a geographical area (a cell). If the user moves from one cell to another while telephoning, the call is automatically transferred from one cell to another without interruption.
>
> **(B) Entry-phone systems.**
>
> The systems usually consist of a telephone handset and keypad or a loudspeaker, a microphone and keys. These systems are usually mounted at the entrance of buildings housing a number of tenants. With these systems, visitors can call certain tenants, by pressing the appropriate keys and talk to them.
>
> **(C) Videophones.**
>
> Videophones for buildings, which are a combination consisting principally of a telephone set for line telephony, a television camera and a television receiver (transmission by line).
>
> **(D) Apparatus for telegraphic communication other than facsimile machines of heading 84.43.**
>
> These apparatus are essentially designed for converting characters, graphics, images or other data into appropriate electrical impulses, for transmitting those impulses, and at the receiving end, receiving these impulses and converting them either into conventional symbols or indications representing the characters, graphics, images or other data or into the characters, graphics, images or other data themselves.
>
> **(E) Telephonic or Telegraphic Switching Apparatus.**
>
> *******
>
> **(F) Transmitting and receiving apparatus for radio-telephony and radio-telegraphy.**
>
> *******
>
> **(G) Other communication apparatus.**

> This group includes apparatus which allows for the connection to a wired or wireless communication network or the transmission or reception of speech or other sounds, images or other data within such a network.
>
> Communication networks include, inter alia, carrier-current line systems, digital-line systems and combinations thereof. They may be configured, for example, as public switched telephone networks, Local Area Networks (LAN), Metropolitan Area Networks (MAN) and Wide Area Networks (WAN), whether proprietary or open architecture.
>
> This group includes:
> (1) Network interface cards (e.g., Ethernet interface cards).
> (2) Modems (combined modulators-demodulators).
> (3) Routers, bridges, hubs, repeaters and channel to channel adaptors.
> (4) Multiplexers and related line equipment (e.g., transmitters, receivers or electro-optical converters).
> (5) Codecs (data compressors/decompressors) which have the capability of transmission and reception of digital information.
> (6) Pulse to tone converters which convert pulse dialed signals to tone signals.

27. A perusal of the aforesaid portion of the HSN Explanatory Notes shows that base stations, entry-phone systems, video phones, apparatus for telegraphic communication other than facsimile machines of heading 84.43, telephonic or telegraphic switching apparatus, transmitting and receiving apparatus for radio-telephony and radio-telegraphy, other communication apparatus are contained. None of these would satisfy the description of the product under consideration.

28. Emphasis has been lead by the learned Authorized Representative of the Department on II (G), which is "other communication apparatus". In this connection reliance has been placed on the decision of the Supreme Court in **O.K. Play** The observation are as follows:

> "7. In the case of A. Nagaraju Brothers vs. State of Andhra Pradesh reported in [1994 (72) E.L.T. 801], it has been held by this Court that no one single universal test can be applied for correct classification. There cannot be a static parameter for correct classification.

> 8. Further, the scheme of the Central Excise Tariff is based on Harmonized System of Nomenclature (for short "HSN") and the explanatory notes thereto. Therefore, HSN along with the explanatory notes provide a safe guide for interpretation of an Entry.
>
> 9. Further, equal importance is required to be given to the Rule of Interpretation of the Excise Tariff. Under Rule 3(a), it is provided that the heading which provides a specific description shall be preferred to a heading having a more general description. For example, in the case of "toys" referred to in the HSN Heading and the Tariff Heading, the description refers to reduced size model of an Article used by adults. This test helps us to understand the difference between "toys" and "furniture".
>
> 10. Lastly, it is important to bear in mind that functional utility, design, shape and predominant usage have also got to be taken into account while determining the classification of an item.
>
> 11. The aforestated aids and assistance are more important than the names used in the trade or common parlance in the matter of correct classification."

29. It is not possible to accept this contention for the simple reason that an executive IP Phone does not match the description of any of the apparatus mentioned in (G). Even otherwise, in view of the decision of the Supreme Court in **Mohinder Singh Gill vs. Chief Election Commissioner[11],** this submission of the learned authorized representative of the Department cannot be entertained as the impugned order is not based on this reason. The Supreme Court in **Mohinder Singh Gill** observed that when a statutory functionary makes an order based on certain grounds, the validity of that order has to be judged on the reasons stated in the order and the order cannot be supplemented by fresh reasons.

30. The Gujarat High Court in **F.S. Enterprise** vs. **State of Gujarat [12]** , followed the decision of the Supreme Court in **Mohinder Singh Gill** and observed that it is not permissible to supplement the original order by additional reasons**.**

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11. AIR 1978 SC 851
12. 2020 (32) G.S.T.L. 321(Guj.)

31. The aforesaid decision of the Supreme Court in **O.K. Play** would not help the Department. The submissions made by the learned authorized representative of the Department in regard to (G) of (II) of entry 85.17 of the HSN cannot, therefore, be accepted.

32. What also supports the case of the appellant are the two orders dated February 27, 2020 and March 9, 2020 passed by the Commissioner of Customs (Appeals-II), Chennai, in matters relating to the present appellant, wherein in respect of similar goods, but of different models, the Commissioner (Appeals) classified the goods under CTH 8517 18 10.

33. According to learned counsel for the appellant, the orders were accepted by the Department as the goods were re-assessed and clearance was allowed pursuant to the two orders passed by the Commissioner (Appeals). Learned counsel, however, very fairly pointed out an appeal has been filed by the Department only against the order dated March 9, 2020. Learned authorized representative has also stated that till date appeal has not been filed to assail the order dated February 27, 2020 passed by the Commissioner (Appeals) at Chennai.

34. In the order dated February 27, 2020, the Commissioner (Appeals) noticed that the product under consideration was IP Phone FON-175 and though the goods were classified by the importer under CTH 8517 18 10, but the Adjudicating Authority classified the goods under CTH 8517 69 90. The Commissioner (Appeals) held that the goods would be classified under CTH 8517 18 10 and for coming to this conclusion placed reliance upon the

HSN Explanatory Notes. The relevant portion of the order is reproduced below:

> "6. I have carefully gone through the facts given in the appeal, the speaking order and both the submissions, written and oral, made by the Advocate of the appellant company, during the personal hearing. The issue to be decided is,
>
> i. whether the imported CISCO IP Phone Model 8841 and FON175 Entry Level Phone of FortiFone are to be classified under CTH 85176990 or under CTH 85171810?
>
> 7. It is seen from the catalogue that Fortinet Companies Forti IP Telephones has various models including FON 175. These IP Phones has dedicated keys for the most common features and it has a PBX also with call forwarding, voice mail notification, one touch transfers, conference calling, speed dial, POE (Power Over Ethernet) support and Auto discovery for easy setup.
>
> 8. The CISCO IP Phone 8841 has five programmable line keys, these keys can be configured to support either multiple directory numbers or call features such as speed dials. Fixed function keys gives one touch access to applications, messaging, directory, holding the call, transfer and conference. This phone supports the built-in Gigabyte and Ethernet Switch for PC connection also. From the catalogues, it is observed that these are push button type telephone sets and CTH 8517 covers telephones sets, including telephones for cellular networks or for other wireless networks. Since these phones can be used through internet, these cannot be classified under CTH 85171110. **Therefore, the right classification appears to be CTH 851718 (Other) and sub-classification 85171810 push button type. Going by the HSN explanatory notes for CTH 8517 telephone sets including telephone for cellular networks or other networks, these items are appropriately to be Classified under CTH 851718 only as "others". The relevant portion of the HSN explanatory notes is reproduced;**
>
> "Telephones sets, may incorporate or have fitted a memory for storing and recalling telephone numbers, a visual display for showing the number dialed, incoming callers number, date and time and duration of the call, an extra loud speaker and microphone to enable communication without using the hand set; devices for automatically answering calls, transmitting a recorded message, recording incoming messages and playing back recorded message on command; devices for holding a connection on line while communicating with the person on another telephone. Telephone sets incorporating these devices may also have keys or push buttons which enable their operation, including a switching key which enables the telephone to be operated without removing the handset from the cradle. Many of these devices utilized a microprocessor or digital integrated circuits for their operation."
>
> 10. The AA has classified the goods as CTH 85176990 as "others" as this can be made use of in the LAN and SIP (Session Initiation Protocol). **As these phones cannot be used for video call, they have to be essentially**

> **classified under CTH 851718 only. In the case of video screen phones, it can be classified under CTH 85176990 as "others". As these phones are meant only for audio calls, the classification claimed by the appellant M/s. Ingram Micro India Pvt. Ltd., appears to be correct.** It is not understood why they have cleared the impugned goods earlier under CTH 85176990. Therefore, in view of the above discussions, the AA's order classifying the impugned VoIP (Voice over Internet Protocol) Phone is set aside and he is directed to reassess the goods vide classification CTH 85171810. It is further directed to verify their earlier dearances of such VoIP Phones under CTH 85176990 and whether they availed wrongly any benefit of exemption notification."
>
> **(emphasis supplied)**

35. The second order dated March 9, 2020 of the Commissioner (Appeals) relies upon the aforesaid order dated February 27, 2020 passed by the Commissioner (Appeals). After noticing that the 6 models of CICO IP Phone are not capable of making video call and are meant only for audio call, the Commissioner (Appeals) observed that the goods would be classifiable under CTH 8517 18 10. The observation are as follows:

> **"10. All the other 6 models of CISCO IP Phones are not capable of making video calls and as per the literature available those are meant only for audio calls.** CISCO IP 7800 Series has 4 line and programmable feature keys, high resolution graphical display, dedicated fixed keys, built-in speaker phones and handset, speaker/headset. It has PCE (Power over Ethernet) Class-1 feature also, Model 8841 and 8851 has wide band audio for crystal clear voice communications, it is also supported on 3rd party hosted call control services. In addition in the Model 8851, the mobile phone also can be attached (Audio path) and this IP Phone comes with USB Port for charging.
>
> **11. As per the literature, the CISCO IP Conference Phone 8831 & 8832 are basically voice telephones having push buttons. Going by the literatures all the 6 models are having push buttons and fixed keys and are to be classified under CTH 8517 18 10 as claimed by the appellant M/s. Ingram Micro India Pvt. Ltd."**
>
> **(emphasis supplied)**

36. Learned counsel for the appellant submitted that different Collectorates of Customs cannot adopt different standards on a

particular issue and in this connection placed reliance upon the decision of the Calcutta High Court in **Opal Exports Pvt. Ltd.** vs. **Collector of Customs**[13].

37. The Calcutta High Court held in **Opal Exports** that Custom Authorities cannot be permitted to practice discrimination and that the Collectorates of the Customs have to adopt a similar stand on a particular issue. The relevant portion of the judgment is reproduced below:

> "28. The respondent Customs authorities by treating similar imports as imports of spares while adopting a different view in the case of the petitioner (who is placed in similar circumstances as other importers of similar goods) have discriminated against the petitioner in violation of the guarantee of equal protection contained in Article 14 of the Constitution of India.
>
> 29. The discriminatory treatment meted out by the Customs Authorities to the petitioner is also mala fide as is evident from the fact that subsequently the respondents have allowed import of similar goods and such goods have been treated as spares and customs duty has been levied accordingly. However, the imports forming the subject matter of the writ petition have been illegally and arbitrarily subjected to discriminatory treatment.
>
> 30. It is not open to the Customs authorities to contend that the subject goods were complete measuring instrument in view of the decision of the Customs Excise & Gold (Control) Appellate Tribunal, West Regional Bench at Bombay in the case of M/s. Sushu Electronic v. Collector of Customs & Central Excise, Rajkot, in which similar goods have been classified as spares and not as complete instruments. **It is a settled law that different Collectorates of Customs cannot adopt different stands on a particular issue."**
>
> **(emphasis supplied)**

38. Learned counsel for the appellant also pointed out that another consignment of similar goods imported by the appellant at Air Cargo Complex, Chennai by Bill of Entry No. 8380173 dated August 5, 2020 was allowed to be cleared by the Department on September 8, 2020.

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13. 1992 (60) E.L.T. 232 (Cal.)

39. Thus, for the reasons stated above, the goods under consideration also require classification under CTH 8517 18 10.

40. Learned counsel for the appellant, in the alternative, submitted that even if the product under consideration is prima facie classifiable under two or more Headings, the classification would be effected in the manner prescribed in (a) or (b) or (c) of rule 3 of the General Rules and so the Heading which provides the most specific description shall be preferred to Headings providing a more general description. In such a situation also the product under consideration would fall under the Tariff Item Heading 8517.

41. This submission of learned counsel of the appellant deserves to be accepted. The product under consideration is an Executive IP Phone. It would satisfy the specific description of Tariff Item Heading 8517.

42. In **Moorco (India) Ltd.** vs. **Collector of Customs, Madras** [14], the Supreme Court held that the First Schedule appended to the Customs Act lays down the General Principles for the interpretation and classification of goods for import tariff and that the applicability of rule 3 arises when the goods consisting of more than one material fall in two or more headings. The Supreme Court observed that each of the classes are mutually exclusive. What is covered in (a) cannot be classified in (b), and (c) operates when neither (a) or (b) applies. It is like a residuary clause. The observations are as follows:

> **"The primary question, therefore, is whether the goods manufactured by the appellant fall in**

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14. 1994 (74) E.L.T. 5 (S.C.)

clause (a) and if it can be classified with reference to (a) then clauses (b) and (c) would not apply. Clause (a) incorporates the common and general principle that the goods which can be classified specifically with reference to any heading should be placed in that category alone. The specific heading of classification has to be preferred over general heading. The clause contemplates goods which may be satisfying more than one description. Or it may be satisfying specific and general description. In either situation the classification which is the most specific has to be preferred over the one which is not specific or is general in nature. In other words, between the two competing entries the one most nearer to the description should be preferred. Where the class of goods manufactured by an assessee falls say in more than one heading one of which may be specific, other more specific, third most specific and fourth general. The rule requires the authorities to classify the goods in the heading which satisfies most specific description. For instance, taking the case of the appellant the item manufactured by the appellant is described and used as flow meter. It is an instrument for measuring volume as well. Flow meter is specifically classified in Heading No. 90.24. Whereas the Heading 90.26 is general in nature. It applies to every production meter or calibrating meter for gas, liquid and electricity supply. Therefore, on the finding recorded by the Assistant Collector, the goods produced by the appellant specifically fall in Heading No. 90.24. They may also fall in Heading No. 90.26 but that being more general entry preference should have been given to the entry 90.24 as the goods satisfy most specific description of being flow meter. **The Tribunal or the appellant authority without adverting to it applied clause (c) and levied duty under 90.26 as it was a latter heading. But clause (c) would apply only if clauses (a) and (b) do not apply. Since the goods manufactured by the appellant satisfied the specific**

description of Tariff Heading 90.24 being a flow meter, the Tribunal committed an error of law in classifying it under Tariff Heading 90.26 as it was a latter item under the classification list."

(emphasis supplied)

43. The Commissioner (Appeals) has relied upon rule 3(c) to hold that since Tariff Item Number 8517 69 90 falls last in the numerical order among those which equally merit consideration, the product under consideration would be classifiable under CTH 8517 69 90 and not CTH 8517 18 10.

44. The Commissioner (Appeals) clearly committed in error in straight away jumping to rule 3 (c) without first exhausting rule 3(a) and rule 3 (b).

45. The Commissioner (Appeals) also committed an error in holding that the goods in question are for video calling. As noticed above, the facility of video codec support is available only in model 675i, whereas the imported goods model is 670i, which does not have any feature of video support. The **Order Information** contained in the product literature, also describes model 675i as an "Executive Video IP Phone", while model 670i is described as an "Executive IP Phone". This clearly shows that the facility of video calling is not available in the model imported by the Appellant.

46. Learned Authorized Representative of the Department also submitted that the Commissioner (Appeals) committed no legality in placing reliance upon the Exemption Notification dated January

29, 2019, which Notification suggests that VoIP phones are classifiable under CTH 8517 69 90 and are not eligible for exemption.

47. This contention of learned the Authorized Representative of the Department cannot also be accepted. The classification of goods has to be done in accordance with the terms of Headings and any relative Section or Chapter Note. The classification is not required to be done in terms of any Exemption Notification. This is what was also observed by the Tribunal in **Ruchi Soya Industries Ltd.** vs. **Commissioner of Customs (Acc& Imp.), Mumbai** [15]. The relevant portion of the decision is reproduced below:

> **"5.3** In the present case the benefit of Exemption Notification as claimed by the appellants under Notification No. 21/2002-Cus., dated 1-3-2002 has been allowed by the lower authorities. However, **the issue that appellants have raised is two folds-**
>
> **(i) The classification of the goods imported by them should have been done by following the classification as per the exemption notification and not by application of Chapter Note 3 to the Chapter 12.**
>
> (ii) Since no rate of duty has been mentioned under column 5 of the Notification No.21/2002-Cus., assessment should have been made allowing them full exemption from Additional Duty.
>
> **5.4** We are not in position to agree with the said submissions-
>
> (i) As per Rule 1 of **"Genera Rules of Interpretation of Import Tariff"**
>
> "1. The Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:"

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15. 2019 (369) E.L.T. 1529 (Tri.-Mumbai)

> **Thus by application of the said rule classification of the goods is to be done in accordance with the terms of headings and any relative Section or Chapter Note. It is not the case of the appellant that by application of the above Rule 1, the classification as done by the Revenue is erroneous but appellants are contending that the classification should have followed the exemption notification. We are not in position to agree with the said contention.** The decision of Indian Tobacco Association referred by the appellants in their appeal do not advance the case of appellant as the said decision do not state so and is also not on the issue of classification. The said decision is authority for giving liberal interpretation to the exemption notification in accordance with the objective of the notifications. Hence the contentions of appellant in respect of classification cannot be agreed to."
>
> **(emphasis supplied)**

48. Thus, for all the reasons stated above, the product under consideration, which is an Executive IP Phone (Model No. FON-670i), is classifiable under CTH 8517 18 10 and not under CTH 8517 69 90.

49. The order passed by the Commissioner (Appeals), therefore, cannot be sustained. It is, accordingly set aside and the appeal is **allowed.**

(Order Pronounced on **December 17, 2020**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

JB

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. I

CUSTOMS APPEAL No. 51167 OF 2020

(Arising out of Order-in-Original No. 26/2020/U.G./PR. Commissioner/dated 29.06.2020 passed by the Principal Commissioner of Customs, New IGI Airport, New Delhi)

Vodafone Idea Limited **...Appellant**
(Previously Idea Cellular Limited)
1st Floor, Gaurav Tower,
Mlaviya Nagar, Jaipur,
Rajasthan-302017

versus

Principal Commissioner of Customs, **...Respondent**
ACC-Import, New Customs House,
Near IGI Airport, New Delhi-110037

APPEARANCE:

Shri B.L. Narasimhan, Shri Dhruv Matta and Shri Prafful Dawani, Advocates for the Appellant
Shri Mihir Ranjan, Special Counsel for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 10.01.2024
Date of Decision: 01.07.2024

FINAL ORDER NO. 55948/2024

JUSTICE DILIP GUPTA:

Vodafone Idea Limited (previously Idea Cellular Limited)[1] has sought the quashing of the order dated 29.06.2020 passed by the Principal Commissioner of Customs ACC (Imports)[2] by which Hybrid/Pure Matrix Cards and Small form Factor Pluggable (SFP) transceivers[3] imported by the appellant during the period from

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1. **the appellant**
2. **the Principal Commissioner**
3. **the subject goods**

08.11.2017 to 14.03.2018 under 181 Bills of Entry have been classified under Customs Tariff Item[4] 8517 62 90 as claimed by the department and not under CTI 8517 70 90 as claimed by the appellant and consequently the demand of duty has been confirmed with interest and penalty.

2. The appellant now seeks classification of Hybrid/Pure Matrix Cards for PTN Equipment under CTI 8517 70 10 as parts of goods falling under Heading 8571, and Small Form Factor Pluggable for PTN Equipment under CTI 8517 70 90.

3. The details of the imported subject goods, the classification adopted in the Bills of Entry and the classification now sought by the appellant are as follows:

Description of the imported goods	**Classification by appellant under CTI**	**Classification by department under CTI**	**Classification now claimed by the appellant under CTI**
Hybrid/Pure Matrix Cards for PTN Equipment	8517 70 90	8517 62 90	8517 70 10
Small Form Factor Pluggable (SFP) for PTN Equipment	8517 70 90	8517 62 90	8517 70 90

4. In respect of the classification by appellant, the Basic Customs Duty is NIL (S. No. 5 of NN 57/2017), Education Cess is Nil and ISGT is @ 18%. In respect of the classification by department, the Basic Customs Duty is @ 10%, Education Cess on BCD @ 3% and IGST is @ 18%.

5. The appellant cleared these goods under CTI 8517 70 90 as parts by virtue of Section Note 2(b) of Section XVI. However, the department believed that these goods were a kind of Network

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4. CTI

Interface Cards[5] classifiable under CTI 8517 62 90 and proposed a demand of Rs. 2,59,32,255/- through the show cause notice dated 05.07.2019.

6. The Principal Commissioner classified the goods under CTI 8517 62 90 and confirmed the proposed duty demand with interest by order dated 29.06.2020. The findings recorded by the Principal Commissioner are as follows:

(a) Like NIC cards connect computer over a network in telecommunication, these cards connect OTN equipment over an optical network. Thus, the subject goods are nothing but NIC cards;

(b) Group G of HSN Explanatory Notes to Sub-Heading 8517 62 covers NIC cards, multiplexers, and electro-optical converters. Thus, by application of General Rules of Interpretation Rule 1, the subject goods are covered under CTI 8517 62 90;

(c) Even though the subject goods are incomplete populated PCBs, they have the essential character of finished good as they perform the function of network interfacing, multiplexing, electro-optical conversion and hence should be classifiable as complete apparatus under CTI 8517 62 90 by application of General Rules of Interpretation Rule 2(a); and

(d) From a conjoint reading of Section Note 3 to Section XVI and HSN Explanatory Notes to Heading 8517, these goods mounted in series/ groups on PTN main board are composite machines, consisting of two or

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5. NIC cards

more machines fitted together to make a whole. Thus, a PTN equipment would amount to composite machine and the subject goods should be classified under CTI 8517 62 90.

7. Shri B.L. Narasimhan, learned counsel for appellant assisted by Shri Dhruv Matta and Shri Prafful Dawani submitted that:

(i) The Principal Commissioner committed an error in not accepting the classification of the subject goods by the appellant. The appellant has correctly sought classification of Hybrid/Pure Matrix Cards for PTN Equipment under CTI 8517 70 10 as parts of goods falling under Heading 8571 and CTI 8517 70 90 for Small Form Factor Pluggable for PTN Equipment;

(ii) To support this contention reliance has been placed on the decision of a Division Bench of the Tribunal in **Commissioner of Customs, Mumbai** vs. **Reliance Jio Infocomm Ltd.**[6] [hereinafter referred to as **Reliance Jio (I)**], which decision was accepted by the department, as has been noted by the Supreme Court in the appeal filed by the department to assail the aforesaid order of the Tribunal in **Reliance Jio (I);**

(iii) Reliance has also been placed upon Division Bench decisions of the Tribunal in **M/s. Ciena Communications India Pvt. Ltd.** vs. **Principal Commissioner of Customs (Import)**[7] and **Commissioner of Customs, Mumbai (Air Cargo**

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6. Customs Appeal No. 88483 of 2018 decided on 29.07.2022
7. Customs Appeal No. 86992 of 2021 decided on 18.12.2023

Import) vs. **Reliance Jio Infocomm Ltd.**[8] [hereinafter referred to as **Reliance Jio (II)**],;

(iv) The appeal filed by the department to assail the aforesaid decision of the Tribunal in **Reliance Jio (II)** was dismissed by the Supreme Court on 30.01.2023;

(v) The subject goods that have been imported by the appellant are not a machine in itself but parts of the main equipment and in support of this contention reliance has been placed upon a Division Bench decision of the Tribunal in **M/s. Vodafone Idea Limited** vs. **Principal Commissioner of Customs (Import), New Delhi**[9]; and

(vi) The subject goods are not NIC Cards. To support this contention reliance has been placed upon the aforesaid decision of the Tribunal **Vodafone Idea.**

8. Shri Mihir Ranjan, learned special counsel appearing for the department, however, supported the impugned order and contented that it does not call for any interference in this appeal. In this connection, learned special counsel placed the order passed by the Principal Commissioner.

9. The submissions advanced by the learned counsel for the appellant and the learned special counsel appearing for the department have been considered.

10. Though the appellant had earlier claimed classification of the subject goods under CTI 8517 70 90, but the appellant now seeks classification of Hybrid/Pure Matrix Cards for PTN Equipment under

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8. Customs Appeal No. 88479 of 2018 decided on 22.06.2022
9. Customs Appeal No. 52287 of 2019 decided on 20.09.2022

CTI 8517 70 10 as parts of goods falling under Heading 8571 and CTI 8517 70 90 for Small Form Factor Pluggable for PTN Equipment.

11. The relevant tariff entries are reproduced below:

Tariff Item	Description of goods	Unit	Rate of Duty	
(1)	(2)	(3)	(4)	(5)
8517	**Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525,8527 or 8528**			
	- Telephone sets, including telephones for cellular networks or for other wireless networks:			
8517 11	-- Line telephone sets with cordless handsets:			
8517 11 10	--- Push button type	u	Free	-
8517 11 90	--- Other	u	Free	-
8517 12	-- Telephones for cellular networks or for other wireless networks:			
8517 12 10	--- Push button type	u	10%	-
8517 12 90	--- Other	u	10%	-
8517 18	-- Other:			
8517 18 10	--- Push button type	u	Free	-
8517 18 90	--- Other	u	Free	-
	- Other apparatus for transmission or reception of voice, images or other data including apparatus for communication in a wired or wireless network (such as a local or wide area network):			
8517 61 00	-- Base stations	u	10%	-
8517 62	-- Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:			
8517 62 10	--- PLCC equipment	u	Free	-
8517 62 20	--- Voice frequency telegraphy	u	Free	-
8517 62 30	--- Modems (modulators-demodulators)	u	Free	-
8517 62 40	--- High bit rate digital subscriber line system (HDSL)	u	Free	-
8517 62 50	--- Digital loop carrier system(DLC)	u	Free	-
8517 62 60	--- Synchronous digital hierarchy system(SDH)	u	Free	-
8517 62 70	--- Multiplexers, statistical multiplexers	u	Free	-
8517 62 90	--- Other	u	10%	-
8517 69	-- Other:			
8517 69 10	--- ISDN System	u	Free	-
8517 69 20	--- ISDN terminal adaptor	u	Free	-
8517 69 30	--- Routers	u	Free	-
8517 69 40	--- X 25 Pads	u	Free	-
8517 69 50	--- Subscriber end equipment	u	Free	-
8517 69 60	--- Set top boxes for gaining access to internet	u	Free	-
8517 69 70	--- Attachments for telephones	u	Free	-
8517 69 90	**--- Other**	u	**10%**	-
8517 70	**-** Parts:			
8517 70 10	-- Populated, loaded or stuffed printed circuit boards	u	**Free**	-
8517 70 90	**-- Other**	kg	**10%**	-

12. The following facts would emerge in connection with the subject goods:

(i) The subject goods are used in the 'main equipment', which is Packet Transport Network[10] equipment classifiable under CTI 8517 62 90;

(ii) The main equipment consists of a modular chassis i.e., chassis with dedicated slots for various populated printed circuit boards[11];

(iii) All the cards in the main equipment communicate with each other via backplane interface in the chassis of the main equipment; and

(iv) This backplane interface is proprietary of the manufacturer and not universal. Thus, these goods will function solely with the chassis of the main equipment, when put in the dedicated slots, and will not function with the chassis of any other vendor.

13. According to the appellant, the goods are an integral and inseparable part of the main equipment, which together form the complete main equipment. The goods cannot function on a standalone basis and function only when put in the slot of the main equipment chassis. It is, therefore, the submission that the goods are proprietary to the main equipment. The term 'proprietary', as defined in Newton's Telecom Dictionary[12], means "something that will only work with one vendor's equipment". The subject goods, the appellant claims, are designed specifically for NPT-1020/1200/1800.

14. It has also been submitted that the main equipment, i.e. PTN is

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10. PTN
11. Cards
12. 17th Updated edition, Newton's Telecom Dictionary, 2001

a network technology used in telecommunications to transport packet-based traffic efficiently and reliably; PTN solutions are typically used in service provider networks to support a variety of services, including voice, data, and video; within this technological arrangement, the chassis of the main equipment has dedicated slots marked for these goods; and that these goods become functional when plugged into these slots from where it derives the source power and intelligence.

15. The technical details of the subject goods in dispute have been described in the following manner:

(a) **<u>Switching cards (pure matrix / hybrid matrix)</u>**: These cards are high capacity switching boards and support TDM switching as well as Packet level switching and direct data card connectivity. The basic function of these cards is to implement grooming of service line / network boards and client / tributary boards. It implements non-congestion full cross connection, multicast and broadcast services. It enables the communication between the cross connect boards and other boards. This card performs the function of switching and there is no conversion of any voice, images, or other data or information being carried on the signal. Inputs signals to these cards are by other line-side cards / client-side cards including SDH, Ethernet and Internet Protocol, through proprietary backplane interface.

(b) **<u>Transceivers (SFP):</u>** A transceiver enables interface with the optical fibre connectivity. Since the various board / card (another integral part of the

> main-equipment) perform processing in the electrical domain (and not the optical domain), the main-equipment would not be able to function without a transceiver to connect to the optical fibre network. Transceivers come in various forms such as Small Form Factor Pluggable (SFPs) or the C-Form Factor Pluggable (CFP), besides others. Transceivers are passive devices which work in conjunction with the other components deployed within the PTN equipment chassis.

16. It is now necessary to examine the decisions on which reliance has been placed by learned counsel for the appellant.

17. In **Reliance Jio Infocomm (I),** the Tribunal held that Small Form Factor Pluggable (SFP) are classifiable as 'parts' under CTI 8517 70 90. This decision of the Tribunal was upheld by the Supreme Court in the judgment rendered on 27.02.2023 in Civil Appeal No's 1475-1477 of 2023. It needs to be noted that Supreme Court in the aforesaid decision noted that the department had accepted that classification of said product determined by the Tribunal.

18. In **Ciena Communications India,** the Tribunal held that the goods Hybrid/Matrix Cards and Small Form Factor Pluggable for OTN equipment are correctly classifiable under 8517 70. The Tribunal also noted that the goods do not perform their function independently, without being fitted in the chassis of the main equipment. It also needs to be noted that while making reference to Section Note 2(b) to Section XVI, the Tribunal held that the goods are classifiable as 'parts'. The Tribunal also relied upon the earlier decision of the Tribunal in **Commissioner of Customs, Mumbai (AIR Cargo**

Import) vs. **Reliance Jio Infocomm Ltd.** decided on 22.06.2022, which decision was upheld by the Supreme Court in the judgment rendered on 30.01.2023 in Civil Appeal No's. 586-598 of 2023. It also needs to be noted that the Tribunal held, in view of the decision of the Supreme Court rendered on 30.01.2023, that goods of similar nature (Amplifier Cards, Transponder Cards, Muxponder Cards and Optical Add-Drop Multiplexer Cards used in Dense Wavelength Division Multiplexing (DWDM) machines) would be classifiable as parts of DWDM equipment under CTI 8517 70 10. The Division Bench observed that the said cards cannot function without being incorporated in DWDM equipment and accordingly, such cards cannot be considered as independent apparatus.

19. The present matter, therefore, stands concluded by the aforesaid decisions of the Tribunal, which have been upheld by the Supreme Court.

20. The following chart will give the classification of goods of similar nature involved in the decisions of the Tribunal.

S. No.	Case Title	Goods	Remarks
1	**Reliance Jio.** Order of the Tribunal dated 29.07.2022 in Customs Appeal No. 88483 of 2018	Small-Form Factor Pluggable (SFP)	Classifiable under 8517 70 as 'Parts'
2	**Cienna Communications.** Order of the Tribunal dated 18.12.2023 in Customs Appeal No. 86992 of 2021	Transponder, Muxponder and Splitter Card for OTN equipment	Classifiable under 8517 70 as 'Parts'
3	**Reliance Jio.** Order of the Tribunal dated 22.06.2022 in Customs Appeal No. 88479 of 2018	Transponder and Muxponder Card for DWDM equipment	Classifiable under 8517 70 as 'Parts'
4	**Huawei Telecommunications.** Order of the Tribunal dated 05.10.2023 in Customs	Interface Cards for OTN equipment	Classifiable under 8517 70 as 'Parts'

	Appeal No. 86186 of 2022		
5	**Vodafone Idea.** Order of the Tribunal dated 20.09.2022 in Customs Appeal No. 52287 of 2019	Line Cards for Routers	Classifiable under 8517 70 as 'Parts'

21. In terms of applicability of the aforesaid decisions, a summary of similarity between the Cards used for DWDM/OTN equipment in these decided appeals and the main equipment in the instant appeal, i.e. PTN equipment is as follows:–

(i) **Modular Architecture** – In terms of design, the DWDM/OTN equipment and main equipment have scalable and modular architecture. The chassis of both the machines contain dedicated slots in which cards can be plugged.

(ii) **Cards used in such equipment are in the nature of PCB Assembly** – It is an undisputed fact in the present case as well as the **Reliance Jio (II)** that the cards incorporated on the chassis of end equipment are in the nature of PCB assembly. Such PCB assembly was held to be classifiable under CTI 8517 70 10 by relying on the decision of the Tribunal **Commissioner of Cus., Bangalore** vs. **Modicom Network Pvt. Ltd**[13].

(iii) **Goods are parts of equipment which cannot function independently** – Similar to subject goods used in the main equipment, the cards used with DWDM/OTN equipment are specifically designed for use with the said equipment. Such cards draw power

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13. 2005 (185) E.L.T. 333 (Tri - Bang.)

> and intelligence from the DWDM/OTN equipment and cannot function unless incorporated in the DWDM/OTN equipment. The subject goods in the present appeal are dependent on the backplane components of the main component for drawing power and intelligence. Consequently, the subject goods cannot function unless they are incorporated in the main equipment. Thus, the subject goods and the cards of DWDM/OTN equipment are different from NIC Cards.

22. Thus, as in the case of cards of DWDM/OTN equipment, the subject goods in the present appeal cannot be considered as complete communication apparatus having an independent function. The subject goods cannot function independently without the other components of the main equipment and become functional only when plugged into the slot of modular chassis of the main equipment. Since the subject goods cannot be considered as an 'independent machine', like the machines mentioned under the heading 'Other Communication Apparatus' in HSN Explanatory Notes to CTH 8517, the same will be classifiable as 'parts'.

23. A Division Bench of the Tribunal in **Vodafone Idea Limited** (Customs Appeal No. 52287 of 2019 decided on 20.09.2022) in the matter of the appellant had examined the classification of router line cards imported for use in Cisco Routers. The Tribunal recorded a finding that in contrast to network interface cards, the cards under consideration were router line cards which were essential for the routers to operate. Thus, the Tribunal held that the correct classification of the cards would be under CTI 8517 70 90 as 'parts'

and not CTI 8517 69 90 as 'other communication apparatus'. The Tribunal, while deciding classification, also discussed HSN Explanatory Notes to CTH 8479 which deal with machines having individual function and laid down the following twin tests for determining whether an item is classifiable as 'part':

> **Test 1 -** No separate identifiable function of its own– The Tribunal held that the line cards are proprietary of the original equipment manufacturer and are not cross compatible with devices of other manufacturers but are usable for the purpose for which they are designed. Thus, the cards possess no functionality other than when used in the dedicated slot designed for them in the primary chassis equipment; and
>
> **Test 2 -** Incapable of operating independently of the main machine- The Tribunal concluded that until the said cards are slotted in the dedicated slots into the chassis of the equipment, these cards cannot function. Thus, the cards in question could not perform independently of the router.

24. In the present case, the subject goods under dispute are not cross compatible with devices of other manufacturers and hence are solely usable for the pre-determined purpose i.e., usage with the main equipment. Thus, the subject goods also have no separable function of their own. It is also seen that the main equipment has modular chassis i.e., chassis has dedicated slots for the subject goods. Unless the subject goods are slotted in the chassis in their designated slots, the cards do not source power and intelligence and hence cannot operate independently of the main equipment.

25. Thus, the twin tests laid down in **Vodafone Idea Limited**, are satisfied by the subject goods imported in the instant case and would be classifiable as 'parts' of CTI 8517.

26. This apart, the subject goods are in the nature of Populated PCB. Undisputedly, the main equipment is classifiable under CTI 8517 62 90. The subject goods are not specifically covered under any heading of Chapter 84 or 85. Thus, they do they do not merit classification as per Note 2(a). Sub Heading 8517 70 specifically identifies and recognizes populated PCBs as 'parts'. The subject goods (Hybrid/Pure Matrix Cards) are populated PCB and thus merit classification under CTI 8517 70 10 as 'parts' of goods falling under Heading 8517 by virtue of Section Note 2(b) of Section XVI.

27. HSN Explanatory Notes to CTH 8534 distinguishes PCBs and PCBs mounted with mechanical/ electrical components (i.e., populated PCBs). It clarifies that populated PCBs are classified in accordance with Section Note 2 to Section XVI. It is, therefore, seen that even HSN Explanatory Notes treat populated PCBs as 'parts' of the primary apparatus.

28. In this regard, reliance can be placed on the decision of the Tribunal in **Modicom Network**, wherein the Tribunal held that the modules in the form of populated PCBs are 'parts' and are correctly classifiable under Sub-Heading 8517 90 and not under Sub-Heading 8517 80 as 'other apparatus'. The said decision was affirmed by the Supreme Court in **Commissioner of Cus., Bangalore** vs. **Modicom Network Pvt. Ltd**[14].

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14. 2015 (320) E.L.T. 21 (S.C.)

29. The Principal Commissioner has in paragraphs 93 and 94 of the impugned order incorrectly relied upon General Rules of Interpretation Rule 2(a) to hold that though the subject goods are in the nature of incomplete populated PCBs, but they have the essential character of the network interfacing equipment and, therefore, should be considered as complete machine for the sake of classification. Since these goods have no capability to function on a standalone basis and were not imported collectively but through separate Bills of Entry, Rule 2(a) of the General Rules of Interpretation cannot be applied to determine classification.

30. The Principal Commissioner also relied on Note 3 to Section XVI to infer that the main equipment is a composite machine consisting of two or more machines fitted together to form a whole. Note 3 will not be applicable as the main equipment does not consist of two or more machines, nor does it consist of machines designed to perform two or more complementary or alternative functions. Thus, reliance placed in the impugned order on Section Note 3 is misconceived.

31. The subject goods are also not NIC cards as was held in **Vodafone**. The Principal Commissioner committed an error in holding that the subject goods are nothing but NIC cards as like NIC cards connect computer over a network in telecommunication, these cards connect OTN equipment over an optical network.

32. Definition of 'Network Interface Card', as given in the Thomas' Concise Telecom & Networking Dictionary, is as under:

> "**Network interface card (NIC):** A network interface device in the form of a circuit card that is installed in an expansion slot of a computer to provide network access. Examples of NICs are cards that interface a

> computer with an ethernet alien and cards that interface of computer with an FDDI ring network."

33. Attaching a computer to a network requires a NIC to create and mediate the connection between the computer and the networking medium. For incoming data, the NIC must be able to interpret the incoming signals, then convert them into bits and assemble them into frames and to send it to the computer. For outgoing data, the NIC converts frame data received from the computer into bits and transmits these bits to the medium in the correct signal format.

34. Hence, NIC is effectively a translator which allows a computer to communicate with a network by translating the output of the computer into a format understandable by the network and vice versa. If a computer is not to be connected to a network, there is no need for the NIC of the computer to function. A computer is complete in itself and does its job of data processing without any need for NIC.

35. It has been clearly established in **Vodafone** that NIC cards are distinct and separable from the overall equipment and thus satisfy the twin tests laid down by this Tribunal. Using the analogy laid down in **Vodafone**, the subject goods which are tailor-made for the main equipment are in contrast to the NIC cards and are very much essential for the main equipment to operate.

36. Thus, the subject goods are not similar in nature to 'NIC Cards' and any reliance on the classification of 'NIC Cards' to determine appropriate classification for the subject goods is misplaced.

37. Thus, for all the reasons stated above, Hybrid/Pure Matrix Cards for PTN Equipment would be classifiable under CTI 8517 70 10

as ‘parts’ of goods and Small Form Factor Pluggable for PTN Equipment would be classifiable under CTI 8517 70 90.

38. The impugned order dated 29.06.2020 passed by the Principal Commissioner, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order Pronounced on **01.07.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Jyoti

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Customs Appeal No. 51172 of 2020

[Arising out of the Order-in-Original No. 32/2020/U.G./Principal Commissioner dated 25.08.2020 passed by the Commissioner of Customs (Import), New Customs House, New Delhi]

M/s. Samsung India Electronics Pvt. Ltd ……Appellant
B-1, Sector 81, Phase-II,
Noida, Uttar Pradesh-201305

VERSUS

Commissioner of Customs, …..Respondent
Air Cargo Complex (Import)
New Customs House,
Near IGI Airport, New Delhi-110 037

APPEARANCE:

Shri B.L. Narasimhan, Shri Dhruv Matta and Ms. Yashi Srivastava Advocate for the Appellant

Shri Nagendra Yadav, Authorized Representative of the Department

WITH

Customs Appeal No. 51204 of 2020

[Arising out of the Order-in-Original No. 32/2020/U.G./Principal Commissioner dated 25.08.2020 passed by the Commissioner of Customs (Import), New Customs House, New Delhi]

Commissioner of Customs ……Appellant
Air Cargo Complex (Import)
New Customs House,
Near IGI Airport, New Delhi-110 037

VERSUS

M/s Samsung India Electronics Pvt. Ltd …..Respondent
B-1, Sector 81, Phase-II,
Noida, Uttar Pradesh-201305

APPEARANCE:

Shri Nagendra Yadav, Authorized Representative of the Department

Shri B.L. Narasimhan, Shri Dhruv Matta and Ms. Yashi Srivastava Advocate for the Respondent

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 12.03.2024
Date of Decision: 22.07.2024

FINAL ORDER NO. 56037-56038/2024

JUSTICE DILIP GUPTA:

Customs Appeal No. 51172 of 2020 has been filed by M/s Samsung India Electronics Pvt. Ltd.[1] for quashing the order dated 25.08.2020 passed by the Principal Commissioner of Customs ACC (Imports)[2] by which the claim of the appellant seeking classification of the imported goods namely 'IC-Codecs' under Customs Tariff Item[3] 8542 39 00 of the Customs Tariff Act 1975[4] has been rejected and the goods have been directed to be classified under CTI 8517 62 90. Accordingly, the demand of customs duty and integrated goods and service tax[5] to the extent of Rs. 1,89,05,965/- on the import and clearance of the goods has been confirmed under section 28 (1) of the Customs Act, 1962[6]. The order also directs payment of interest under section 28AA of the Customs Act. However, the Principal Commissioner also held that the goods are not liable to confiscation under section 111(m) of the Customs Act and also refrained from imposing any penalty under section 112 (a)(ii) of the Customs Act.

2. **Customs Appeal No. 51204 of 2020** has been filed by the department to assail that part of the order dated 25.08.2020 passed by the Principal Commissioner that refrains from confiscating the goods and imposing penalty.

3. The appellant is engaged in the manufacture and sale of mobile phones and tablet computers. In connection with its manufacturing

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1. **the appellant**
2. **the Principal Commissioner**
3. **CTI**
4. **the Tariff Act**
5. **IGST**
6. **the Customs Act**

activities, the appellant imports 'Integrated Circuits-Codecs'[7] for use in the manufacture of mobile phones and tablets. It is stated that these goods are integrated circuits, which function as Codecs, i.e., compressor/decompressor and comprise of Digital Signal Processor[8], General Purpose Input/Output[9] pins and Inter-Integrated Circuit[10] interface. The DSP, GPIO pins and 12C interface are only functional when the goods are mounted on the Printed Circuit Board[11] and power is supplied within the PCB. The DSP are the main functionality of the goods which function in data compression or decompression upon inflow of data. The GPIO pins are digital control pins of the goods which enable connection with the master such as CPU or FPGA through the PCB. These masters, in turn, control the operation of the goods and the flow of the data within the DSPs using GPIO pins and 12C interface, respectively. 12C interface is the communication protocol which allows to and fro of data from the communication input.

4. During the relevant period from 05.03.2018 to 07.03.2019, the appellant imported the goods; classified them under CTI 8542 39 00; availed the benefit of concessional rate of duty under Serial No. 24 of Notification dated 01.03.2005[12]; and paid IGST @12% on the import of the goods.

5. The department conducted an audit scrutiny of the imports of the goods. It was understood by the audit team that the goods are a kind of Codec that have the capability of transmission and reception of digital information and would, therefore, be classifiable under CTI 8517 62 90 as

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7. the goods
8. DSP
9. GPIO
10. 12C
11. PCB
12. the Exemption Notification

'other communication apparatus' and, accordingly, would be subject to levy of basic customs duty @ 10% and IGST @ 18%.

6. An investigation was, therefore, initiated by the Custom Authorities. The Commissioner of Customs issued a Pre-Notice Consultation letter dated 02.07.2019 wherein the appellant was advised to pay the differential duty of Rs. 1,89,05,965/-. The appellant submitted a reply on 08.07.2019 along with technical write up of the goods.

7. However, a demand cum show cause notice dated 04.03.2020 was issued to the appellant proposing to re-classify the goods under CTI 8517 62 90. The appellant filed a detailed reply to the show cause notice on 04.08.2020 refuting all the allegations made therein.

8. The Principal Commissioner passed the order dated 25.08.2020 rejecting the classification of the goods claimed by the appellant under CTI 8543 39 00 and re-classified the goods under CTI 8517 62 90 of the Tariff Act. The order, therefore, confirms the demand of customs duty and IGST to the extent of Rs. 1,89,05,965/- with interest under section 28AA of the Customs Act. The main reasons contained in the order passed by the Principal Commissioner are as follows:

(i) The appellant admits that the goods function as Codecs. The appellant has neither given any explanation that the transmission and reception features are not inbuilt in the goods nor has the appellant provided any evidence that the goods are not Codecs;

(ii) Rule 3(a) of General Rules of Interpretation is not applicable as the appellant has not been able to suggest how the pre-requisite conditions under the said rule are fulfilled for the classification of the goods; and

(iii) Section Note 2(b) to Section XVI is applicable as the goods are used in the manufacture of mobile phones and the same would be classifiable as 'parts of mobile phone' and classifiable under Customs Tariff Heading[13] 8517.

9. This appeal has been filed to assail the aforesaid order passed by the Principal Commissioner.

10. Shri B.L. Narasimhan, learned counsel for the appellant assisted by Shri Dhruv Matta and Ms. Yashi Shrivastava, made the following submissions:

(i) The order passed by the Principal Commissioner is a non-speaking order and the burden of proof lies on the department if the department wishes to classify the goods under a different heading;

(ii) The goods are correctly classifiable under CTI 8542 29 00 and the goods cannot be classified under CTI 8517 62 90 of the Customs Tariff;

(iii) The benefit under Serial No. 24 of the Notification dated 01.03.2005 is available to the appellant;

(iv) Even if the goods cannot be classified on the basis of the said submissions of the appellant, they would merit classification under a heading which occurs last in numerical order;

(v) Even if the goods merit classification under CTH 8517, the demand of duty is revenue neutral;

(vi) IGST and interest on IGST cannot be demanded under section 28 of Customs Act; and

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13. CTH

(vii) No interest can be demanded when duty demand is not sustainable.

11. Shri Nagendra Yadav, learned authorised representative appearing for the department, however, supported the impugned order except to the extent it refrained from confiscating the goods and imposing penalty under section 112 (a)(ii) of the Customs Act. The following submissions have been made by the learned authorised representative for the department:

(i) Onus was on the appellant to elaborate as to whether the goods falling under CTH 8542 can also acquire the nature of Codecs during the course of post importation operations. However, they have not mentioned or proved that the goods imported by them are not the kind of Codecs and, hence, the same go beyond the purview of CTH 8542;

(ii) Since the appellant has neither suggested which are the two headings under which the goods are prima-facie classifiable nor placed on record any plausible explanation regarding the constituents (i.e. more than one material or substance) contained therein, rule 3 (a) of the General Rules of Interpretation would not be applicable; and

(iii) Section Note 3 and 4 to Section XVI provides that classification of sub-part will eventually depend upon the machine which performs the principal function. In the instant case, the goods are being put to further use in those apparatus which have a specific principal function of transmission/reception capability as well as communication capability. The goods are one of the components which when assembled and programmed with other components

enable communication capability of mobile phones. Thus, once the main apparatus is classifiable under CTH 8517, the components used therein will be classifiable in that Chapter Heading only in line with the provisions of Note 3 and Note 4 to Section XVI of Customs Tariff Act.

12. The submissions advanced by learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

13. The issue that arises for consideration in this appeal is as to whether the goods imported by the appellant namely "IC-Codecs" deserve classification under CTI 8542 39 00 as claimed by the appellant or under CTI 8517 62 90 as determined in the impugned order.

14. It would, therefore, be appropriate to refer to the relevant tariff items under CTH 8517 and the same are as follows:

Tariff	Description of goods	Unit	Rate of Duty	
(1)	(2)	(3)	(2)	(4)
8517	Telephone sets, Including telephones for cellular networks or for other wireless networks; **other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network),** other than transmission or reception apparatus of heading 8443, 8525,8527 or 8528			
	Telephone sets, including telephones for cellular networks or for other wireless networks:			
8517 11	Line telephone sets with cordless handsets:			
8517 11 10	Push Button type	u	Free	-
8517 11 90	Other	u	Free	-
8517 12	Telephones for cellular networks or for other wireless networks:			
8517 12 10	Push button type	u	10%	-
8517 12 90	Other	u	10%	-
8517 18	Other	u	Free	-
	Other apparatus for transmission or reception of voice, images or other data including apparatus for communication in a wired or wireless network (such as a			

	local or wide area network):			
8517 61 00	Base Stations	u	10%	-
8517 62	Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:			
8517 62 10	PLCC equipment	u	Free	-
8517 62 20	Voice frequency telegraphy	u	Free	-
8517 62 30	Modems (modulators-demodulators	u	Free	-
8517 62 40	High bit rate digital subscriber line system (HDSL)	u	Free	-
8517 62 50	Digital loop carrier system (DLC)	u	Free	-
8517 62 60	Synchronous digital hierarchy system(SDH)	u	Free	-
8517 62 70	Multiplexers, statistical multiplexers	u	Free	-
8517 62 90	Other	u	10%	-

15. It would also be necessary to reproduce the relevant tariff items under CTH 8542 and the same are reproduce below:

Tariff	**Description of goods**	**Unit**	**Rate of Duty**	
(1)	**(2)**	**(3)**	**(2)**	**(4)**
8542	Electronic Integrated circuits			
	Electronic integrated circuits			
8542 31 00	Processors and controllers, whether or not combined with memories, converters, logic circuits, amplifiers, clock and timing circuits, or other circuits	u	Free	-
8542 32 00	Memories	u	Free	-
8542 33 00	Amplifiers	u	Free	-
8542 39	Other :	u	Free	-
8542 39 00	Other	u	7.5%	-
8542 90 00	Parts	kg.	Free	-

16. The goods are IC-Codecs which are electronic integrated circuits and are also known as microelectronic circuit, microchip or chip. An 'IC-Codec' is a semi conductor wafer on which multiple components are fabricated. According to the appellant, the IC Codec imported by it is an array of miniaturized and microscopic components consisting of active components/devices such as transistors and diodes; and passive components/devices such as capacitors and resistors. The goods are imported in the form of rolls and after importation, they undergo further process to make them functional. Thus, it is claimed by the appellant that at the time of importation the goods do not have the capability of transmission or reception of data.

17. The description of goods under CTH 8517, amongst others, is "other apparatus for transmission or reception of voice, images or other data, including apparatus for communication under the wired or wireless network". Customs Tariff sub-heading 8517 62 with double dash is "Machines for reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus". CTI 8517 62 90 with triple dash is "Other".

18. Rule 1 of the General Rules for the Interpretation of the First Schedule to the Tariff Act provides that classification of goods shall be determined in accordance with the terms of the Chapter Heading and any other relevant Section or Chapter Notes. On a plain reading of the Headings, it is evident that CTH 8517 covers apparatus and machines.

19. The issue, therefore, that arises for consideration is whether the imported goods are "apparatus" or "machines". The terms "apparatus" or "machines" have not been defined in the Tariff Act. It would, therefore, be necessary to make a reference to the dictionary meanings.

20. The Modern Dictionary of Electronics defines "apparatus" as follows:

> "Equipment or instruments used for a specific purpose."

21. The Modern Dictionary of Electronics defines "equipment" and "instrument" as:

> "Equipment An item having a complete function apart from being a substructure of a system. Sometimes called a set."
>
> "Instrument- A device capable of measuring, recording, and/or controlling."

22. The goods imported are electronic integrated circuits used in the process of manufacture of mobile phones and tablets. The items covered

under CTH 8517 constitute a complete machinery or apparatus in itself. The goods imported would not satisfy any of the description of goods covered under CTH 8517 as the ICs-Codecs cannot be described either as a machine or as an apparatus. The goods in the present case i.e. ICs are merely electronic integrated circuits.

23. The Principal Commissioner held that the goods can be classified under 8517 as "other communication apparatus". It needs to be noted that CTH 8517 covers "other apparatus for transmission or reception of voice, images or other data including apparatus for communication in a wired or wireless network" (such as a local or wide area network). The goods imported are not in the nature of stand-alone devices for communication in a wired or wireless network i.e. Local Area Network[14] or Wide Area Network[15]. LAN and WAN are communication networks which connect devices in a limited or broad area, respectively. In fact, they establish a communication network within a particular geographical area between stand-alone devices.

24. In the present case, the goods are IC chips which are incapable of stand-alone function or connection with any other device. The ICs are only capable of functioning as compressor/decompressor upon connection with external peripherals like power supply and interface. The goods imported only interact with components which are mounted on the PCB. No network like LAN/WAN is established between the impugned goods and other components of PCB. The imported goods are not in the nature of machines or apparatus which are deployed in a network like LAN/WAN.

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14. LAN
15. WAN

25. On the other hand, CTH 8542 deals with "electronic integrated circuits" i.e. ICs. They would, therefore, be specifically covered under CTH 8542.

26. The IC-Codecs imported by the appellant are covered under the definition of "monolithic integrated circuit" as defined under Chapter Note 9 (b) to Chapter 85 of the Customs Tariff. The relevant portion is extracted below:

> "9. For the purposes of headings 8541 and 8542:
> .....
> (b) "Electronic integrated circuits" are:
> (i) **Monolithic integrated circuits** in which the circuit elements (diodes, transistors, resistors, capacitors, inductances, etc.) are created in the mass (essentially) and **on the surface of a semiconductor or compound semiconductor material** (for example, doped silicon, gallium arsenide, silicon germanium, indium phosphide) **and are inseparably associated**;..."
>
> **(emphasis supplied)**

27. HSN Explanatory Notes to CTH 8542 provides that monolithic ICs may be in the form of un-diced wafers. The IC-Codecs, as imported by the appellant, are in form of rolls i.e., un-diced wafers.

28. It, therefore, clearly follows that the goods imported by the appellant are IC-Codecs and are classifiable under Customs Heading 8542 and more specifically under CTI 8542 39 90.

29. The appellant is, therefore, entitled to the benefit of exemption Notification dated 01.03.2005, which exempts whole of the customs duty leviable on the goods imported into India falling under CTH 8542.

30. The department has not provided any technical literature or material in the impugned order to show that the imported ICs, at the time of import, have any capability of transmission or reception of digital

information. The allegations made in the show cause notice and confirmed in the impugned order are only based on presumptions.

31. Reliance placed by the learned authorised representative of the department on the decision of the Tribunal in **CC (Import), Air Cargo Complex, Mumbai** vs. **Indelox Services Private Limited**[16] is misplaced. The goods imported were routers which had the capability of transmission of data at the time of import itself. In the present case, the imported goods do not have the capability of transmission of data at the time of import.

32. The Principal Commissioner also committed an error in referring to rule 2(b) of the General Rules of Interpretation. This governs the classification of mixtures and combinations of materials or substances; and of goods consisting of two or more materials or substances. In the present case, rule 2(b) would have no relevance as the product is not a mixture or combination of materials or substances. The product would be classifiable under CTH 8542 by virtue of rule 1 of the General Rules of Interpretation as an IC is appropriately covered therein.

33. In view of the aforesaid discussion, the order dated 25.08.2020 passed by the Principal Commissioner cannot be sustained.

34. The department has also filed an appeal against that part of the order passed by the Commissioner of Customs that holds that the goods are not liable to be confiscated under section 111(m) of the Customs Act and penalty cannot also be imposed upon the appellant under section 112 (a)(ii) of the Customs Act.

35. As the order on merits cannot sustain, the appeal filed by the department deserved to be dismissed.

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16. 2017 (357) E.L.T. 946 (Tri-Mumbai)

36. In view of aforesaid, it is not necessary to examine the remaining contentions advanced by the learned counsel for the appellant.

37. **Customs Appeal No. 51172 of 2020** filed by the appellant to assail that part of the order that has classified the goods imported by the appellant under CTI 8517 62 90 instead of CTI 8542 39 00 as claimed by the appellant is, accordingly, allowed.

38. **Customs Appeal No. 51204 of 2020** filed by the department against that part of the order passed by the Principal Commissioner that holds that goods are not liable to confiscation nor penalty can be imposed is dismissed.

(Order Pronounced on **22.07.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Diksha, Shreya

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 53942 of 2023 [DB]

[Arising out of Order-in-Appeal No. CC(A)/Customs/D-I/Import/NCH/407/2022-23 dated 25.07.2022 passed by the Commissioner of Customs (Appeals), New Delhi]

Principal Commissioner of Customs,
New Delhi (ACC Import) **...Appellant**
New Customs Hose,
Near IGI Airport,
New Delhi - 110037

VERSUS

M/s. Aptar Pharma India Pvt. Ltd. **...Respondent**
Survey No. 790, Kistapur Village,
Medchal Mandal, Medchal Malkagiri,
District Hyderabad, Telangana - 501401

APPEARANCE:
Shri Nagendra yadav and Shri Rakesh Kumar, Authorized Representatives for the department

Shri Rachit and Shri Amitabh Amrit, Advocates for the respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 02.11.2023
DATE OF DECISION: **01.03.2024**

FINAL ORDER No. 54526/2024

DR. RACHNA GUPTA

The appellant as an importer filed a Bill of Entry No. 7818002 dated 03.06.2020 (self assessed) for clearance of goods declared as "Pump-1.200-GS-THREAD-28/410-2N-192.0 (Pump for lotion dispenser)" after classifying the goods under CTH 84248990 with Basic Customs Duty (BCD) leviable at the rate of 7.5%. The shipment was marked for clearance under RMS by the system. However, during the scrutiny of said Bill of Entry by the Shed Officer, the declared CTH 84248990 was not found appropriate for

the description of the goods given in the said Bill of Entry with the opinion that the goods appeared more appropriately classifiable under CTH 9616. The Shed Officer redirected the Bill of Entry to the Appraising Group-V for necessary action along with the representative sealed sample of the impugned goods. The said Appraising Group-V/Deputy Commissioner of Customs vide Order-in-Original No. 187/2020 dated 23.07.2020 held that the impugned goods i.e. "Pump-1.200-GS-THREAD-28/410-2N-192.0 (Pump for lotion dispenser)" imported vide Bill of Entry No. 7818002 dated 03.06.2020 are correctly classifiable under CTH 84132000 which provides in pertinent part, for "Pump-1.200-GS-THREAD-28/410-2N-192.0 (Pump for lotion dispenser)": Handpumps other than those of subheading 8413.11 and 8413.19 and are liable to be assessed accordingly.

2. Being aggrieved, assessee preferred an appeal before Commissioner (Appeals). The committee of commissioners in exercise of powers under Section 129A(2) of Customs Act, 1962 (hereinafter called as the Act) passed and Review Order No. 32/2002 dated 27.10.2022 directing the Deputy Commissioner of Customs (Review), ACC (Import) to file an appeal praying for setting aside Oredr-in-Appeal dated 25.07.2022. But nerither any appeal was filed by the department nor department marked its presence before Commissioner (Appeals) in the appeal filed by the assessee who proceeded to decide the appeal before him as per records and submissions made by the appellant-assessee. Vide Order-in-Appeal No. 407/2022-23 dated 25.07.2022 the aforesaid Order-in-Original though was set aside but with the direction that

Bill of the Entry No. 7818002 dated 03.06.2020 should be reassessed by classifying the same under CTH 84249090. Being aggrieved of this order, department is before this Tribunal.

2. We have heard Shri Nagendra Yadav and Shri Rakesh Kumar, learned Authorized Representatives for the department and Shri Rachit and Shri Amitabh Amrit, learned Advocates for the Respondent.

3. Learned Departmental Representative has mentioned that in the instant case, the importer has classified the gods under CTH 84248990 and Commissioner (Appeals) has classified the same under CTH 84249090 which is not correct since items are intended for use in smaller containers with smaller necks for spraying small quantity for material like fragrance, liquid soaps or pharmaceutical medicines and the said chapter heading does not include scent sprays, similar toilet sprays and their mount and head. Such items are specifically covered under CTH 9616. The Tribunal is competent to classify the goods under a different heading not covered by the show cause notice. The decision of Hon'ble Supreme Court in the case of **Voltas Ltd. Vs. Collector of Customs, Bombay reported as 1997 (91) E.L.T. 261 (S.C.)** is relied upon along with the decision of this Tribunal in the case of **O.K. Play (I) Ltd. Vs. Commissioner of C. Ex., Delhi-III (Gurgaon) reported as 2004 (171) E.L.T. 378 (Tri.-Del.).** The goods are mentioned to be the pumps and the pumps for liquids are specifically categorized under CTH 8413. Hence, the order of Commissioner (Appeals) is prayed to be set aside and department's appeal is prayed to be allowed.

4. While rebutting these submissions learned counsel for the appellant has mentioned that the impugned goods are rightly been declared under CTH 84248990 which include mechanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders-other. CTH 8413, on the other hand, cover pumps which are intended for industrial applications and which are capable of continuously displacing volumes of liquids whereas the product in question is a pump for dispersing small amount of lotion (a cosmetic). Learned counsel has further mentioned that the perusal of Heading pertaining to CTH 8424 discloses that the liquid dispensers and spray pumps (other than scent sprays and toilet sprays) would get covered under the Tariff Item pertaining to 'other' under the sub Heading in respect of 'other appliances' under CTH 84248990. Hence, CTH 9616 was wrongly proposed by the Shed Officer. Commissioner (Appeals) has gone ahead in adopting a new CTH 84249090. It is impressed upon that the case which Revenue never canvassed cannot be made out by the departmental authority. The decision of Hon'ble Supreme Court in the case of **Reckitt & Colman of India Ltd. Vs. Collector of Central Excise reported as 1996 (88) E.L.T. 641 (S.C.)** is relied upon**.** With these submissions, it is prayed that the product under consideration be allowed to be classified under CTH 84248990 instead of 84132000 as was held by original adjudicating authority and not even under CTH 84249090 as has been held by the departmental led authority. The appeal is prayed to be disposed of accordingly.

5. Having head the rival contentions and perusing the records, we observe and hold as follows:

5.1 The product imported admittedly is a pump for lotion dispenser. The issue involved in the present case is about classification of said pumps. The appellant had imported these pumps vide Bill of Entry dated 03.06.2020 while classifying them under CTH 84248990. The Shed Officer opined CTH 9616 to be the correct classification for the said product. For adjudication of the said issue, we first need to understand the procedure of classification. We observe that the Customs Tariff is based on the Harmonised System of Nomenclature [HSN] which classifies goods under various Sections and Chapters within each section. The general scheme of this tariff is that it starts from simple goods starting with live animals and animal products and moves to higher and more complex goods. Under each section there are chapters. The chapter title is of two digits under which there are various customs tariff headings of 4, 6 or 8 digits each are listed. The General Rules of Interpretation are provided in the tariff which indicate how goods should be classified. When these rules are applied, all goods can be classified under one heading or the other of particular chapter. The general rules of interpretation are briefly, as follows:

(i) Title of sections and chapters are provided for ease of reference. Classification shall be determined according to the Customs Tariff Headings read with relevant section notes and chapter notes, if any.

2(a) Any reference to heading to an article shall include incomplete and unfinished article and disassembled or assembled articles, if they have the essential characteristics of the finished article. 2(b) Any reference to a heading of a material or substance shall include reference to the mixture or combination of that material with other materials.

(3) When by application of Rule 2(b) or for any other reason goods are prima facie classifiable under two or more headings they shall be classified as follows:

(a) Heading which provides more specific description should be preferred to the one which provides more general descriptions;

(b) Mixtures, composite goods consisting of a different materials or made of different components or goods put up in sales and retail sale which cannot be classified with reference to (a) shall be classified as per the material or components which gives them essential character;

(c) The goods cannot be classified as per (a) or (b) they should be classified under the heading which occurs last in numerical order of the numbers they shall equally merit consideration and

(d) Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate of the goods to which they are most akin.

5.2. The impugned goods have differently been classified as follows:

(i) Importer classified under - 84248990

(ii) Shed Officer classified under - 9616

(iii) Original Adjudicating Authority - 84132000

(iv) Appellate Adjudicating Authority classified under - 84249090

(v) Review Order classified under - 8413.11

Present is the appeal filed by the department praying for setting aside the classification under CTH 84249090 and to reclassify under CTH 84132000. Accordingly, first we need to see the Chapter Headings of Chapter 84 and Chapter 96:

Chapter – 84

SECTION XVI MACHINER AND MECHANICAL APPLIANCES; ELECTRICAL EQUIPENTS; PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE AND SOULD RECORDERS AND REPRODUCERS, AND PARTS AND ACCESSORIES OF SUCH ARTICLES

8413 Pumps for liquids, whether or not fitted with a measuring device:

8424 Mechanical Appliances (Whether or Not Hand Operated) For Projecting, Dispersing or Spraying Liquids or Powders; Fire Extinguishers, Whether or not Charged; Spray Guns And Similar Appliances; Steam or Sand Blasting Machines And Similar Jet Projecting Machines

8424 20 00 – Spray guns and similar appliances

8424 89 90 --- Other

Chapter 96 – Miscellaneous manufactured articles

9616 SCENT SPRAYS AND SIMILAR TOILET SPRAYS, AND MOUNTS AND HEADS THEREFOR; POWDER-PUFFS AND PADS FOR THE APPLICATION OF COSMETICS OR TOILET PREPARATIONS

Since 9616 has not been considered either by original adjudicating authority and nor even by the departmental appellate authority, we need not to dwell into the said chapter.

5.3 Scope of appeal crystalizes to adjudicate as to:

"Whether the goods in question are pumps for liquids which can be classfied under CTH 8413 or these are mechanical appliances for projecting, dispersing or spraying liquids or powders as are classifiable under CTH 8424?"

For the purpose, we foremost need to understand the meaning of pump:

We observe that the word pump has been defined in the dictionary of the technical terms by F.S. Crispin as a machine for lifting or forcing liquids either by means of a bucket or a piston working in a closed cylinder. Accordingly, pumps are the apparatus which simplify the transportation or dispersion of fluids including water. The basic operating principle of a pump is that it uses energy to move fluids from one point to another. Hence, pumps can be classified by their method of displacement into electromagnetic pumps, positive displacement pumps, velocity pumps, gravity pumps, steam pumps, valveless pumps, etc. The products to be classified under 8413, as apparent from Chapter and section note, as discussed above, are the pumps which are meant

for displacement/transportation of fluid. Admittedly the product in question is a pump but not merely for displacing the liquid but also for dispersing the same. 'Displacement' and 'Dispersion' are two different phenomenas. As per their dictionary meaning former amount to change of location whereas later is process of spreading over a wide area. Thus pumps which simply displaces the liquid are different from pumps which disperse liquid hence cannot be classified together under general entry of pumps if there is a category more specific to pumps meant for dispersing liquids.

5.4 Pump is definitely a mechanical appliance. According to the Dictionary meaning, mechanical appliances are the tools that held with everyday task i.e. the appliances which are related to mechanics i.e. the branch of physics that deals with forces acting on mass. There is no dispute about the product/pump in question that pressure is used on the impugned product to get the lotion in the container beneath the product, to disperse out. Thus, we hold that product in question is a mechanical appliance performing two functions based on simple mechanics:

(i) Transporting liquid from the container to which the product gets attached.

(ii) Dispersing the lotion in the said container to the given surface.

5.5 We observe that the section note of 8424 talks about mechanical appliances meant for projecting, dispersing or spraying liquids or powders including pumps, spray guns and all other appliances for the purposes specified in the respective entry of this chapter. Pumps merely for liquids displacement are under CTH

8413. But the pumps for dispersion of fluids are covered under CTH 8424. Admittedly, the imported goods are the pumps but for dispersion of fluids. As per GRI Rules, as quoted above, more specific entry has to be followed. We hold that imported goods deserve classification under CTH 8424, more specifically under CTH 84248990. It cannot be classified even under 84249000 as the imported good is not the part of the pump but the pump as such.

5.6 Section XVI (which includes 8413 as well as 8424) says that this section covers all mechanical or electrical machinery, plant equipment, apparatus, appliances and parts thereof. Chapter note (b) further says that goods of this section may be of any material. Though in great majority of cases they are of base metal but they may be of other material also. Pumps wholly of plastics is cited as an example in that note. Section Note 2 in part 2 of the chapters says that pumps and compressors are specifically covered under Heading 8413 and 8414.

5.7 The Section Note for 8413 specifically states that this heading covers most machines and appliances for raising or otherwise continuously displacing volumes of the liquids. The entry is absolutely silent about dispersing the raised liquid. The kind of pumps defined under this entry makes it clear that this entry cover those pumps which are meant purely for displacement of liquids. Even elevating wheels and banned elevator are uncovered under this entry. On the contrary, the section note for CTH 8424 clarifies that this heading covers machines and appliances which are meant for projecting, dispersing or spraying steam liquids or solid materials and such machines which operate under high pressures

for dispersing and spraying liquids are excluded from the scope of this entry whereas the machines under 8413 since are such which are meant for displacing volume of liquids, those are opined to be a mainly industrial in nature. Chapter note (d) excludes scent sprays and similar toilet sprays of Heading 9616 out of 8424. Similarly, dispersing or spraying appliance of Heading 8424 are excluded from the Chapter note of 9616.

6. In view of the above discussion, we hold that the product in question is a pump for displacing and dispersing the lotion/cream. Hence, it is definitely not a scent spray or toilet a spray (CTH 9616). It is a pump but not the one under 8413 where the pumps meant only for displacement of liquids are covered. The goods in question is held to be covered under CTH 84248990 being the pumps meant not only for displacing the liquid/lotion but for simultaneously dispersing the same. Hence we hold that classification made by the respondent-assessee in the Bill of Entry No. 7818002 dated 03.06.2020 is the correct classification i.e. the pumps imported by the appellant are classifiable under CTH 84248990. Hence, the Order-in-Appeal is hereby set aside which classified the impugned pump under CTH 84249090. However, the appeal filed by the department still stands dismissed as they have prayed for impugned pump to be classified under CTH 8413.

[Order pronounced in the open court on **01.03.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

HK

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. I

Customs Appeal Nos. 40630 to 40634 of 2024

(Arising out of Order-in-Appeal C.Cus.II No. 463-467/2024 dated 16.05.2024 passed by Commissioner of Customs (Appeals-II), Custom House, No. 60, Rajaji Salai, Chennai – 600 001)

M/s. Suraj Constructions **...Appellant**
1st Floor, No. 91, Fuso House,
Poonamalle High Road,
Chennai – 600 084.

Versus

Commissioner of Customs **...Respondent**
Chennai II Commissionerate,
Custom House, No. 60,
Rajaji Salai,
Chennai – 600 001.

APPEARANCE:

For the Appellants : Ms. Swetha R.S., Advocate
For the Respondent : Mr. M. Selvakumar, Authorised Representative

CORAM:
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAYAN T.V., MEMBER (JUDICIAL)

FINAL ORDER Nos. 40431-40435 /2025

DATE OF HEARING : 20.01.2025
DATE OF DECISION : 09.04.2025

Per Mr. VASA SESHAGIRI RAO

These five Customs Appeal Nos. C/40630-40634/2024 have been filed by M/s. Suraj Constructions being aggrieved by the Orders-in-Appeal No. 463-467/2024

dated 16.05.2024 passed by the Commissioner of Customs (Appeals-II), Chennai dismissing all the appeals filed by the Appellant. The issue involved is the correct classification of Clear Float Glass imported by the Appellant in all these appeals.

1.2 Brief facts emerging from these appeals are that the Appellant has been regularly importing "Clear Float Glass" (CFG) from Malaysia classifying them under CTH 7005 1090 and clearing the same @ Nil rate of BCD availing exemption under Notification No. 46/2011-Cus dated 01.06.2011 (Serial No. 934) as the Country of Origin of subject import goods is Malaysia, a country notified for the benefit of ASEAN India Free Trade Area (AIFTA). However, in respect of the following imports of clear float glass as tabulated below: -

Sl.No.	Appeal No.	File No.	Appellant's Name	BE No.	Date
1	C/46030/2024	C3/II/164/O/2023-Sea	Suraj Construction	3654677	08.12.2022
2	C/46031/2024	C3/II/165/O/2023-Sea	Suraj Construction	3796954	19.12.2022
3	C/46032/2024	C3/II/166/O/2023-Sea	Suraj Construction	4146436	12.01.2022
4	C/46033/2024	C3/II/167/O/2023-Sea	Suraj Construction	4112838	10.01.2022
5	C/46034/2024	C3/II/168/O/2023-Sea	Suraj Construction	3683062	10.12.2022

The Assessing Officer did not permit the appellant to file the bills of entry under CTH 7005 1090, as the Country of Origin certificate contained a different CTH. The appellant had explained that the goods imported by them are rightly

classifiable under CTH 7005 1090, as the said goods contain an absorbent layer. The appellant also requested for provisional assessment of the said goods, which was also not acceded to by the Assessing Officer. Therefore, left with no other option and to avoid demurrage and detention charges the appellant filed the above mentioned bills of entry under CTH 7005 2990. Further, the appellant have reportedly submitted a Letter dated 14.12.2022 as supporting documents while filing the said bills of entry, stating that the goods are correctly classifiable under CTH 7005 1090, and they were forced to classify the goods under CTH 7005 2990. The classification of the imported CFG was mentioned as CTH 70052990 instead of CTH 7005 1090, in the Country of Origin Certificate (COO). It appeared that the goods covered under CTH 70052990 were the ones which did not have an absorbent layer whereas the goods imported by the Appellant were having an absorbent layer and so classifiable under CTH 70051090. But, it appeared to the Department that the assessments were to be made in terms of the description in the COO certificate. Being aggrieved by the classification in the Bills of Entry and consequent denial of benefit of Notification No. 46/2011 dated 01.06.2011, appeals were filed before the lower appellate authority to get the assessment orders modified under Section 128 of the Customs Act, 1962 and to seek consequential refund. The

Lower Appellate authority rejected all the five appeals on the grounds that the appellant failed to provide any technical inputs and any substantive evidence to support their arguments nor register any protest before assessment of the goods. Being aggrieved, the Appellant has filed the subject appeals before this forum.

2. The Grounds of Appeal filed by the Appellant in respect of the Appeals have been specified below: -

i. It was averred that the issue was already covered by the decision of the Hon'ble Tribunal in the case of *Bagreecha Enterprises Ltd. Vs. Commissioner of Customs, Kolkata in appeals C/75536-75538/20223 and C/40203/2023* wherein it was held that the presence of tin layer on the clear float glass was sufficient to classify the same under CTH 70051090.

ii. It was submitted that the Appellants have been regularly importing Clear Float Glass with an absorbent layer which are classifiable under CTH 70051090 and eligible for NIL rate of BCD as per sl.no.934 of Notification no.46/2011 dated 01.06.2011.

iii. It was submitted that the imported goods were rightly classifiable under CTH 70051090. In this regard the

relevant classifications of Float Glass in the Customs Tariff were adverted to as under: -

7005		**FLOAT GLASS AND SURFACE GROUND OR POLISHED GLASS, IN SHEETS, WHETHER OR NOT HAVING AN ABSORBENT, REFLECTING OR NON- REFLECTING LAYER, BUT NOT OTHERWISE WORKED**			
7005 10		*- Non-wired glass, having an absorbent, reflecting or non-reflecting layer :*			
7005 10 10	---	Tinted	m^2	10%	-
7005 10 90	**---**	**Other**	m^2	10%	-
		- Other non-wired glass :			
7005 21	--	*Coloured throughout the mass (body tinted) opacified, flashed or merely surface ground :*			
7005 21 10	---	Tinted	m^2	10%	-
7005 21 90	---	Other	m^2	10%	-
7005 29	--	*Other :*			
7005 29 10	---	Tinted	m^2	10%	-
7005 29 90	---	**Other**	m^2	10%	-
7005 30	-	*Wired glass :*			
7005 30 10	---	Tinted	m^2	10%	-
7005 30 90	---	Other	m^2	10%	-

and it was submitted that CFG having an absorbent layer and non-tinted are classifiable under CTH 7005 1090. It was submitted that CTH 700510 at six- digit level covered non-wired glass having an absorbent, reflecting or non-reflecting layer and is further sub-divided into two headings at eight-digit level, one covering tinted variety under CTH 70051010 and other varieties under heading 70051090. It was submitted that as far as absorbent layer was concerned, in terms of Note 2(c) to Chapter 70, the tariff itself explained

what an absorbent, reflecting or non-reflecting layer means, as mentioned below:-

> *"Chapter Note 2(c) to chapter 70 reads as follows:-*
> *"2. For the purposes of headings 7003, 7004 and 7005 :*
> *(a) glass is not regarded as "worked" by reason of any process it has undergone before annealing ;*
> *(b) cutting to shape does not affect the classification of glass in sheets ;*
> *(c) the expression "absorbent, reflecting or non-reflecting layer" means a microscopically thin coating of metal or of a chemical compound (for example, metal oxide) which absorbs, for example, infra-red light or improves the reflecting qualities of the glass while still allowing it to retain a degree of transparency or translucency; or which prevents light from being reflected on the surface of the glass."*

iv. It was submitted that in respect of import of identical goods imported earlier by the Appellants, the Central Glass and Ceramic Institute (CGCRI), CSIR- Kolkata *vide* their test report dated 02.02.2022 mentioned that the tin layer is UV absorbent. It was pointed out that the crucial question was whether the product had an absorbent layer and the answer to this question is in the affirmative which is backed by the opinion of CSIR, Central Glass & Ceramic Research Institute, Kolkata.

v. It was submitted that the investigation as to whether float glass could be manufactured without tin bath or

not is beyond the scope of the present case because articles other than float glass was also covered under CTH 7005.

vi. It was averred that the decisions of the higher forums should be followed by lower authorities unless it's operation has been suspended by a Competent court. By referring to Paragraph 11 of the impugned order wherein it was mentioned that the Tribunal, Kolkata did not consider certain factors in the case of *Bagreecha Enterprises Ltd. Vs Commissioner of Customs, Kolkata (Order dated 03.11.2023 passed in C/75536-75538/2023),* it was averred that the principle of judicial discipline requires the lower authorities to follow the decisions of the higher forums and subordinate courts are bound to follow the judgements unless there be a subsequent judgement by a higher court which had taken a different view other than the earlier view expressed. In this regard, the Appellant relied upon the decision in the case of *Tata Motors Ltd. Vs Union of India [2009 (244) ELT 337 (Bom.)]* and Hon'ble Supreme Court decision in the case of *Kamalakshi Finance Corporation Ltd. [1991 (55) ELT 433 (SC)].*

vii. It was submitted that on a similar issue which came up for consideration before the Commissioner of

Customs (Appeals), New Delhi in the case of M/s. Asahi India Glass Limited, it was held *vide* Order-in Appeal No. 861-863/2022-23 dated 20.07.2022 that the subject goods merit classification under CTH 70051090 as the goods have an absorbent (Tin) layer on one side and consequently extended the benefit under Notification No. 46/2011-Cus. dated 01.06.2011.

viii. It was submitted that on identical issues pertaining to classification of CFG, the Commissioner of Customs (Appeals) *vide* the Orders-in-Appeals No. CUS-000-APP-400-22-23 and CUS-000-APP-400-22-23 both dated 09.03.2023 had upheld the classification of goods under CTH 70051090 and had extended the benefit of Notification No. 46/2011-Cus dated 01.06.2011(Serial No. 934).

ix. It was pointed out that in identical cases, the Customs Authority for Advance Ruling, Mumbai vide ruling Nos. CAAR/MUM/ARC/10/2022 dated 10.05.2022 in the case of M/s. Suraj Constructions and CAAR/MUM/ARC/ 36/2021 dated 24.09.2021 in the case of M/s Chandrakala Associates, held that the Clear Float Glass with absorbent layer on one side would merit classification under heading 7005 and more specifically under CTH 70051090, irrespective of the tariff heading mentioned in the Country of Origin Certificate (COO)

and hence it was averred that the reliance placed by the assessing officer on the Classification mentioned in the COO is not legally relevant for determining the classification of impugned imports.

x. It was averred that identical goods manufactured by domestic manufacturers *viz*., Saint Gobain and others classified the goods under CTH 7005 10 90 and assessed accordingly on the basis of absorbent layer on one side. It was also pointed out that the majority of imports into India having absorbent layer have been correctly classified under CTH 70051090 as per data available on various web sites.

xi. It was submitted that the entire allegation of mis-classification was based on an audit para (DAP 83 of audit report No.17/2020) in respect of CFG imports and in this regard reference was invited to Para 5 of Circular No. 1023/11/2016-CX dated 08.04.2016 issued by the Central Board of Excise and Customs (CBEC) as per which the adjudication of admitted DAP/AP's should be undertaken after ensuring that the reply given by the Ministry (CBEC) is available on record and in the instant case no such reply was made available on record. In this connection, it was further submitted that the Appellant had applied for and sought for the Ministry's Action Taken Note on the said audit para by

way of information sought under RTI ACT and perusal of the same revealed that the Ministry had replied in detail legally justifying the classification of CFG under CTH 70051090 as tabulated below:-

Verification comments on Ministry's Action Taken Note on Audit Para No. 4.10.1 (DAP 83) Audit Report No.17 of 2020

Sl. No	Audit Para No. and subject.	Gist of Para	Ministry's ATN	Remarks/comments of CRA Kochi
1	**4.10.1 Clear Float Glass misclassified as 'non wired glass'.**	4.10.1 Clear float glass misclassified as 'non wired glass'. Clear float glass is transparent and offers high visible light transmittance. It does not have any absorbent, reflective layer and is classifiable under CTH 70052990 as 'Other non-wired glass' attracting BCD at the rate of 5 per cent (notification no.46/2011-cus, Sl.no.935) when imported from ASEAN countries. M/s 'K' Enterprises Limited and 19 other firms imported (April 2017 to March 2018) 'float glass' (249 BsE) through Chennai (Sea) and Kochi (Sea) Commissionerates. The imported goods were misclassified under CTH 70051090 and exempted from BCD. This resulted in non-levy of duty amounting to 4.34 crore. Audit noticed that the imported goods were clear and not coated with any absorbent, reflective or non-reflecting layer, accordingly merit classification under CTH 70052990 and BCD was leviable at 5 per cent in terms of aforesaid	Please refer to your office letter No. 29/ Ind Tax/Customs/136-2019 dated 31.01.2022 on the above cited subject. In this regard it is to submit that the Audit objection is based on the proposition that the "absorbent, reflecting or non-reflecting layer" mentioned in Chapter notes 2(c) of Chapter 70 of the Customs tariff is distinct from the Tin layer found in the floating glass and that coating of glass is a process whereby metal oxides are sprayed in the form of thin coatings; that it modifies the behaviour of the glass with respect to solar radiation, visibility and reflection of light; that different types of technology and process are involved in coating of glass according to the purpose for which the glass is used and is a class apart from clear float glass. Classification of goods in the first schedule - import tariff is governed by the general rules of interpretation (GRI) and general explanatory notes thereof. As per Rule1 of GRI, "for legal purpose, classification shall be determined according to the terms of the headings and any relative section or chapter notes.". As	***The Ministry's reply examined and the following remarks are offered.*** As stated by the Ministry, as per Rule 1 of GRI, for legal purpose, classification shall be determined according to the terms of the headings and any relative section or ***chapter notes.*** Chapter note 2 (c) under Chapter 70 states as follows: ***"the expression "absorbent, reflecting or non-reflecting layer" means a microscopically thin coating of metal or of a chemical compound (for example, metal oxide) which absorbs, for example, infra-red light or improves the reflecting qualities of the glass while still allowing it to retain a degree of transparency or translucency; or which prevents light from being reflected on the surface of the glass***". The purpose of the above Chapter Note indicates the intention of the legislature to bring clarity as to the type of glass covered by the term 'absorbent, reflecting or non-reflecting layer" and the purpose for which such type of glass is used, ie., ***which absorbs, for example, infra-red light or improves the reflecting qualities of***

		notification. On this being pointed out (July/ August 2018), the Customs authorities, Cochin stated (September 2019) that I/36202/2021 the composition of the glasses was soda lime silica based glass containing other minor components. The glass surfaces are not polished, not tinted, non-wired and not specified. The Department further stated that test results of imports indicate that "An absorbent Layer of Tin" was observed on one side of the glass which is fluorescent under UV illumination". Accordingly, in view of the test result, the imported goods are clear float glass and correctly classified under CTH 70051090. The reply of the Department was not acceptable because:- (a) The manufacturing process of float glass involves floating molten glass to the mirror-like surface of molten tin, starting at 1,100 degree Celsius leaving the float bath as a solid ribbon at 600 degree Celsius on a bed of molten tin which inevitably introduces tin by thermal diffusion into one side of the glass. The glass so manufactured is clear float glass, one side of which is known as the	per GRI 6, for legal purposes, the classification of goods in sub-headings of a heading shall be determined according to the terms of those sub-headings and any related subheading notes..."The terms of heading 7005 read as "float glass and surface ground or polished glass in sheets, whether or not having an absorbent, reflecting or non reflecting layer but not otherwise worked". The sub-heading 7005 10 read as "non-wired glass, having an absorbent, reflecting or non reflecting layer". The tariff item 7005 1010 denotes "tinted" and 7005 1090 denotes "other" whereas the Customs tariff item 7005 2990 denotes "Other" in the "Other" category of "other non-wired glass. The subject goods are declared as "clear float glass" and the relevant CGCRI report states that the glass is a non-wired float glass and that an absorbent layer (tin) is observed on one side of the glass which is fluorescent under UV illumination". On conjoint reading of the report vis a vis the chapter notes and terms of the sub heading 7005 10 and GRI, it can be seen that the goods are rightly classifiable under the customs tariff item of 7005 1090. Moreover Rule 3(a) of the GRI states that the heading which provides the most specific description shall be preferred to headings providing a more general description. It is pertinent to note that	***the glass while still allowing it to retain a degree of transparency or translucency; or which prevents light from being reflected on the surface of the glass*** " as a result of coating applied with metal or chemical compound. Audit is in agreement with the case law quoted by the Ministry which ruled that "in classifying the product, the scientific and technical meaning is not to be resorted to and that the product must be classified according to the popular meaning attached to it by those using the product" The popular meaning attached to the product "Clear float glass" does not covers glass which is subject to coating as specified in the Chapter note. Clear float glass means "CLEAR" as understood by those using the product and not COATED. Whereas the popular meaning of Glass which is coated as specified in the Chapter note is generally understood by those using the product as "coated glass". (i) The department has not disputed the fact that the item description in the Bills of Entry mentioned in the TA
		tin side and other side as the air side. All glass manufactured under float process, (clear, coated or tinted) invariably would contain a layer of tin on one side, which does not mean that all float glass is to be classified under 70051090. (b) Further, test reports also revealed that the glasses are neither "tinted' nor "wired". Hence, the possibility of classifying the glasses under CTH 70052110 (meant for tinted) or under CTH 70053010 (wired glass) was also ruled out. Therefore, the imported goods merit classification under CTH 70052990 – "Others" and attract BCD at the rate of 5 per cent. Apart from test checked cases, analysis of data (2017- 18) revealed that in another 592 imports of "Clear float glass" made through 27 Customs Ports, BCD was exempted instead of applicable rate of five per cent. The duty involved was 13.39 crore. CBIC may examine these cases and take corrective action. The matter was referred to the Ministry in August 2020, their response was awaited (September 2020).	neither the chapter notes to Chapter 70 of the Customs Tariff nor the explanatory notes issued by the World Customs Organization stipulate any specific process for the production of the coating nor it excludes per se the absorbent layer of Tin as reported in the test report of CGCRI, from the scope of the "microscopically thin coating of metal or of a chemical compound...". The wordings used in the relevant sub-heading is "non-wired glass, having an absorbent, reflecting or non-reflecting layer". The chapter notes or the explanatory notes referred above has not given any clarification on the coating process. Moreover, Supreme Court of India in Dabur (India) Ltd., Vs Commissioner of Central Excise, Jamshedpur (2005) (182) ELT 290 (SC) & Commissioner of Central Excise, Nagpur Vs Vicco Laboratories has ruled that in classifying the product, the scientific and technical meaning is not to be resorted to and that the product must be classified according to the popular meaning attached to it by those using the product. The audit has not given any source or details of the methodology adopted by them for arriving at the conclusion that the absorbent layer of Tin is excluded from the ambit of "microscopically thin coating	Memos were "Clear float glass" and not "Float glass having an absorbent reflecting or non-reflecting layer" or "coated glass". The presence of absorbent, reflecting or non-reflecting layer on the 'clear float glass' imported was not examined by the Department at the time of assessment nor was any test report produced along with the import documents to prove that the glass imported contained any absorbent reflecting or non-reflecting layer. In the absence of such documentary evidence it is not known how the Department concluded that the goods imported declaring as "clear float glass" contained any absorbent reflecting or non-reflecting layer and allowed clearance classifying under CTH 70051090 without considering the Chapter note 2(c). (ii) As stated by the Ministry "Rule 3(a) of the GRI states that the heading which provides the most specific description shall be preferred to headings providing a more general description". The sub-heading 7005 10 is specific to glass having an 'absorbent, reflecting or non-reflecting layer'. Whereas the item description of the imported glass is "clear float glass". In the absence of any documentary

			of metal or of a chemical compound..." as given in Chapter notes 2 (c) of Chapter 70 of the Customs tariff and also the process of coating of glass as detailed in (ii) ibid. In the absence of such scientific or legal background and also on the basis of the test results of identical goods, the objection raised by the audit is unsustainable. In view of the above, Audit Para may kindly be considered for closure.	evidence regarding the presence of "absorbent, reflecting or non-reflecting layer' on the imported glass at the time of permitting clearance, the imported "clear float glass' was rightly classifiable under 7005 29 90. (iii) The test report of CGCRI which was produced subsequently was not in respect of "clear float glass" imported against the Bills of Entry in respect of which Audit has issued TA Memos. Hence the same cannot be relied upon to conclude that all clear float glass imported and cleared earlier also contained "an absorbent, reflecting or non-reflecting layer'. Considering the above facts, reply of the Ministry is not acceptable and requires re-consideration.

xii. It was disputed that the impugned order without considering the case laws, advance rulings, action taken note and reply by the Appellant, had proceeded to confirm the classification of the imported CFG under CTH 70052990 thereby ignoring Para 5.3 of the Circular No. 1023/11/2016-CX dated 08.04.2016 which mandated that the quasi- judicial proceedings was legally bound to independently and judiciously adjudicate by taking into consideration the audit objections by CRA/ reply of the department, reply of the party, relevant legal provisions, extant case laws and relevant circulars of the CBEC. It was averred that it is the onus of the department to prove and establish the classification of the product, in case, the Department confronts a classification claimed by the

Appellant and in this regard the Appellant relied on the ratio of the decision in the cases of *Hindustan Ferrodo Ltd. [1997 (89) ELT 16 (SC)], Collector of Central Excise Vs. Calcutta Steel Industries and Others [1989 (39) ELT 175 (SC)], Parle Agro (P) Ltd. Vs. Commissioner of Commercial Taxes, Trivandrum [2017 (352) ELT 113 (SC)]* and *Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner of Central Excise, Nagpur [2006 (196) ELT 3 (SC)].*

xiii. It was submitted that the representative of the Appellant had filed an application dated 20.06.2023 with M/s. Central Glass and Ceramic Research Institute (CGCRI), Kolkata in which one of the queries pertained to whether the reports given by the said institute is relating to the existence of observant tin layer on one side of the CFG and the institute *vide* their reply dated 17.07.2023 clarified that the float glass tested by them contain an absorbent tin layer on one side which meant that the CFG had an absorbent and non-reflective layer.

3.1 The Ld. Counsel Ms. R.S. Swetha representing the Appellant recapitulated the averments in the grounds of appeals and further submitted that the issue involved in the

appeal was already covered by the decisions of the Tribunal in the following cases:

i. *Bagreecha Industries Limited Vs. Commissioner of Customs (Port), Kolkata [Final Order Nos. 77460-77462/2023 dated 03.11.2023]* passed in Customs Appeal Nos. C/75536-75538/2023 wherein the Tribunal had held that the presence of tin layer on the CFG is sufficient to classify the same under CTH 70051090 and also covered by the decision of Tribunal Chennai in the case of the same appellant in Final Order No. 40352/2024 dated 27.03.2024 passed in Customs Appeal No. 40203 of 2023.

ii. *M/s. Rider Glass Industries Pvt. Ltd. Vs Commissioner of Customs, Chennai vide Final Order no.40958/2024 dated 23.07.2024.*

iii. *M/s. Enviro Safety Glass Vs. Commissioner of Customs, Audit, Chennai vide Final Order No. 40957/2024 dated 23.07.2024.*

iv. *Float Glass Centre Vs. Commissioner of Customs, Chennai vide Final Order Nos. 40876-40908/ 2024 dated 18.07.2024.*

v. *M/s. Navakar Impex Pvt. Ltd. Vs. Commissioner of Customs, Chennai (Order dated 24.07.2024 in C/40514/2023).*

3.2 Further, it was submitted that the Hon'ble Apex Court in the case of *Commissioner of Central Excise, Bhopal vs. Minwood Rock Fibres Ltd. [2012 (278) ELT 581 (SC)]* had held that when there were two conflicting entries in a classification dispute, then an entry which is beneficial to the Assessee requires to be applied. Further, the Counsel has pointed out that the Hon'ble Apex Court in the case of *STP Limited [1998 (97) ELT 16 (SC)]* held that if there is any dispute in the construction of any provision of a taxing statute, that doubt must be resolved in favour of the Assessee.

3.3 The Ld. Counsel submitted that the general Rules of Interpretation has precedence over the Country of Origin Certificate and hence reliance placed on the classification mentioned in the COO is not legally sustainable.

3.4 It was submitted that the Circular No. 23/2024-Customs dated 14.11.2024 regarding classification of clear float glass holds no merit as it is a settled principle of law that judicial precedents override Department's circulars.

3.5 In view of the submissions and relied upon case laws, the Counsel prayed to dismiss the impugned order.

4.1 The Ld. Authorized Representative Shri M. Selvakumar representing the Department affirmed the findings of the lower Appellate Authority. It was stressed that the primary condition for classifying the imported CFG under CTH 70051090 was not satisfied. He has submitted that if the tin layer is treated as the absorbent layer which is inherent in the manufacturing process of every float glass, the words "whether or not having an absorbent, reflecting or non-reflecting layer" will become redundant. He has contended that it is not legal to interpret the tin layer itself as an absorbent layer, which is automatically formed in the manufacture process of every float glass. The words "whether or not" used in the heading becomes redundant and such interpretation is not correct as settled by various case laws *viz., Rao Shiv Bhadr Singh Vs. The State of VP [AIR 1953, SC 394]* and *Shri Balaganesan Metals Vs. Shri M.N. Shanmugham Chetty & Others [AIR 1987 SC 1668].* He has further submitted that the Commissioner of Customs (Port), Kolkata has filed a Civil Appeal No. 28721/2024 before the Hon'ble Apex Court challenging the decision of the Kolkata Tribunal in the case of *Bagrecha Enterprises Ltd.* wherein though the stay petition filed by the Department was dismissed, a notice was issued on the Department's application seeking condonation of delay.

4.2 He has supported the findings of the lower Appellate Authority and prayed for setting aside the appeals, in view of the clear findings recorded in the impugned Order.

5. Heard both sides and carefully considered the submissions and evidences on record.

6. The issues which arise for decision in these appeals are:-

i. Whether the imported Clear Float Glass by the appellant in these five appeals is correctly classifiable under CTH 70051090 as contended by the appellant or under CTH 70052990 as classified / assessed by the Department? and,

ii. Whether the Appellant is eligible for FTA benefit under Sl. No. 934 of Notification No. 46/2011-Cus dated 01.06.2011?

7. We find that the Ld. Counsel for the appellant argued that they have regularly importing Clear Float Glass from Malaysia through Chennai Seaport by declaring the classification under CTH 7005 1090 and availing FTA benefit under Sl. No. 934 of Notification No. 46/2011-CUS dated 01.06.2011 by furnishing the required Certificate of Origin (COO) in terms of Customs Tariff (Determination of Origin of

Goods Under the Preferential Trade Agreement Between the Government Of Member States of ASEAN and Republic of India) Rules, 2009. It appears that in respect of these five appeals when the importer has sought classification of the goods under CTH 70051090, the authorities have not allowed the appellants to adopt the above said classification or request for provisional assessment. In order to avoid detention and demurrage charges, the appellants filed the above five Bills of Entry adopting the classification under CTH 70052990 as mentioned in the COO Certificate but have filed these appeals before the Lower Appellate Authority which were rejected. The Department, based on an earlier audit objection and the description of goods mentioned in COO, rejected the classification declared by the Appellant and re-classified the imported goods under CTH 70052990 denying the benefit of Notification cited supra.

8. We notice that these proceedings were initiated as a result of CAG's audit objection and CBEC had replied in detail legally justifying the classification of CFG under CTH 70051090. As the Department itself was of the view that the CFG is rightly classifiable under CTH 70051090, the action initiated by the Department appears to be contrary to its earlier stance maintained before the CAG.

9. It has been argued that the only requirement for CFG to get classified under 70051090 is that the CFG shall have an absorbent reflecting or non-reflecting layer, which is undisputedly present in the instant case and the same, is evidenced by test reports issued by the notified Government Agency *viz*., CSIR-CGCRI. Further, a reference was made to an RTI application addressed to CSIR wherein it was clarified that all the float glasses tested for Customs by them has a tin layer on one side of the float glass which is absorbent and non-reflective as per the test report of the said Agency.

10. We find that the issue of classification of CFG is no more res integra since the issue and identical arguments submitted by litigants were already elaborately dealt with in the Orders of the Kolkata Tribunal *vide* [Final Order Nos. 77460-77462/2023 dated 03.11.2023] and Chennai Tribunal vide [Final Order No. 40352/2024] in the case of M/s. Bagrecha Enterprises Ltd. Vs. Commissioner of Custom, Chennai wherein it was held that the Clear Float Glass is more appropriately classifiable under CTH 7005 1090 of the Customs Tariff Act, 1975 and the relevant paras have been reproduced below for the sake of convenience:-

> *"9.1 Before proceeding to determine the appropriate classification of imported CFG, it would be relevant to reproduce rival tariff entries with the relevant Chapter Note as follows:-*

7005		**FLOAT GLASS AND SURFACE GROUND OR POLISHED GLASS, IN SHEETS, WHETHER OR NOT HAVING AN ABSORBENT, REFLECTING OR NON- REFLECTING LAYER, BUT NOT OTHERWISE WORKED**			
7005 10	-	*Non-wired glass, having an absorbent, reflecting or non-reflecting layer :*			
7005 10 10	- - -	Tinted	m 2	10	- %
7005 10 90		**Other**	m 2	10	- %
		Other non-wired glass :			
7005 21	- - -	*Coloured throughout the mass (body tinted)*			
7005 21 10	- - -	*opacified, flashed or merely surface ground :* Tinted	m 2	10	- %
7005 21 90	- - -	Other	m 2	10	- %
7005 29	- -	*Other :*			
7005 29 10	- - -	Tinted	m 2	10	- %
7005 29 90	- - -	**Other**	m 2	10	- %
7005 30	-	*Wired glass :*			
7005 30 10	- - -	Tinted	m 2	10	- %
7005 30 90	- - -	Other	m 2	10	- %

Chapter Note 2(c) to chapter 70 read as follows:-

"2. For the purposes of headings 7003, 7004 and 7005 :

(a) glass is not regarded as "worked" by reason of any process it has undergone before annealing ;

(b) cutting to shape does not affect the classification of glass in sheets ;

(c) the expression "absorbent, reflecting or non-reflecting layer" means a microscopically thin coating of metal or of a chemical compound (for example, metal oxide) which absorbs, for example, infra-red light or improves the reflecting qualities of the glass while still allowing it to retain a degree of transparency or translucency; or which

prevents light from being reflected on the surface of the glass."

9.2 It is evident from the manufacturing process that the CFG manufactured as above has a microscopically thin coating of metal layer, namely TIN on one side of the CFG, which is known as "Tin Side". Further it is an undisputed fact in this proceeding that the imported CFG are non-wired and non-tinted. This leaves us to ascertain whether such microscopically thin Tin Coating appearing on the TIN side is an absorbent, reflecting or non- reflecting layer to get classified under Tariff item 7005 1090.

9.3 It is already on record that the Department have drawn samples and tested the same with the Government notified laboratory namely CSIR-CGCRI, Kolkata which had reported that the imported CFG sample is having a microscopically thin coating of Metal, namely TIN, and it is an absorbent/non-reflective layer. This fact is also not in dispute in this proceeding. However, the SCN alleges that such absorbent reflective tin layer present in the CFG is obtained by natural phenomena during the manufacturing process and not by way of a separate coating process after manufacture of CFG and hence, the imported CFG would not merit classification under tariff item 70051090. The Ld. Adjudicating Authority has confirmed the above proposition in the impugned order.

9.4 But, the Ld. Advocate argued that as per CTH 7005 to get classified under Chapter Heading 70051090 of CTA, CFG shall be a non-wired glass, having an absorbent, reflecting or non-reflecting layer of metal. The imported CFG is non-wired is not in dispute. Entire dispute centres around whether the imported goods are having an absorbent layer or not in terms of Chapter

Note 2(c) of Chapter 70 of the Customs Tariff Act, 1975. As per Chapter Note 2(c) of Chapter 70 what needs to be demonstrated is that the CFG has a "microscopically thin coating of metal or of a chemical compound (for example, metal oxide) which absorbs, for example, infra-red light or improves the reflecting qualities of the glass while still allowing it to retain a degree of transparency or translucency; or which prevents light from being reflected on the surface of the glass."

9.5 The Ld. Advocate has further submitted that it is evident from the manufacturing process explained above as well as the test report referred above, that the CFG is having a microscopically layer of metal, namely tin, which is an absorbent/non-reflective layer as contemplated in the above referred Chapter note, and it was an admitted fact in Paragraphs 11 and 12 of the Show Cause Notice.

9.6 It was further contended that though the Ld. Adjudicating Authority accepts that CFG has an absorbent layer of tin on one side, he proceeds to give a finding that such layer of tin is not the result of applying any coating on the CFG but of a natural phenomena in the manufacture of CFG which inevitably introduces tin by thermal diffusion into one side of the glass. In other words, the Ld. Adjudicating Authority tows the audit objection of CRA that the absorbent reflecting or non-reflecting layer is available only on the tin side of the CFG and not on the air side of the CFG.

9.7 The advocate would submit that, neither the tariff heading nor the Chapter Note warrants nor mandates that the absorbent reflecting or non-reflecting layer shall be on which side of the CFG. In other words, the only requirement for CFG to get classified under 70051090 is that the CFG shall have an

absorbent reflecting or non-reflecting layer, which is undisputedly present in the instant case and the same, is evidenced by test reports issued by the notified Government Agency viz., CSIR-CGCRI as many as more than 40 test reports pertaining CFG imports through various Custom Houses. Further, the Ld. Advocate referred to an RTI application made to CSIR wherein it was clarified that all the float glasses tested for Customs by them since 2017 till 17.07.2023 has a tin layer on one side of the float glass which is absorbent and non-reflective. [CSIR-Central Glass and Ceramic Research Institute's letter dated 17.07.2023. (Page No. 43 of Synopsis filed)]

9.8 He also submitted that, identical goods manufactured by domestic manufacturers viz., Saint Gobain have also classified the goods under CTH 7005 1090 and assessed accordingly both for domestic clearances and exports.

9.9 We find that Department's insistence of absorbent layer to be only on the air side for its classification under CTH 70051090 was vehemently contested by the counsels for the appellant and they submitted that, neither the tariff heading nor the chapter note provides for a requirement of such coating on any prescribed side and instead, on a plain reading of the tariff entry and the chapter Note 2(c) would only envisage that the CFG should have an absorbent, reflective or non-reflective thin microscopical layer for the purpose of classification under tariff item 70051090, which is very much present and remains undisputed. It was submitted that it is not permitted for the Ld. Adjudicating Authority to add or amend either tariff or chapter notes, to suit revenue's benefit. The above contentions are convincing as in matters of classification, a simplicitor and straight forward approach is paramount unless there is an anomaly.

10. We also note that in the appellant's own case on the very same issue, the co-ordinate bench of this Tribunal at Calcutta vide their Final Order No. 77460-77462/2023 reported in [2023 (11) TMI 485 CESTAT KOLKATA] has held that the CFG is rightly classifiable under tariff item 7005 1090. The relevant Paragraphs read as follows:-

> *"16. We find that there is no dispute that the impugned goods is non-wired glass. By conjoint reading of the above note 2(c) and the manufacturing process, it can be inferred that CFG would have microscopical layer of metal, namely tin, which is an absorbent layer as contemplated under the above said Chapter Note 2(c). Hence, the correct classification of the impugned goods is under CTH 7005 1090 of Customs Tariff Act.*
>
> *17. We further find that the manufacturers in India of the identical goods namely M/s. Saint-Gobain India Pvt. Ltd., M/s. Goldplus Float Glass are manufacturing and clearing CFG under CTH 70051090 of the CTA and the same has been accepted by the department.*
>
> *18. We further find that the impugned proceedings were initiated against the appellant on the basis of Audit Para holding that the Float Glass invariably a layer of Tin on one side, which does not mean that all Float Glass to be classifiable under 7009 1090.*
>
> *19. We find that the appellant sought reply under RTI dated 17.07.2023, wherein the question was raised that it is observed that in some of the Report, no other layer other than Tin layer is found on one side of the Glass which is fluorescent is mentioned. Whether such layers are reflective or notreflective and whether such layers are absorbent or not? The reply is given as (a) not-reflective and (b) absorbent (UV).*
>
> *20. If the same is considered then the said clarification is satisfying the Chapter Note 2(c) of Chapter 70 of the*

Customs Tariff Act and the said Report has not been relied upon by the adjudicating authority while adjudicating the case. Therefore, the impugned order is bad in law.

21. We further take note of the fact that in the case of M/s. Suraj Constructions (supra), the Advance Ruling Authority has examined the issue and observed as under:-

> *"7. I have considered all the materials placed before me for the subject goods. I have gone through the submissions made by the applicant during personal hearing and the comments of the jurisdictional Principal Commissioner/Commissioner of Customs, on the impugned subject matter. The subject goods for which advance ruling has been sought, their characteristics, manufacturing process, utility etc. are already mentioned in the aforementioned paras. The subject goods are clear float glass, with an absorbent layer, which is fluorescent under UV illumination. The subject goods are not wired, tinted or green in colour. The heading 7005 10 covers non-wired glasses having an absorbent, reflecting or non-reflecting layer and the headings 7005 21 to 7005 29 deal with non-wired glasses which are tinted having absorbent layer, opacified, flashed etc. Therefore, the subject goods are appropriately covered under sub-heading 7005 1090. Based on the applicant's submission about the country of origin and the manufacturer of the subject goods, benefits under sr.no.934 of the table annexed to the exemption notification no.46/2011-Cus., dated 01.06.2011, would be available, subject to the condition that in respect of each case of import, the applicant would have to produce evidence before the Deputy/Assistant Commissioner of Customs as to the origin of subject goods.*
>
> *8. On the issue of whether the benefit of the said exemption would be available even if the sub-heading*

mentioned in the COO differs for 70051090, the applicant & their authorized representative were asked to explain the context of the said question. It appears that the subject goods are being exported from Malaysia under its code 70052990. The applicant has submitted a copy of the letter ref. no.MITI.700-2/26 Jld.6(38) dated 30.04.2021 from the Director of Trade and Industry Cooperation, Ministry of International Trade and Industry (MITI, hereinafter), stating that they had been requesting the clear float glass exporters to provide an advance ruling/document of the Government of India or from Royal Malaysian Customs confirming the correct HS code. It appears that M/s. Kibing Group (M) Sdn. Bhd. has obtained a letter from the Royal Malaysian Customs dated 12.03.2021 confirming the classification of clear float glass under HS code 7005.10.09, and therefore, MITI has allowed KGM to apply for a COO with exporting and importing HS code of 70051090. This letter goes on to state that unless M/s. Xinyi produces a similar document, their application with different exporting and importing tariff code cannot be approved."

22. Further, in the case of M/s. Chandrakala Associates (supra), again the Advance Ruling Authority has examined the issue and observed as under:-

"10. I have considered all the materials placed before me for the subject goods. I have gone through the submissions made by the applicant during personal hearing. In the absence of any comment from the jurisdictional Principal Commissioner/Commissioner of Customs, on the impugned subject matter, I proceed to render an advance ruling based on materials available on record. The subject goods for which advance ruling has been sought, their characteristics, manufacturing process, utility etc. are already mentioned in the

aforementioned paras. The subject goods are clear float glass, with an absorbent layer, which is fluorescent under UV illumination. The subject goods are not wired, not tinted or not green in colour. The heading 7005 10 covers nonwired glasses having an absorbent, reflecting or non-reflecting layer and the headings 7005 21 to 7005 29 deal with non-wired glasses which are body tinted, opacified, flashed etc. Therefore, the subject goods should more appropriately be covered under sub-heading 7005 1090. While prima facie, based on the applicant's submission about the country of origin and the manufacturer of the subject goods, exemption notification no.46/2011-Cus., dated 01.06.2011, appears to be available, in terms of the said notification, in each case of import the applicant would have to produce evidence before the Deputy/Assistant Commissioner of Customs to substantiate the origin of subject goods.

11. In view of the above discussions, I hold that the subject goods 'Clear Float Glass' having an absorbent layer merit classification under heading 70.05 and more specifically, under subheading 70051090 of the first schedule to the Customs Tariff Act, 1975. The said imports shall also be governed by the provisions of Notification No.37/2020- Customs (ADD), dated 11.11.2020. The benefit of exemption notification no.46/2011, dated 01.06.2011 would be determined in accordance with conditions laid down in the said notification."

23. Further, the Ld. Commissioner (Appeals) in the case of M/s. Asahi India Glass Limited (supra) has examined the issue and observed as under:-

"5.4 Now coming to merits of issue, the contesting entries viz 70051010 (as declared by the appellant) and

70052110 (as per the assessing Authority) from the Customs Tariff are reproduced below:-

Upto 31.12.2019

7005	*Float glass and surface ground or polished glass, in sheets, whether or not having an absorbent, reflecting or non-reflecting layer, but not otherwise worked.*
700510	*-Non-wired glass, having an absorbent, reflecting or non-reflecting layer.*
70051010	*--- Tinted*
70051090	*--- Other*
	- Other non-wired glass;
700521	*-- Coloured throughout the mass (body tinted) opacified, flashed or merely surface ground:*
70052110	*--- Tinted.*

It is pertinent to mention that w.e.f. 01.01.2020 (as amended vide Finance Act, 2019 and made applicable as per Notfn.89/2019-Cus (N.T.), dated 10.10.2019), the sub-heading700521 was amended to read as under:-

"….Coloured throughout the mass (body tinted), opacified, flashed or merely surface ground.".

Thus, specifically a comma was inserted in the said sub-heading. The said amendment was not given retrospective effect.

5.4.1 Chapter Note 2 of chapter 70 is reproduced below –

"2. For the purposes of headings 7003, 7004 and 7005:

(a) …….

(b) ……..

(c) The expression "absorbent, reflecting or non-reflecting layer' means a microscopically thin coating of

metal or of a chemical compound (for example, metal oxide) which absorbs, for example, infra-red light or improves the reflecting qualities of the glass while still allowing it to retain a degree of transparency or translucency; or which prevents light from being reflected on the surface of the glass."

5.4.3 A Plain reading of CTH 7005 would reveal that 700510 covers non-wired glass having absorbent, reflecting or non-reflecting layer. A clear conclusion is that single clash entry after 70051090 i.e. "…. other non-wired glass" would cover non-wired glasses without absorbent, reflecting or non-reflecting layer.

5.4.4 The Adjudicating Authority has held that CTH 700521 covers glass which may or may not have absorbent or reflecting or non- reflecting layer. The Adjudicating Authority has contended that the impugned goods are coloured through out body (i.e. body tinted) and thus covered by CTH 700521 and articles of CTH 700521 may or not have absorbent/reflecting layers. This interpretation itself is erroneous in light of scheme of CTH under 7005 and explanation given in 5.4.3 above.

5.4.5. It is settled position of law that burden of proof of classification is on the Department. The classification has been changed on the basis of Test Reports. I have carefully going through the copies of Test Reports from CGCRI, Kolkata. I find that said Test Reports are not conclusive enough to reject the declared classification by the Appellant. Rather, the said Reports do mention the presence of Layer. The exact findings of some of the Test Reports in this regard are as under:-

"c) The Tin Side is detected under UV illumination using the detecter.

i) An absorbent layer (Tin) is observed on one side of the glass which is fluorescent under UV illumination.

j) The glass is found to be coated with ZnSO4 film on opposite to tin side as protective layer."

The Test Reports have clearly established that impugned goods were having absorbent layer (Tin) on one side. This fact is not disputed. Accordingly, I find absolutely no reason to exclude these goods from 700510 & classify them under 700521. Rather, the said goods viz. "Light Green Float Glass/Coloured Float Glass" with absorbent Layer of Tin on one side would merit classification under Sub-heading 7005 and more precisely under CTH 7051010."

24. As from the facts of the case, it is clear that the Clear Float Glass imported by the appellant are absorbent and having non-reflecting layer, in that circumstances, the appellant has qualified the merit classification under CTH 7005 1090, therefore, we hold the correct classification of the Clear Float Glass imported by the appellant under the impugned Bills of Entry is classifiable under CTH 7005 1090. Consequently, the appellant is entitled for benefit of Sl. No. 934 (I) of Notification No. 46/2011-CUS dated 01.06.2011

25. In view of this, we conclude that the impugned orders deserve no merit, hence, the same are set aside and the appeals are allowed with consequential relief, if any."

11. In the instant case, a conjoint reading of the Tariff Heading, relevant Chapter Note, test reports and the manufacturing process would establish that there is a thin TIN layer which is absorbent and non-reflective answering the tariff heading/chapter note in the affirmative, thus meriting classification under tariff item 70051090. As rightly contested by the appellants, there is no legal prescription as to which side

of the CFG should have such an absorbent, reflective/non-reflective layer. We are unable to persuade ourselves with the Revenue's contention which is based on contested CRA objection that the presence of metal layer should be by way of conscious coating and on the "Air Side" of the CFG. It is relevant to note here that on one hand the revenue themselves have not accepted the CRA objection, which is the basis for these proceedings, and are contesting the CRA objection. Thus, we conclude that the classification adopted by the appellant under tariff item 7005 1090 is correct and the classification determined in the impugned order is without any basis and hence not sustainable. Appreciating the ratio of the decision of Kolkata Tribunal in the Appellant's own case where facts are identical, we hold that the impugned Order-in-Original No. 101620/2023 dated 11.04.2023 cannot be sustained and so ordered to be set aside.

12. As such, we confirm the classification of the imported CFG under tariff item 7005 1090 and consequently, the appellants are rightly entitled for the benefit of Sl.No. 934 of Notification No. 46/2011-cus., as claimed by them subject to fulfilment of production of valid Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Government of Member States of ASEAN and Republic of India) Rules, 2009."

12. The Lower Appellate Authority has noted that the importer has not provided any technical literature or documentary evidence to substantiate their claim that the tin layer found on the tin side of the float glass serves as an absorbent or reflecting layer. Furthermore, there is no evidence to suggest that the presence of the tin layer is a deliberate attempt during the manufacturing process to

impart absorbent or reflecting properties to the glass. No samples were drawn in respect of these appeals for getting the CFG tested but we find that in respect of the earlier import by the same appellant, samples were drawn and sent to Central Glass and Ceramic Research Institute which has opined in respect of Bill of Entry No. 8520077 dated 19.10.2018 as given below: -

Report:

Based on the above test results and analysis, following points can be drawn:

a) From complete chemical analysis it can be stated that, the composition of the glass is soda-lime silica based glass containing other minor components as given in the complete chemical analysis report.

b) The measured average thickness of glass plate is observed to be 7.97 mm.

c) The glass is float glass.

d) It is clear float glasses with light transmission of 89.15 % with Fe_2O_3 content of 0.12 %

e) It is not tinted glass.

f) It is not green glass.

g) It is not wired glass.

h) An absorbent layer (Tin) is observed on one side of the glass which is fluorescent under UV illumination for both the glasses.

i) It is annealed glass for decorative, industrial or automotive glass.

The above test report clearly indicate that an absorbent layer is observed on one side of the glass which is fluorescent under UV illumination for both the glasses thus satisfying Chapter Note 2(c) to Chapter 70. The classification of any imported goods has to be decided in terms of the provisions of Customs Tariff Act i.e, Section Notes, Chapter Notes & Chapter Headings and in terms of Interpretative Rules to the Customs Tariff Act duly aided by HSN Explanatory notes. Regarding the classification of CFG mentioned in the COO

Certificate issued in respect of these imports would not be having any bearing on the classification of the imported Clear Float Glass by the appellant. We also take note of the decisions rendered in the appellant's own case by the Customs Authorities for Advance Ruling No. CAAR/CUS/APPL/10/2022 and in the case of *M/s. Chandrakala Associates, Chennai* that irrespective of the Tariff Heading mentioned in the COO Certificate, the imported goods are appropriately classifiable under CTH 70051090.

13. We have considered the appellant's arguments that the Orders of the Tribunal on the issue of correct classification of Clear Float Glass as decided in the cases of Bagrecha Enterprises Ltd. by Tribunal Kolkata and Tribunal Chennai *vide Navakar Impex Pvt. Ltd. [F.O.No. 40960/2024 dated 24.07.2024], Float Glass Centre Vs. Commissioner of Customs, Chennai vide Final Order Nos. 40876-40908/ 2024 dated 18.07.2024, M/s. Enviro Safety Glass Vs. Commissioner of Customs, Audit, Chennai vide Final Order No. 40957/2024 dated 23.07.2024, M/s. Rider Glass Industries Pvt. Ltd. Vs. Commissioner of Customs, Chennai vide Final Order No. 40958/2024 dated 23.07.2024, etc.* The ratio of the above decisions is clearly applicable to the facts in these appeals also.

14. Appreciating the facts and following the above ratio of Tribunal decisions, we hold that the imported Clear Float Glass is more appropriately classifiable under Customs Tariff Heading 7005 1090 of the Customs Tariff Act, 1975 and thus is eligible for the exemption benefit of the Notification No. 46/2011-Cus. dated 01.06.2011 (Sl.No. 934) and as such, the impugned Order-in-Appeal C.Cus.II No. 463-467/2024 dated 16.05.2024 of Commissioner of Customs (Appeals II) cannot be sustained and ordered to be set aside. So, ordered accordingly.

15. Consequently, the appeals are allowed with consequential relief, if any, as per the law.

(Order pronounced in open court on 09.04.2025)

Sd/-
(AJAYAN T.V.)
MEMBER (JUDICIAL)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Regional Bench - Court No. – I

Customs Appeal No. 30256 of 2019

(Arising out of Order-in-Appeal No.HYD-CUS-000-APP-074-18-19 dt.30.11.2018 passed by Commissioner of Customs & Central Tax (Appeals-I), Hyderabad)

Verder Scientific Pvt Ltd
1-2-45,1, 2nd floor, Street No.2, Kakateeya Nagar Colony, Habsiguda, Hyderabad – 500 047 **.....Appellant**

VERSUS

Commissioner of Customs
Hyderabad - Customs
Kendriya Shulk Bhavan, LB Stadium Road, Basheerbagh, Hyderabad – 500 004 **.....Respondent**

Appearance:-

Shri Y. Sreenivasa Reddy, Advocate for the Appellant.
Shri K. Sreenivasa Reddy, AR for the Respondent.

Coram: HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)
HON'BLE MR. ANGAD PRASAD, MEMBER (JUDICIAL)

FINAL ORDER No. A/30117/2025

Date of Hearing: 08.04.2025
Date of Decision: 08.04.2025

[Order per: A.K. JYOTISHI]

M/s Verder Scientific Pvt Ltd (hereinafter referred to as the appellant) are in appeal against the Order of the Commissioner (Appeals) dt.30.11.2018, whereby, the Commissioner (Appeals) has upheld the classification of 'Carbon and Sulphur Analyzer CS-800', imported by the appellant, under CTH 90271000 by treating it as 'Gas or Smoke analysis apparatus'. The Commissioner (Appeals) has examined the findings of the Original Adjudicating Authority and held that it is primarily a gas analyzer because when the metal samples are burnt in the apparatus, it releases gas, which is captured by the sensors and thereafter, they analyze the same. Therefore, it is akin to 'gas or smoke analysis apparatus'.

2. Learned Advocate is mainly contesting its classification on the ground that the product is not analyzing the gas content of various combustible gases, etc., and in fact, it is determining the element content like Carbon and Sulphur, which is present in the metal for which this apparatus is used. Therefore, its classification would not be under CTH 90271000. Further, he submits that on going through the HSN, there is no specific apparatus which is akin to their apparatus and therefore, it would fall under the residuary heading, as broadly it would fall within the overall heading of 9027. He has relied on certain case laws in support of his contention.

3. On the other hand, learned AR is relying on the judgment of Hon'ble Supreme Court in the case of Dunlop India Ltd & Madras Rubber Factory Ltd Vs Union of India and others [1983 (13) ELT 1566 (SC)], wherein, it was held that when a specific heading is available, reliance placed on residuary heading is not tenable. He is also submitting that for the subsequent period to the demand, the appellants themselves have started claiming the classification under CTH 90271000 and that there is no record that this classification or payment of duty subsequent thereto, is under protest, as intimated by the Department, who has checked their record.

4. Heard both sides and perused the records.

5. The short question for determination is whether the product would squarely fall within the CTH 90271000 or otherwise. Clearly, CTH 9027 is the heading which covers 'Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); Instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes'. CTH 9027.10 specifically covers 'Gas or smoke analysis apparatus'. In the HSN, the gas or smoke analysis apparatus has been described as under:-

> *"(8) Gas or smoke analysis apparatus - These are used to analyse combustible gases or combustion by-products (burnt gases) in coke ovens, gas producers, blast furnaces, etc., in particular, for determining their content of carbon dioxide, carbon monoxide, oxygen, hydrogen, nitrogen or hydrocarbons. Electrical gas or smoke analysis apparatus are mainly for determining and measuring the content of the following gases: carbon dioxide, carbon monoxide and hydrogen, oxygen, hydrogen, sulphur dioxide, ammonia."*

6. A plain reading of the coverage, as per HSN, would indicate that the kind of gas or smoke analysis apparatus, which is specifically covered under CTH 90271000, are the one where the apparatus is used to analyze combustible gases or combustion by-products (burnt gases) and especially in coke ovens, gas producers, blast furnaces, etc., for determining their content of carbon dioxide, carbon monoxide, oxygen, hydrogen, nitrogen or hydrocarbons. Essentially, these apparatus are mainly for determining and measuring content of gases like carbon dioxide, carbon monoxide and hydrogen, oxygen, hydrogen, sulphur dioxide, ammonia. Therefore, what is emerging from the plain reading is that the input which this apparatus takes has to be in the form of combustible gas or smoke and the same is analyzed and the end result is percentage of different types of gases present in the said input gas or smoke. On the other hand, the impugned apparatus is essentially meant for measuring the range of presence of carbon and sulphur only in a particular sample. Therefore, it is not meant for measuring carbon dioxide gas or sulphur dioxide gas in the metal and it is meant for determining only carbon and sulphur content/ element in the solid metal. The technology it is using requires creation of fume or gas only with intent to ultimately test the presence of carbon or sulphur element in the metal and not the presence of carbon dioxide or sulphur dioxide gas in the metal. Therefore, we find this particular equipment is not classifiable under CTH 90271000. We also note that different types of analysers have been imported through different ports and they have been classified under many headings including CTH 90279090 & 90278090. From perusal of the same, we also notice that those equipments, which are specifically meant for analysing gases like SOX/NOX i.e., sulphur dioxide and nitrous oxide, etc., are getting classified under CTH 90271000, whereas, other kinds of analysers are getting classified under CTH 90278090.

7. As far as the argument that appellants themselves have started classifying the product under CTH 90271000 and therefore, now they cannot go back and claim that it is not classifiable is concerned, we find that there is no estoppel on the appellant to challenge the classification even if they have started paying the duty under different heading during subsequent period. As far as the issue of payment under protest is concerned, it has got no relevance for the present appeal as during the material period, they had

contested the classification and the said classification is being examined and not for the future classification practice adopted by them.

8. Therefore, in the given factual matrix, we find that the order of the Commissioner (Appeals) is not tenable and therefore, liable to be set aside and accordingly, we do so.

9. Appeal allowed.

(Dictated and pronounced in the Open Court)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

(ANGAD PRASAD)
MEMBER (JUDICIAL)

Veda

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 85509 of 2023

(Arising out of Order-in-Original No. CC-GSS/14/2022-23 Adj. (I) ACC dated 19.12.2022 passed by the Commissioner of Customs (Import), Air Cargo Complex (ACC), Sahar, Mumbai.)

Larsen & Toubro Limited **.... Appellants**
L&T House, N.M. Marg,
Ballard Estate,
Mumbai – 400 001

Versus

Commissioner of Customs (Import) **.... Respondent**
Air Cargo Complex (ACC), Sahar
Andheri (East), Mumbai – 400 099.

APPEARANCE:

S/Shri Vishal Agarwal, along with Akshit Malhotra, Advocates for the Appellants
Shri Ram Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85701/2025

Date of Hearing: 10.02.2025
Date of Decision: 16.04.2025

Per: M.M. PARTHIBAN

This appeal has been filed by M/s Larsen & Toubro Limited, L&T House, N.M. Marg, Ballard Estate, Mumbai – 400 001 (herein after, referred to as 'the appellants', for short), assailing Order-in-Original CAO No. CC-GSS/14/2022-23 Adj. (I) ACC dated 19.12.2022 (herein after, referred to as 'the impugned order') passed by the Commissioner of Customs (Import), Air Cargo Complex (ACC), Sahar, Andheri (East), Mumbai – 400 099.

2.1 Briefly stated, the facts of the case are that the appellants herein is, engaged in supply of water meters to the Pune Municipal Corporation. For this purpose, the appellants had imported "Battery operated Ultrasonic/ Electromagnetic Automatic Meter Reading (AMR) water meters" of different dimensions viz., 15MM, 20MM, 25MM, 40MM (shortly referred to as 'the water meters') from the supplier abroad M/s. Sensus Slovensko A.S., Slovakia. These water meters have been imported by the appellants in terms of the contract executed between them and Pune Municipal

Corporation (PMC), pursuant to a tender floated under an International Competitive Bid (ICB) for supply of a comprehensive water supply system for Pune city. As per terms and conditions of the tender, the bidder was to supply Battery operated inline non-intrusive Ultrasonic/Electromagnetic water meters with no moving parts to PMC, for installation at the consumer's premises for metering of potable water supply. The said meter was required to measure the water units in metre cube (m^3) for volume and metre cube/hour (m^3/h) or litres/hour (l/h) for flow rate. Pursuant to the successful bidding of the tender with PMC, an agreement dated 23.02.2018 was entered into between the appellants and PMC, for the execution of contract in which the appellants had in turn entered into a contract dated 16.03.2018 with M/s. Sensus Slovensko A.S., for procurement of the said imported Battery operated Ultrasonic/ Electromagnetic AMR water meters. On import, the appellants have classified the water meters under Customs Tariff Item (CTI) 9026 1010 as 'Flow meters', and filed 16 Bills of Entries (B/Es) viz., three B/Es Nos.9118587 dated 04.12.2018, 9139702 dated 06.12.2018 & 2562597 dated 25.03.2019 for import through Jawaharlal Nehru Customs Commissionerate (JNCH) Customs; and thirteen B/Es Nos. 9139698 dated 06.12.2018; 2425892, 2425898, 2425900, 2425906 all dated 14.03.2019; 2472008, 2473484, 2464094, 2462657 all dated 18.03.2019; 2561567, 2561569, 2566612 all dated 25.03.2019; 2588267 dated 27.03.2019, for import through Air Cargo Complex (ACC), Sahar, Mumbai; and self-assessed all such B/Es by claiming the customs duty concession/exemption under serial No. 31 of Notification No.24/2005-Customs dated 01.03.2005, as amended. These goods were cleared by the appellants after obtaining customs clearance of the above B/Es from the jurisdictional customs authorities and imported goods were stored in the appellants' godown premises in Wagholi, Pune for further supply to PMC for use in the said Pune City water supply system.

2.2 According to intelligence developed by the officers of the Directorate of Revenue Intelligence, Amritsar, (DRI) that the appellants have entered into a contract with PMC under the 'Smart City Mission' for proper management of potable water and had imported AMR water meters by mis-classifying it under CTI 9026 1010, instead of correctly classifying it under CTI 9028 2000 as 'Liquid supply meters', DRI had initiated investigation into such imports. DRI had interpreted that these imported domestic potable water meters are mainly for volumetric measurement of

water and revenue billing thereof. On the basis of above intelligence, the business and godown premises of the appellants were searched and documents, imported goods were detained vide panchanams dated 03.12.2019 & 04.12.2019. Further, statements were recorded from persons concerned and the aforesaid detained goods were later seized under Seizure Memo dated 30.12.2019 on the reasonable belief that these imported goods are liable for confiscation under Section 111 of the Customs Act, 1962. The seized goods were also given on provisional release to the appellants, upon execution of bond and bank guarantee by the appellants for the requisite amount as determined by the appropriate authority, in respect of imports made through JNCH port and ACC, Sahar, Mumbai.

2.3 On completion of the detailed investigation, a Show Cause Notice (SCN) dated 30.04.2022 was issued demanding differential customs duty to the tune of Rs.3,32,46,581/- under section 28(4) of the Customs Act, 1962 along with interest and penalty, besides seeking confiscation of the imported goods, which were seized in the course of investigation, under section 111(m) ibid. The said SCN was adjudicated vide Order-in-Original dated 19.12.2022 by the learned Commissioner of Customs, wherein the proposals for demand of duty was confirmed under Section 28(4) ibid along with interest and the adjudicating authority also appropriated an amount of Rs.3,32,46,577/- paid by the appellants, besides imposition of redemption fine of Rs.3,00,00,000/- under Section 125(1) ibid and penalty of an amount equal to the duty demanded under Section 114A ibid. Feeling aggrieved with the said impugned order, the appellants has preferred this appeal before the Tribunal.

3.1 The Learned Advocate appearing for the appellants submitted that the disputed goods i.e., Battery operated Ultrasonic/ Electromagnetic AMR water meters had been imported by the appellants in terms of the contract executed with the Pune Municipal Corporation and these are flowmeters, which as per the terms of the tender/contract were required to *inter alia* indicate the rate of flow of the water in metre cube/hour (m^3/h) or litres/hour (l/h), in addition to indicating the volume of water in metre cube (m^3). It is submitted by him that the scope and coverage of entries given for classification of goods under Customs tariff and HSN being identical, the Explanatory Notes (EN) to HSN to the two competing headings viz: CTH 9026 and CTH 9028 have to be referred to for deciding on the correct classification. Learned Advocate stated that as per the EN

to CTH 9026, the said heading covers 'Flow meters' which indicates the rate of flow (in volume or weight per unit of time). The said heading excludes such apparatus which merely indicate the total amount of liquid (volume delivered) over a period of time. Further, he stated that the EN to heading 9028 clarify that the same applies to meters which are used for measuring volumetric units and specifically excludes Flow meters which measure the rate of flow.

3.2 Learned Advocate has also submitted that from the HSN explanatory notes it is evident that a Flow meter, i.e., the meter which indicates the rate of flow (volume or weight per unit of time) is clearly and specifically excluded from CTH 9028. It has been contended by him that, however, a meter which in addition to indicating the rate of flow also indicates the volume would squarely be covered by CTH 9026. Learned Advocate also submitted that there is no dispute about the fact that the water meters imported by the appellants *inter-alia* indicate the rate of flow as also the volume. Further, in explaining about the technical features of the imported goods, he drew attention to the fact that the product literature/brochure of the supplier state that one of the five key features of the product is its ability to measure low flow i.e., with the flow measurement down to one litre per hour, which helps to reduce undetected water leakage by procuring data at intervals as small as every 15 seconds. The brochure also records that unlike other solid meters the iPERL FLX uses remnant magnetic field technology which provides a linear measurement range even down to very low flow rates. The magnetic field acting on the water flowing through the flow channel generates an electrical voltage; this is proportional to the velocity of water (principle of magnetic-inductive flow measurement). Even the technical data sheet records permanent flow rate, starting flow rate, maximum flow rate, minimum flow rate, transitional flow rate. Therefore, he stated that the classification of impugned goods adopted by the appellants under CTH 9026 is correct and is legally sustainable.

3.3 It was further submitted by the learned Advocate that the department has proceeded on the premise that the function of the meter is to measure the consumption of the water i.e. the volume and therefore the imported goods are classifiable under CTH 9028 which has been rebutted by the appellants by explaining the features of the product, and that the classification has to be determined with reference to the terms of the relevant headings and the explanatory notes as given under the Indian

Customs Tariff. Learned Advocate also stated that the issue regarding classification of Flow meters under CTH 9026 (earlier CTH 9024 prior to the amendment to the tariff) is settled by the judgement of the Apex Court in the case of *Moorco (India) Ltd. Vs. Collector of Customs, Madras* - 1994 (74) E.L.T. 5 (S.C.). Therefore, he prayed that the appeal filed by the appellants be allowed.

4. On the other hand, the Learned Authorised Representative (AR) appearing for the Revenue has contended that water meters are specifically covered by description in CTI 9028 2000 and therefore applying Rule 1 of the General Rule of Interpretation of the First Schedule to the Customs Tariff, the water meters imported by the appellants are classifiable under CTH 9028. The fact that the goods imported are not classifiable under CTH 9026 is also evident from the fact that the appellants has not described the imported goods in the B/E as Flow meters; for this reason, he stated that even the decision in the case of Moorco (India) Ltd. (supra) cited by the appellants was also inapplicable. Insofar as the reliance on the HSN explanatory notes are concerned, it is contended by him that the Apex Court has in the case of *Coen Bharat Ltd. Vs. Commissioner of Central Excise, Vadodara* - 2007 (217) E.L.T. 165 (S.C.) held that HSN explanatory notes are not required to be relied upon while determining classification under the Central Excise Tariff, when there is no ambiguity in the Tariff item. Therefore, he pleaded that the classification decided in the impugned order is sustainable and the appeal filed by the appellants may not be entertained.

5. We have heard both sides and perused the case records and additional paper books submitted in this case by both sides.

6.1 The issue involved herein is to decide the classification of impugned goods imported by the appellants as to whether, the same merits classification under Customs Tariff Item (CTI) 9026 1010 as claimed by the appellants; or, is it classifiable under Customs Tariff Heading (CTI) 9028 2000 as determined by the learned Commissioner of Customs, for deciding on the appropriate levy of customs duty, in respect of various Bills of Entries filed during the disputed period. Further, it is also required to be decided whether the confirmation of the demand and appropriation of the differential duty which was paid by the appellants during investigation, consequent redemption fine and penalty is legally sustainable on the basis of the determination of the classification of impugned goods.

6.2 In order to address the above issue of classification of imported goods, we would like to refer the relevant legal provisions contained in Section 12 of the Customs Act, 1962; the Customs Tariff Act, 1975 and rules framed thereunder for consideration of proper and appropriate classification of the subject goods under dispute.

*"**Section 12. Dutiable goods.** -*

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government."

***"Section 1. Short title, extent and commencement.** -*

(1) This Act may be called the Customs Tariff Act, 1975.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

***Section 2. Duties specified in the Schedules to be levied.** -*

The rates at which duties of customs shall be levied under the Customs Act, 1962 (52 of 1962), are specified in the First and Second Schedules.

xxx xxx xxx xxx

THE FIRST SCHEDULE – IMPORT TARIFF

(Refer Section 2)

THE GENERAL RULES FOR THE INTERPRETATION OF IMPORT TARIFF

Classification of goods in this Schedule shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provisions does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub headings and any related sub headings Notes and, mutatis mutandis, to the above rules, on the understanding that only sub headings at the same level are

comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

THE GENERAL EXPLANATORY NOTES TO IMPORT TARIFF

1. Where in column (2) of this Schedule, the description of an article or group of articles under a heading is preceded by "-", the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of articles is preceded by "- -", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-". where the description of an article or group of articles is preceded by "---" or "----", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "--".

2. The abbreviation "%" in any column of this Schedule in relation to the rate of duty indicates that duty on the goods to which the entry relates shall be charged on the basis of the value of the goods as defined in section 14 of the Customs Act, 1962 (52 of 1962), the duty being equal to such percentage of the value as is indicated in that column.

3. In any entry, if no rate of duty is shown in column (5), the rate shown under column (4) shall be applicable.

ADDITIONAL NOTES

In this Schedule,—

(1)(a) "heading", in respect of goods, means a description in list of tariff provisions accompanied by a four-digit number and includes all sub-headings of tariff items the first four-digits of which correspond to that number;

(b) "sub-heading", in respect of goods, means a description in the list of tariff provisions accompanied by a six-digit number and includes all tariff items the first six-digits of which correspond to that number;

(c) "tariff item" means a description of goods in the list of tariff provisions accompanying eight digit number and the rate of customs duty;

(2) the list of tariff provisions is divided into Sections, Chapters and Sub-Chapters;

(3) in column (3), the standard unit of quantity is specified for each tariff item to facilitate the collection, comparison and analysis of trade statistics."

6.3 From plain reading of the above legal provisions, it transpires that in order to determine the appropriate duties of customs payable on any imported goods, one has to make an assessment of the imported goods for its correct classification under the First Schedule to Customs Tariff Act, 1975 in accordance with the provisions of the Customs Tariff Act by duly following the General Rules for Interpretation (GIR) and the General Explanatory notes (GEN) contained therein. The First Schedule to the

Customs Tariff Act, 1975 specifies the various categories of imported goods in a systematic and well-considered manner, in accordance with an international scheme of classification of internationally traded goods, i.e., 'Harmonized Commodity Description and Coding System' (HS). Accordingly, goods are to be classified taking into consideration the scope of headings / sub-headings, related Section Notes, Chapter Notes and the General Rules for the Interpretation (GIR) of the First Schedule to the Customs Tariff Act, 1975. Rule 1 of the GIR provides that the classification of goods shall be determined according to the terms of the headings of the tariff and any relative Section notes or Chapter notes and thus, gives precedence to this while classifying a product. Rules 2 to 6 provide the general guidelines for classification of goods under the appropriate sub-heading. In the event of the goods cannot be classified solely on the basis of GIR 1, and if the headings and legal notes do not otherwise require, the remaining Rules 2 to 6 may then be applied in sequential order. Further, while classifying goods, the foremost consideration is the 'statutory definition', if any, provided in the Customs Tariff Act. In the absence of any statutory definition, or any guideline provided by HS explanatory notes, the trade parlance theory is to be adopted for ascertaining as to how the goods are known in the common trade parlance for the purpose of dealing between the parties.

7. In the case before us, the contending classification of imported goods discussed in the impugned order are either under CTI 9026 1010 or under CTI 9028 2000 of the First Schedule to the Customs Tariff Act. Thus, it is clear that at the Chapter level, there is no difference of opinion among the department and the appellants; it is only at the level of heading i.e., CTH 9026 or CTH 9028, there is a difference of opinion. The dispute in classification therefore lies in the narrow compass of analysis of the appropriate Headings under which the impugned goods are covered as per the Customs Tariff and then classifying the impugned product under the corresponding Sub-heading, Tariff Item which is appropriate as per the legal principles of classification of goods. Now, we may closely examine the scope of the contending classification for determining correct classification of the imported goods. The various headings of entire Chapter 96 and the relevant headings and their tariff entries of contending Chapter headings 9026 and 9028, as provided in the First Schedule to the Customs Tariff Act are extracted as below:

"SECTION XVII

OPTICAL, PHOTOGRAPHIC, CINEMATOGRAPHIC, MEASURING, CHECKING, PRECISION, MEDICAL OR SURGICAL INSTRUMENTS AND APPARATUS; CLOCKS AND WATCHES; MUSICAL INSTRUMENTS; PARTS AND ACCESSORIES THEREOF

CHAPTER 90

Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof

Notes :

1. This Chapter does not cover :

(a) articles of a kind used in machines, appliances or for other technical uses, of vulcanised rubber other than hard rubber (heading 4016), of leather or of composition leather (heading 4205) or textile material (heading 5911);

xxx xxx xxx xxx xxx

3. The provisions of Notes 3 and 4 to Section XVI apply also to this Chapter.

xxx xxx xxx xxx xxx

5. Measuring or checking optical instruments, appliances or machines which, but for this Note, could be classified both in heading 9013 and in heading 9031 are to be classified in heading 9031.

Chapter Heading	**Description of goods**
(1)	(2)
9001	Optical fibres and optical fibre bundles; optical fibre cables other than those of heading 8544; sheets and plates of polarising material; lenses (including contact lenses), prisms, mirrors and other optical elements, of any material, unmounted, other than such elements of glass not optically worked
9002	Lenses, prisms, mirrors and other optical elements, of any material, mounted, being parts of or fittings for instruments or apparatus, other than such elements of glass not optically worked
9003	Frames and mountings for spectacles, goggles or the like, and parts thereof
9004	Spectacles, goggles and the like, corrective, protective or other
9005	Binoculars, monoculars, other optical telescopes, and mountings therefor; other astronomical instruments and mountings therefor, but not including instruments for radio-astronomy
9006	Photographic (other than cinematographic) cameras; photographic flashlight apparatus and flash bulbs other than discharge lamps of heading 8539
9007	Cinematographic cameras and projectors, whether or not incorporating sound recording or reproducing apparatus
9008	Image projectors, other than cinematographic; photographic (other than cinematographic) enlargers and reducers
9009	* * * *
9010	Apparatus and equipment for photographic (including cinematographic) laboratories, not specified or included elsewhere in this chapter; negatoscopes; projection screens
9011	Compound optical microscopes, including those for photomicrography, cine photo micrography or micro projection
9012	Microscopes other than optical microscopes; diffraction apparatus
9013	Lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this Chapter
9014	Direction finding compasses; other navigational instruments and appliances

Chapter Heading	Description of goods
9015	Surveying (including photo grammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders
9016	Balances of a sensitivity of 5 cg or better, with or without weights
9017	Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, callipers), not specified or included elsewhere in this chapter
9018	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scienti graphic apparatus, other electromedical apparatus and sight-testing instruments
9019	Mechano-therapy appliances; massage apparatus; psychological aptitude-testing apparatus; ozone therapy, oxygen therapy, aerosol therapy, artificial respiration or other therapeutic respiration apparatus
9020	Other breathing appliances and gas masks, excluding protective masks having neither mechanical parts nor replaceable filters
9021	Orthopaedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability
9022	Apparatus based on the use of X-rays or of alpha, beta, gamma or other ionising radiations, whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus, X-ray tubes and other X-ray generators, high tension generators, control panels and desks, screens, examination or treatment tables, chairs and the like
9023	Instruments, apparatus and models, designed for demonstrational purposes (for example, in education or exhibitions), unsuitable for other uses
9024	Machines and appliances for testing the hardness, strength, compressibility, elasticity or other mechanical properties of materials (for example, metals, wood, textiles, paper, plastics)
9025	Hydrometers and similar floating instruments, thermometers, pyrometers, barometers, hygrometers and psychrometers, recording or not, and any combination of these instruments
9026	Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 9014, 9015, 9028 or 9032
9027	Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes
9028	Gas, liquid or electricity supply or production meters, including calibrating meters therefor
9029	Revolution counters, production counters, taximeters, mileometers, pedometers and the like; speed indicators and tachometers, other than those of heading 9014 or 9015; stroboscopes
9030	Oscilloscopes, spectrum analysers and other instruments and apparatus for measuring or checking electrical quantities, excluding meters of heading 9028; instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionising radiations
9031	Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors
9032	Automatic regulating or controlling instruments and apparatus
9033	Parts and accessories (not specified or included elsewhere in this chapter) for machines, appliances, instruments or apparatus of chapter 90”

In plain reading of the various entries providing the description of the goods covered under respective headings of Chapter 90, starting from 9001 to 9033, it transpires that all instruments and apparatus and its parts & accessories are covered under this Chapter, irrespective of its usage in various fields/ technology areas or for various purposes. Further, these instruments can be broadly grouped depending upon its usage and other factors as given below:

(i) **Optical instruments/apparatus**, including Liquid Crystal Devices, laser instruments, covered under headings 9001 to 9005, 9012 and 9013;

(ii) **Photographic instruments/apparatus**, covered under headings 9006 and 9008;

(iii) **Cinematographic instruments/apparatus**, covered under headings 9007, and those used both in (ii) & (iii) under headings 9010 and 9011;

(iv) **instruments and apparatus for measuring, checking**, including those for navigational, surveying, weighing, drawing, flow, level, pressure or other variables of liquids, gases mathematical calculation, covered under headings 9014, 9015, 9016, 9017 and 9026;

(v) **precision instruments and apparatus** including thermometers, pyrometers, barometers, hygrometers and psychrometers etc.; physical or chemical analysis instruments; measuring or checking viscosity, porosity, expansion, surface tension, heat, sound, light, electrical quantities, alpha, beta, gamma, cosmic and other ionising radiations etc.; Gas, liquid or electricity supply or production meters, tacho meters and speed indicators, models, instruments, apparatus, designed for educational, demonstrational purposes; instruments, apparatus for testing mechanical properties such as hardness, strength, compressibility, elasticity etc., of various materials and automatic regulating or controlling instruments and apparatus; parts and accessories thereof, covered under heading 9023, 9024, 9025, 9027, 9028, 9029, 9030, 9031, 9032 and 9033.

(vi) **medical or surgical instruments and apparatus** including dental, veterinary science, various therapies such as mechano, psychological, ozone, oxygen, aerosol etc., breathing, orthopaedic etc., including complex and highly advanced medical instruments using technology of X-Ray, Radiography, Computerized Tomography (CT), Gamma ray etc.; parts and accessories thereof, covered under headings 9018, 9019, 9020, 9021 and 9022.

From the details of the goods covered as explained above, it could be seen that the general content and arrangement of the goods classified under Chapter 90 covers a wide variety of instruments and apparatus which

are, as a rule, characterised by their high finish and high precision. Further, it is also explained in the WCO's HS Explanatory notes that most of the goods covered under Chapter 90 are used mainly for scientific purposes (laboratory research work, analysis, astronomy, etc.), for specialised technical or industrial purposes (measuring or checking, observation, etc.) or for medical purposes. Some of these instruments are specified in certain headings, for example, compound optical microscopes (heading 90.11), electron microscopes (heading 90.12), other instruments and apparatus are covered by more general descriptions in headings which refer to a particular science, industry, etc. (e.g., astronomical instruments of heading 90.05, surveying instruments and appliances of heading 90.15, X-ray, etc., apparatus of heading 90.22). There are certain exceptions to the general rule that the instruments and apparatus of this Chapter are high precision types. For example, the Chapter also covers ordinary goggles (heading 90.04), simple magnifying glasses and non-magnifying periscopes (heading 90.13), divided scales and school rules (heading 90.17) and fancy hygrometers, irrespective of their accuracy (heading 90.25).

From the above, it could be seen that the various instruments and apparatus have been grouped in a manner that serves the purpose of classifying these goods as a homogenous group of similar articles, convenient for transacting in the international trade and not on the basis single or few parameters such as technology, complexity of the apparatus, material for which or on which it is used, etc. Therefore, we find that simple binoculars and complex refracting telescopes are classified under heading 9005. The two contending classification in the present dispute is falling under CTH 9026 or CTH 9028, and the respective tariff entries are given below:

"Tariff Item	**Description of goods**
(1)	(2)
9026	**Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 90.14, 90.15, 90.28 or 90.32**
9026 10	*- For measuring or checking the flow of level of liquids:*
9026 1010	--- Flow meters
9026 1020	--- Level gauges
9026 1090	--- Other
9026 2000	- For measuring or checking pressure
9026 80	*- Other instruments or apparatus:*
9026 8010	--- Heat meters
9026 8090	--- Other
9026 90	*- Parts and accessories"*

And

"Tariff Item	Description of goods
(1)	(2)
9028	**Gas, liquid or electricity supply or production meters, including calibrating meters therefor.**
9028 1000	- Gas meters
9028 2000	- Liquid meters
9028 30	- *Electricity meters*
9028 3010	--- For alternating current
9028 3090	--- Other
9028 90	- *Parts and accessories*
9028 9010	--- For electricity meters
9028 9090	--- Other"

8.1 It could be seen that by applying the GIR 1, the position is made clear that Chapter Heading 90.26 covers within its scope and ambit, mainly of five broad categories of goods:

(i) first one i.e., "flow meters" which are instruments and apparatus for measuring or checking **flow of liquids or gases** covered under CTI 9026 1010;

(ii) the second one i.e., "Level gauges" which are instruments and apparatus for measuring or checking **level of liquids or gases** covered under CTI 9026 1020;

(iii) the third one i.e., instruments and apparatus for measuring or checking **pressure of liquids or gases**; covered under CTI 9026 2000;

(iii) the fourth one i.e., "heat meters" for **measuring or checking thermal energy of liquids or gases**; covered under CTI 9026 8010; and

(iv) the fifth one i.e., "Other instruments and apparatus" for measuring or checking (a) flow or level of liquids or gases covered under CTI 9026 1090; (b) other variables of liquids or gases covered under CTI 9026 8090 and (c) parts and accessories of all the above goods, covered under CTI 9026 9000.

8.2. Similarly, by applying same GIR 1, it could also be seen that Chapter Heading 9028 covers within its scope and ambit, mainly of four broad categories of goods:

(i) first one i.e., "**Gas supply or production** meters," covered under CTI 9028 1000;

(ii) the second one i.e., "**Liquid supply or production** meters," covered under CTI 9028 2000;

(iii) the third one i.e., "**Electricity supply or production** meters," (a) for Alternating Current (AC) covered under CTI 9028 3010; (b) for other types of current such as DC etc. under CTI 9028 3090; and

(iv) the fourth one i.e., "parts and accessories" for (a) Electricity meters covered under CTI 9028 9010; (b) for all other apparatus or equipment under CTI 9028 9090.

These meters are generally fitted with a device driven at a speed proportional to the rate of fluid flow or to the electrical quantity being measured. They are often fitted in a bypass or shunt off the main or connected to measuring transformers, so that only part of the flow passes through them, but are calibrated so as to indicate the total quantity passing through the service pipes or through the main. Gas, liquid or electricity supply or production meters fall in this heading whether or not fitted with a clockwork recording device, or with a simple mechanical or electrical device for bringing controlling, signalling, etc., appliances into action.

8.3 From the above discussion on the scope of coverage of goods under the two contending CTIs in Chapter 90, in terms of GIR-1, we find that the CTI 9026 1010 deals with "instruments and apparatus for measuring or checking flow of liquid", whereas the CTI 9028 2000 deals with products of "liquid supply or production meters".

8.4 In order to further examine the classification in terms of various customs tariff entries under the two contending sub-headings CTI 9026 1010 or CTI 9028 2000, we would like to examine the HS explanatory notes of the WCO, which describe in detail the scope and coverage of goods under Customs classification. The HS explanatory notes to chapter heading 9026 *inter-alia* include measuring or checking apparatus incorporating an element sensitive to variation in the quantity to be measured for e.g., Bourdon tube, diaphragm, bellows, semiconductors and devices in which the variations are converted in electrical signals for such measurement. This heading also includes flow meters which operate by using magnetic fields, ultrasound or heat. While providing certain exclusion from the chapter heading 9026, it is specified that "*This heading excludes: (a)…….. (b) Apparatus which* ***merely indicate*** *the total amount of liquid delivered over a period, which are classified as supply meters in heading 90.28*". Similarly, HS explanatory notes to chapter heading 9028 *inter-alia* include meters that are used to measure in volumetric units the amount of fluid passing though a pipe. However, flow meters which measure rate of flow

are excluded from the scope of heading 9028, and are classifiable under heading 9026. On harmonious reading of the both the HS explanatory notes to chapter heading 9026 and 9028, it transpires that apparatus which **merely indicate** the total amount of liquid delivered over a time period, are classified in heading 90.28 as "supply meters"; and, instruments and apparatus for measuring or checking flow of liquid/water besides providing additional features including total quantity of liquid/water supplied would be classified in heading 90.26 as "flow meters". Therefore, by clear inference from WCO's HS Explanatory Notes, it can be concluded that an apparatus which indicates both the rate of flow and volume is not excluded from the ambit of CTH 9026.

8.5 It is a fact on record, as seen from the product brochure placed in the case file that the impugned water meters *inter-alia* measures the various flow rates of water in pipe line as m^3/h or l/h, besides the total quantity of water flown in the pipe line over a period of time in cubic metre/m^3. Therefore, it could be concluded that the impugned water meters which measure the flow rates of water, besides indicating the total quantity of water delivered to the consumer, and having other additional features for billing etc. would be classified only under CTH 9026, and not under CTH 9028 in terms of the above HS explanatory notes.

9.1 Further, in order to evaluate the proper classification of imported goods, we had also examined the facts of the case indicating the actual purpose or use of the imported goods. In other words, the distinction between the two contending classification of goods is better appreciated in examination of the impugned goods as to whether they are used for measuring or checking 'flow of liquid' or for determination of 'production or supply' of liquid including those used for such determination by calibrating the total quantity of production or supply, in order to arrive at the appropriate classification of the impugned goods.

9.2 On the factual matrix, it is not under dispute that all the disputed goods viz., "Battery operated Ultrasonic/Electromagnetic AMR water meters" of different dimensions viz., 15MM, 20MM, 25MM, 40MM have been imported by the appellants for the specific purpose of supply to the Pune Municipal Corporation (PMC). To this effect, we find that the International Competitive Bidding (ICB) issued by PMC vide Tender Notification No.1/2017 specify that the scope of tender is for *'study, survey, investigation, assessment, design validation and revamping of entire Water*

Supply System for Pune city including water audit, NRW reduction, SCADA, bill reading and generation, operation and maintenance of the system from Pure water sump of WTP to the consumer end – Package-I (Parvati WTP Zone)'. The technical specification of the water meters given in the said Tender, *inter alia*, include the measuring principle as given below:

ITEM	SPECIFICATIONS
Measuring Principle	A battery operated inline non-intrusive ultrasonic/ Electromagnetic water meter with no moving parts.
Measuring Units	The measuring units should be m^3 for volume and m^3/h or l/h for flow rate.
Approvals and certifications	The meter should be type approved and verified according to international water meter Standard OIML R 49 and or ISO 4064…

Accordingly, tender agreement No.337 dated 23.02.2018 was also entered into by the appellants with the Chief Engineer, Water supply project of PMC for supply of water meters as per above specifications. Further, the appellants had also issued a Letter of Intent dated 16.03.2018 to their supplier abroad M/s. Sensus Slovensko A.S., Slovakia for manufacture and supply of water meters fulfilling such technical requirements/specifications.

9.3 In this regard, it is seen that International Organization for Standardization (ISO) standard 4064/ International Organization of Legal Metrology (OIML) standard R 49 specifies the metrological and technical requirements for water meters for cold potable water and hot water flowing through a fully charged, closed conduit or pipelines. The standards prescribed for such water meter instrument is intended to measure continuously, memorize, and display the volume of water passing through the measurement transducer at metering conditions. In the note to this standard it is mentioned that for a water meter, the sensor may be a disc, piston, wheel or turbine element, the electrodes on an electromagnetic meter, or another element. The element senses the flow rate or volume of water passing through the meter and is referred to as a "flow sensor" or "volume sensor". It is also not under dispute that the terms and conditions of the PMC tender agreement clearly provide that the imported water meters should confirm to the aforesaid ISO 4064/OIML 49 standard, which *inter alia*, specify that it should measure continuously the water flowing in the pipe line for display of volume of water passing through it. Since, the essential condition for which the ISO 4064/OIML 49 standard apply is for measuring the flow of water passing through the pipe line and the volume of water is determined by applying the formula or calculation based on various parameters such as volumetric flow rate in cubic meters per second

or litres per second, velocity of water measures in meters per second, cross sectional area of pipe line measured in square meters, it is evident that the water meters are having the primary function of measuring the flow of water in pipeline. The product catalogue placed on record also indicate that the water meter, *inter alia*, measures the permanent flow rate, starting flow rate, maximum flow rate, minimum flow rate and transitional flow rate of water in pipe line, besides the total quantity of water flown in the pipe line over a period of time, calculated and shown, in cubic metre/m^3. Therefore, we are of the considered view that in terms of the prescribed standards of the water meters to be fulfilled in the present case, the imported water meters are appropriately classifiable under CTI 9026 1010 as 'flow meters' for measuring the flow of water.

9.4 In terms of Section 8 of the Legal Metrology Act, 2009, as applicable to weights and measures/measuring instruments, no weight or measure shall be imported unless it conforms to the standards of weight or measure specified therein. Under the rules framed therein viz., Legal Metrology (General) Rules, 2011, in terms of Rule 13(2) ibid, every measuring instrument shall conform, as regards physical characteristics, configuration, construction details, materials, performance, tolerances and such other details, to the corresponding specifications laid down for such measuring instrument in Eight Schedule to the said Rules. The standards of conformity 'Water meters (domestic type)' have been specified under Part-III to Eighth Schedule to the Rules of 2011. The nominal sizes permitted therein for water meters are of 15mm, 20mm, 25mm, 40mm and 50mm and the imported goods conforms to this requirement. Further, the metrological characteristics are determined by the metering accuracy, nominal flow rate, minimum starting flow rate, transitional flow rate and maximum flow rate, all of which are complied by the impugned goods in question for supply to the PMC. As the metrological requirements for measuring instrument or apparatus used in any transaction with public are for protection of consumer's interest, the technical characteristics given in the said Rules of 2011 for measuring the various flow parameters provide the essential characteristics for the water supply meter. Therefore, from the perspective of the compliance requirements under the Legal Metrology Act, 2009 and the rules made thereunder also, the imported goods viz., water meters are to be classified as 'flow meters', as these are the metrological properties/characteristics on which the goods are tested for compliance.

9.5 Further, we also note that all imported goods entering into the country are governed by the policy provisions of the Foreign Trade Policy and more specifically the ITC HS Schedule providing the general and specific restrictions and conditions, if any. It is mandated in the General Notes relating to import policy that quality of the products that are subjected to mandatory Indian Standards, as applicable to the domestic goods, shall also be required to be complied with by the imported goods, as it is applied to the quality specified for the product as per the same Indian standards. The items under such mandatory BIS certification is given in Appendix-III of First schedule to the Import Policy of ITC-HS. In respect of BIS quality specifications for new products, it would be deemed to be part of the Appendix-III, from the date of implementation of the said Indian standards for the said products, and the imported products shall conform to the specified Indian Standard from the date of implementation. Bureau of Indian Standards have prescribed IS 779:1994 for "Water meters" of domestic type. Further, such standard also state that it is suitable for measuring the flow of cold potable water at a nominal pressure of 1MPa[1] (Max) ambient temperature. The volume of water passing through the water meter per unit of time; the volume being expressed in litres and the time in hours, minutes or seconds are given under the parameter 'flow rate' and the total volume of water which has passed through water meter in a given time is known as the flow delivered. Further, the technical characteristics determined for conformity with the IS standard also provide for maximum flow rate, nominal flow rate, minimum flow rate, flow rate range, transitional flow rate, pressure loss etc. Therefore, it is seen that the flow rates are the basic parameters for determining the conformity with the standards set for water meters (domestic type), and thus the imported water meters are more appropriately termed as 'flow meters' and not as 'supply or production meters'.

9.6 In terms of the functioning of the water meter under dispute, it is explained in the product literature that it is a static electromagnetic meter, which uses remanent magnetic technology that provides a linear measurement range even down to very low flow rates, in both sides of the pipe line. The magnetic field acting on the water flowing through the flow channel in the pipe lines generates an electrical voltage, that is proportional to the velocity of the water. In terms of the tender agreement entered by the appellants with PMC, these goods were required to clearly indicate the rate of flow (volume per unit of time) as also the volume of water. The

water meters that have been imported comply with this tender requirement as is evident from the suppliers brochure relied upon by the appellants, an extract of which appears in the adjudication order in paragraph 32.1, where it clearly records that the meters offer unparalleled low flow accuracy with high flow durability as also capture previously unmeasured low flow. We have also gone through the photographs of meter reading placed as part of the appeal memorandum which indicates the rate of flow at 2890 l/h as also the volume of water as 533 m^3. As stated earlier, there is no dispute that the water meters imported by the appellants indicate both the 'rate of flow' as also the 'volume' of water. In fact, it is the requirement of IS 779:1994 of BIS that the water meter should have an 'indicating device' to provide a reliable, easy and unambiguous reading of the volume of water measured and expressed in litres. Similarly, the Part-III of the Eight Schedule to the Legal Metrology (General) Rules, 2011 also provide for 'flow delivered' to be the total volume of water which has passed through meter in a given time. Therefore, such an feature of indicating the total volume of water flown through the pipeline, in a mandatory requirement and such feature cannot alter the 'water flow meters' to be categorised as 'water supply/production meters'. Therefore, in terms of the discussion on the compliance requirements to various standards as per the laws in force and the tender agreement dated 23.03.2018 and letter of intent dated 16.03.2018 referred in paragraphs 9.2 to 9.5 above, the imported water meters are appropriately classifiable under CTI 9026 1010, and not under the CTI 9028 2000 of the First Schedule to the Customs Tariff Act, 1975.

9.7 Since, the imported water meters are meant for supply to the Water Supply System for Pune city, under the scheme of providing Pure water to the citizens, we had also examined the 'Manual on water supply and treatment system' developed by the Ministry of Housing and Urban Affairs, Government of India, which serve as a useful guide in understanding the water supply system under the *Atal Mission for Rejuvenation and Urban Transformation (AMRUT)*, in catering to the purpose by providing water supply facilities in 500 Class-l cities and *AMRUT 2.0 Mission* which aims to make all Indian cities 'water secure' and provide functional tap connections to all urban households. A specific chapter-13 has been devolved for "water meters" including its classification, explanation and use of such water meters, its essential characteristics, methods of metering the flow of water, installation, maintenance, etc., In the said manual, it is specifically mentioned that 'water flow meter' is a device used for measurement of flow

rate and quantity of liquids passing through the pipe line as a conduit. The extract of the said manual, providing for various types of water meters and explanation for electro magnetic water meters are given below:

13.3 Classification of Water Meters

13.3.1 Water meters are classified based on the purpose for which they are used.

a. Water meter: Measuring quantity of water for billing

b. Flow meter: Measuring rate of flow and quantity of water for monitoring and management of water supply system.

13.3.2 Water meters are classified based on the measuring technology used, most common ones are

(a) Mechanical
  (i) Single jet
  (ii) Multi jet
  (iii) Woltman

(b) Electromagnetic
  (i) Full bore
  (ii) Insertion

(c) Ultrasonic
  (i) Clamp on
  (ii) Insertion
  (iii) Full bore

All the above classes of meters can also be classified based on the meter reading method used as:

(a) Manual
Meters manually read by the meter reader onsite and recorded

(b) Automatic Meter Reading (AMR)
Meter read and recorded by electronic devices carried by a meter reader walking / driving along the route at fixed intervals

(c) Advanced Metering Infrastructure (AMI)
Automatic transmission of the meter data to the centralised data centre at pre-determined intervals with no human intervention

The most prominent and widely used flow meter for bulk flow measurement is the full bore, inline electromagnetic flow meter. Traditionally, for household connections mechanical Class B Multi jet meters were used, however, with advancements in technology progressive water boards are opting for AMR water meters, especially for high consumption customers. Due to the various advantages, they offer like reduction of cycle time for billing and better customer service. Water flow meters are broadly classified into (i) Bulk flow and (ii) Domestic meters based on usage, as shown in Figure 13.1.

Figure 13.1: Classification of Water Flow Meter based on consumer category

13.6 Electromagnetic Water Meters

Electromagnetic or Magflow water meters' function on the principle of electromagnetism, called Faraday's Induction Law, to measure the velocity of the water passing through it. In an electromagnetic meter, a magnetic field is created across the pipe. When water, which is an electrical conductor, moves through the magnetic field, a voltage is induced which is detected by electrodes in the body of the meter. The voltage is directly proportional to the flow velocity, which allows the flow rate to be calculated. Domestic Electromagnetic meter DN15 to DN40 is shown in Figure 13.10 and Bulk Electromagnetic meter DN50 to DN300 is shown in Figure 13.11. They are

available in two models – a. Full bore and b. Insertion type. Insertion type can be used in retrofitting existing large diameter pipelines

Figure 13.10: Domestic Electromagnetic meter DN15 to DN40

Figure 13.11: Bulk Electromagnetic meter DN50 to DN300

The voltage is measured by two electrodes placed at right angles to the magnetic field. The sensor measurement is transmitted via an electric signal to an electronic counter, which converts the velocity readings to volume. The volume of consumption and/or flow rate is normally displayed on an LCD screen, but can also be obtained as an electronic signal to a telemetry system or flow logger.

Electromagnetic meters are accurate within their measuring range. Electromagnetic flow meters are generally accurate in the range from 0.3m/s to 10m/s and their accuracies are normally stated as a sum of the percentage of the reading and percentage of the full-scale value. Most electromagnetic flow meters are configured for a fixed flow velocity range, typically from 0.5 m/s to 10 m/s. These meter is only able to measure flow in the defined velocity range, and thus it is important to select the correct meter for a given situation. Typical accuracy values range from 0.5% to 0.1% but decrease at low flow rates. Electromagnetic Water Meters accuracy is defined as +/- 5% for lower operating flow range and +/- 2% for upper operating flow range (as per ISO 4064 Standard).

Advantages of electromagnetic meters are as follows:

(i) No obstruction to flow;
(ii) No pressure loss;
(iii) No moving parts subject to wear, therefore there is hardly any maintenance
(iv) Highly accurate and immune to variations in fluid density, pressure, viscosity, or temperature;
(v) Measures only water, no air;
(vi) No drift in accuracy over the product life;
(vii) Composite body, not prone to theft;
(viii) Very good low flow; and

(ix) Meter life more than 10 years R800 metrology Class D meters.
(x) No need for strainers or dirt- boxes.

13.7 . The Electromagnetic Domestic meters operates on battery and battery life is minimum 10 years.Ultrasonic Water Meters

Ultrasonic flow meters utilize the properties and behaviour of sound waves passing through moving water. The ultrasonic meters are of two types depending on different working mechanisms viz, Transit time meters and Doppler meters. The ultrasonic meters are also available as clamp-on, insertion type and inline type.

On perusal of the above details, it transpires that water meters are mainly categorised under various classification based on the flow measurement principle. Further, it is also seen that water flow meters which have nominal internal diameter/*Diametre Nominal* (DN) having a

measuring range, indicated normally, as DN15 to DN40 are referred to as 'domestic electromagnetic water meter', while meters from DN50 to DN300 are referred to as 'bulk electromagnetic meter'. In the electro magnetic water meters, which are akin to the imported goods, the magnetic field created through flow of water is used for determining the total quantity of water flown over a period of time for billing purpose to the consumers. Thus, even the quantity of water consumed or supplied to a consumer, is determined on the basis of flow of water and therefore, it is evidently proved that the impugned water meters of the category "Battery operated Ultrasonic/ Electromagnetic AMR water meters" are 'water flow meters' classifiable under CTI 9026 1010, and not 'water supply /production meters' classifiable under CTI 9028 2000.

10.1 In the impugned order, the learned Commissioner had given some of his finding in support of the classification of impugned goods under CTI 9028 2000 as below:

> *"32. I find that noticee has imported smart water metres under brand name "iPERL". However, the description given in the Bills of entry was "Battery Operated Ultrasonic/Electromagnetic AMR water metres". On perusal of the product description available in the supplier's website 'www.sensus.com' and the representative picture of the "iPERL water meter" it is observed as under:*
>
> *(i) I find that the unit "M^3" and "GALLONS" are explicitly mentioned on the display of the said goods and thus these water meters were capable of measuring amount of water passing through a pipe in volumetric term as the volumetric term 'm^3' is displayed in the water meter.*
>
> *(ii) The "M^3" and "GALLONS indeed are units for measurement of volume of liquids and fluid capacity. Thus the very availability of these units on display of the goods makes them classifiable at 9028.*
>
> *(iii) The following benefits of the said goods are mentioned in the Brochure available on the supplier/manufacturer's (Sensus-Xylem brand) website 'https://www.xylem.com/…'*
>
> *32.1 The above said benefits are more than sufficient to indicate the impugned goods are smart water metres installed for* ***reading the consumption of water by the customers and preparing their bills accordingly****….*
>
> *32.3 I find that these are smart water meters with advanced technology having additional features to detect leakages and manage distribution in an effective manner. These features do not take away the primary function of the device that impugned goods measure consumption i.e., volume and even used for billing purpose. Undoubtedly, the goods attract entry under Tariff Heading 9028, due to its very nature of measuring volumetric flow of water."*

From the above extract of impugned order, it is evident that the learned Commissioner had confirmed the classification under CTI 9028 2000, on the premise that the primary function of the importer water meter is measuring the consumption of water and preparing the bills for the customers. In this regard, we find that classification of goods for the purpose of Customs is to be decided on the basis of legal provisions contained under the Customs Tariff Act, 1975 as explained in the preceding paragraphs 6.2 & 6.3 above and the facts of the case as discussed in preceding paragraphs. However, we are unable to find any specific evidence or fact, on the basis of which the learned Commissioner had come to the conclusion that the primary function of imported water meter is measuring the supply/consumption of water.

10.2 We also find that the learned Commissioner had relied upon the classification opinion given in Customs Ruling No. HQ H249751 dated 03.04.2015 mentioned in the SCN, and the details given therein for arriving at a decision in such ruling, for support of his decision in classifying the impugned goods in the present case under chapter 9028. In this regard, we find the Customs Ruling Online Search System (CROSS) is the decision of the authorities in the US Customs and Border Protection agency and it is a binding decision on such authorities and do not have any relevance for legal purposes of classification in India. Further, on careful reading of the same, it is seen that such a decision has also been taken on the fact that the imported goods examined therein "*measures household's water consumption per billing cycle, not the water's flow*". As the imported goods in dispute in the present case are entirely different from the one referred therein, and the facts of the case are different, we are of the considered view that the learned Commissioner reproducing the portion of such CROSS decision in that customs ruling in paragraph 35.1 of the impugned order and seeking support for his decision for classification of impugned goods under chapter 9028 is not legally sustainable. Furthermore, the classification adopted by the supplier/other importer in a different B/E relied upon by the adjudicating authority for classifying the impugned goods under CTH 9028 without proper comparison of the products in question, does not stand the scrutiny of law.

10.3 In this regard, we have carefully gone through the legal provisions of the Act of 1975 as referred above, and find that for legal purposes, the classification of goods shall be determined according to the terms of the headings of the tariff and any relative Section notes or Chapter notes. We

also find upon careful reading of the Chapter Note 3 to Chapter 90, which provide that Notes 3 and 4 to Section XVI apply also to Chapter 90. The said Section Notes, are extracted and given below:

> *"3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.*
>
> *4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function."*

On applying Note 3 above *mutatis mutandis* to Chapter 90, it would mean that among the contending classification under CTI 9026 1010 and CTI 9028 2000, even after taking into account the finding of the learned adjudicating authority that the imported water meters provide the billing utility to the consumer, we come to a considered opinion that the impugned goods would remain as the 'water flow meters', since in terms of functionality and conformity to the Indian and International standards, the essential function of the said goods remain as measuring the flow of water in domestic water pipe lines. Therefore, in terms of the above discussion on facts and on the basis of explanatory notes to HS and the Chapter Note 3 to Chapter 90, we are of the considered view that the imported water meters are appropriately classifiable under CTI 9026 1010, and not under the CTI 9028 2000.

10.4 We also find that the adjudicating authority, without any basis had concluded that the primary function of the water meters is to measure the volume of water and on such basis, he decided that the impugned goods are classifiable under CTH 9028. We find that the basis suggested by the adjudicating authority for arriving at a classification is clearly without any evidence or supporting fact, and therefore the same cannot be countenanced.

11. We also find that the issue of classification of Flowmeters is settled by the Hon'ble Supreme Court in the case of *Moorco (India) Ltd.,* (supra). The said judgement was, however, rendered in the context of the unamended Customs tariff, wherein CTH 9024 was similar to the present CTH 9026 and earlier CTH 9026 was similar to the present CTH 9028. One

of the difference in the earlier and the present tariff is that unlike the present tariff which in CTH 9026 excludes instruments and apparatus of CTH 9028 the earlier CTH 9024 did not have any such exclusion for the earlier CTH 9026. Despite there being no specific exclusion the Hon'ble Supreme Court by taking note of the fact that the earlier CTH 9024 was a specific heading for Flow meters, i.e. meters that indicate the rate of flow, held that the Flow meters are appropriately classifiable under earlier CTH 9024 which is similar to the present CTH 9026. The extract of the relevant paragraph in the said judgement dated 29.09.1994, is given below:

> *"4……..Clause (a) incorporates the common and general principle that the goods which can be classified specifically with reference to any heading should be placed in that category alone. The specific heading of classification has to be preferred over general heading. The clause contemplates goods which may be satisfying more than one description. Or it may be satisfying specific and general description. In either situation the classification which is the most specific has to be preferred over the one which is not specific or is general in nature. In other words, between the two competing entries the one most nearer to the description should be preferred. Where the class of goods manufactured by an assessee falls say in more than one heading one of which may be specific, other more specific, third most specific and fourth general. The rule requires the authorities to classify the goods in the heading which satisfies most specific description. For instance, taking the case of the appellant the item manufactured by the appellant is described and used as flow meter. It is an instrument for measuring volume as well. Flow meter is specifically classified in Heading No. 90.24. Whereas the Heading 90.26 is general in nature. It applies to every production meter or calibrating meter for gas, liquid and electricity supply. Therefore, on the finding recorded by the Assistant Collector, the goods produced by the appellant specifically fall in Heading No. 90.24. They may also fall in Heading No.90.26 but that being more general entry preference should have been given to the entry 90.24 as the goods satisfy most specific description of being flow meter. The Tribunal or the appellate authority without adverting to it applied clause (c) and levied duty under 90.26 as it was a latter heading. But clause (c) would apply only if clauses (a) and (b) do not apply. Since the goods manufactured by the appellant satisfied the specific description of Tariff Heading 90.24 being a flow meter, the Tribunal committed an error of law in classifying it under Tariff Heading 90.26 as it was a latter item under the classification list."*

From the above, it could be noticed that Hon'ble Supreme Court in its judgement has not given any credence to the submission of the Revenue to the effect that the Flow meter was capable of measuring the volume also and should for this reason be classified in the unamended CTH 9026 (similar to the present CTH 9028).

12. We also find that the ratio laid down by the Hon'ble Supreme Court on classification of water meters in *Moorco (India) Limited,* (supra) in the context of the present tariff has been followed by Co-ordinate Bench of the

Tribunal in another case of *Moorco (India) Ltd*. *Vs. Collector of Customs, Madras* - 1997 (91) E.L.T. 126 (Tribunal). The apparatus therein was capable of measuring the rate of flow as also the volume. The Tribunal taking note of the decision in the case of *Moorco (India) Ltd.* (supra) have held that 'Flow meters' would be classifiable under the old tariff under CTH 9024 and under CTH 9026 under the new tariff. The relevant paragraphs of the said order of the Tribunal are extracted and given below:

> ***"3.*** *Ld. D.R. while reiterating department's arguments fairly conceded that in case of appellants themselves Hon'ble Supreme Court has given judgment in their favour in regard to flow meters.*
>
> ***4.*** *We have heard both sides. It is contended by the appellants that the appellant's range of products include a complete control device for measuring and dispensing liquids for their customers and the range includes meter for measurement of rate of flow as well as volume of flow - a device to initiate action for variation between the actual and the desired rate and a device to control the flow by means of a valve. These meters are used for measuring petroleum products such as kerosene, diesel, petrol, etc. Typical example would be Madras Refineries Ltd. (MRL) selling to Indian Oil Corporation 5,000 kilolitre of petroleum products for further distribution to retail outlets. MRL would require the product delivery automatically commencing at a specified rate of flow (to avoid frothing of the fluid) increasing the rate of flow to higher value (to step up delivery of the fluid) and ensuring that the exact volume, contracted for (5000 kilolitres) is delivered. The meters manufactured by the appellants are exactly intended to serve this Sector. Hence is a device for measuring, controlling, stopping and operating an action device, an essential part of the meters supplied by the appellants to various process industries.*
>
> *The literature placed in the file under operating specifications refers to flow rate. Technical write-up dated December 28, 1987, indicates that the components had been imported for the manufacture of flow meters which measure rate of flow as well as volume of liquid and also incorporate control devices which compare the measured rate of flow or volume with that of actual flow or volume.*
>
> ***5.*** *Hon'ble Apex Court in the case of M/s. Moorco (India) Ltd. supra held with reference to old tariff that flow meter is specifically classifiable under Heading 90.24 whereas Heading 90.26 is general in nature. It applies to every production meter or any meter for gas, liquid or electricity supply. The Tribunal committed an error of law in classifying the goods under Heading 90.26.*
>
> ***6.*** *This Tribunal also vide its Final Order C/1191-1194/96-B, dated 20th September, 1996, held that such goods under the old tariff are classifiable under old Tariff Heading 90.24 and under new tariff under 90.26 CTH.*
>
> ***7.*** *Following the ratio of these orders, therefore, we hold that parts imported for flow meters would be classifiable under 90.24 under the old tariff and 9026.90 under the new tariff."*

13. While the issue of classification has to be decided only basis the technical specification and the relevant headings and the explanatory notes thereto, we will nonetheless deal with the submissions made by the Learned Authorised Representative to the effect that water meters are specifically covered under CTH 9028 as also since the appellants had not described the

imported goods as 'Flow meters' in the Bill of Entry the same cannot be classified under CTH 9026. We find both these arguments are absolutely untenable for the reason that firstly CTH 9028 does not cover water meters by name and even if they did, what would have been relevant is to examine the scope and ambit of the said CTH with reference to its Chapter/Section notes. Further the appellants not describing the imported goods in the Bill of Entry as Flow meters is in our view, no ground for ruling out classification under CTH 9026. It is not merely the description of the commodity, but the function and the characteristics thereof that has to be seen before deciding the appropriate classification, at least insofar as the two competing entries CTH 9026 and CTH 9028 are concerned. Further, reliance placed on the judgement of the Hon'ble Supreme Court in the case of *Coen Bharat Ltd. (*supra) does not help the case of the Revenue as in the facts of that referred case, there was a difference in the relevant entries in the Central Excise Tariff vis-à-vis that in the HSN, which is not the position in the present case. This fact has been clearly recorded by the Tribunal in its *Order No. 2899/2001-WZB/C-II dated 05.11.2001* reported in 2002 (145) E.L.T. 175 (Tri. – Mumbai), which was carried in appeal to the Apex Court. The Tribunal therein specifically records in paragraph 4 of its order, as "*it is necessary to note that the portion of heading 73.22 contained in the Central Excise Tariff differs from the portion in heading 73.22 in the HSN*". It is otherwise settled position of law laid down by the Hon'ble Supreme Court in a number of cases that where the HSN and Tariff are aligned, then the HSN explanatory notes are a safe guide for interpreting the Tariff. In the case of *Collector of Central Excise, Shillong Vs. Woodcraft Products Ltd.* - 1995 (77) E.L.T. 23 (S.C.) and in the case of *Commissioner of Central Excise, Salem Vs. Madhan Agro Industries (India) Private Limited* - (2024) 25 Centax 269 (S.C.), the Hon'ble Supreme Court have held that HSN tariff classification can be adopted as a safe guide for classification of goods in resolving the disputes. The relevant paragraph of the said judgement is extracted below:

> *"12. It is significant, as expressly stated, in the Statement of Objects and Reasons, that the Central Excise Tariffs are based on the HSN and the internationally accepted nomenclature was taken into account to "reduce disputes on account of tariff classification". Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. This being the expressly acknowledged basis of the structure of Central Excise Tariff in the Act and the tariff classification made therein, in case of any doubt the HSN is a safe guide for ascertaining the true meaning of any expression used in the Act. The ISI Glossary of Terms has a different purpose and, therefore, the specific purpose of tariff classification for*

> *which the internationally accepted nomenclature in HSN has been adopted, for enacting the Central Excise Tariff Act, 1985, must be preferred, in case of any difference between the meaning of the expression given in the HSN and the meaning of that term given in the Glossary of Terms of the ISI."*

14. In view of the foregoing discussions and analysis, and on the basis of the judgements of the Hon'ble Supreme Court and the decision of the Tribunal as discussed above, we are of the considered view that the impugned goods are classifiable under CTI 9026 1010 of the First Schedule to the Customs Tariff Act, 1975. Accordingly, the impugned order dated 19.12.2022 classifying imported goods under heading CTI 9028 2000 does not stand the scrutiny of law and therefore it is liable to be dismissed. Accordingly, we set aside the impugned order dated 19.12.2022 to the extent it had confirmed the adjudged demands on the basis of such revised classification, and imposed fine and penalty on the appellants.

15. In the result, by setting aside the impugned order dated 19.12.2022, we allow the appeal filed by the appellant-importer in their favour with consequential relief, as per law.

(Order pronounced in open court on 16.04.2025)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

SM

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 3

Customs Appeal No. 51677 of 2022
With
Customs Stay Application No. 50424 of 2022

(Arising out of Order-in-Appeal No. CC(A)Cus/D-I/Import/NCH/4228/2021-22 dated 21.03.2022 passed by the Commissioner of Customs (Appeals), New Delhi)

Principal Commissioner of Customs **Appellant**
ACC (Import) Commissionerate,
New Custom House,
New Delhi-110037.

VERSUS

M/s Telecare Network (India) Pvt. Ltd. **Respondent**
RZ-340A, Gali No. 11D, Kailashpuri Extension,
Palam, South Delhi-110045.

Appearance

Shri C. Dhanesekaran, Special Counsel – for the Appellant

Shri Kishore Kunal, Shri Manish Rastogi and Ms. Runjhun Pare, Advocates – for the Respondent

CORAM:

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

DATE OF HEARING : 14/03/2023
DATE OF DECISION : 24/03/2023

Final Order No. 50390/2023

P.V. Subba Rao:

Revenue filed this appeal to assail the order in appeal dated 21.03.2022 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi[1] whereby he upheld the order in

1 impugned order

original dated 14.01.2018 passed by the Assistant Commissioner sanctioning refund to the respondent.

2. The brief facts of the case are that the respondent is a Private Limited Company which imports and sells mobile phones in India. The goods which are imported into India are chargeable to basic customs duty levied under Section 12 of the Customs Act, 1962 and additional duty of customs levied under Section 3 of the Customs Tariff Act, 1975. The additional duty of customs is levied at rates applicable to similar goods manufactured in India as per the Central Excise Tariff. If there is any exemption notification under the central excise such notification also applies to the additional duty of customs. Notification No. 12/2012-CE dated 17.03.2012 as amended exempts mobile sets from excise duty in excess of 1% *ad valorem* subject to the condition that no Cenvat credit was availed on the inputs used in the manufacture of such goods. The respondent's claim of the exemption notification was denied by the appellant on the ground that the exemption notification will not apply to imported goods. The respondent paid the duty under protest. Later, the Supreme Court held in the case of **SRF Limited Vs. Commissioner of Customs** [2] that the exemption notification will apply to additional duty of customs on imported goods also.

3. Thereupon, the respondent filed a refund claim on 24.06.2016 seeking refund of the excess additional duty of customs paid during the period 26.03.2015 to 22.06.2015 under 103 bills of entry. This application for refund was initially rejected by the

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2 2015 (318) ELT 607 (SC)

Assistant Commissioner by order in original dated 07.03.2017. Aggrieved by the rejection, the respondent filed a writ petition before the Hon'ble High Court of Delhi which was decided on 06.08.2018 in favour of the respondent. Paragraphs 12 and 13 of this order are reproduced below:

> "12. There is no dispute about the applicability of *SRF Ltd. (supra);* indeed the Revenue's refrain during the hearing was that the amounts *could not be refunded* because the claims were time-barred and that the petitioner has an alternative remedy. This Court is of opinion that the plea of alternative remedy – an unoriginal and frequently used stereotypical defence by public bodies – in such cases at least dodges the crux of any dispute, i.e. the liability of the concerned public body or agency *on merits*. *Sans* any dispute with respect to facts, this Court finds it entirely unpersuasive, since Article 144 of the Constitution, compels all authorities to give effect to the law declared by the Supreme Court (as in this case, the *SRF Limited* judgment). The other plea which the Customs had relied on, to defeat the petitioner's refund application was Section 27 (3) which confines refunds to the situations contemplated in Section 27 (2), notwithstanding any judgment, order or decree of the court. This Court is at a loss to observe the relevance of that reasoning, given that *SRF Limited (supra)* had ruled *in principle* that import implied a deemed manufacture, without any corresponding obligation on the part of the importer to have availed CENVAT credit. As such, the amount claimed was not duty and could not have been recovered by the Customs authorities in the first instance, given the declaration of law in *SRF Limited (supra).* Therefore, they cannot now seek shelter under Section 27 (3) to resist a legitimate refund claim.
>
> 14. The impugned order is hereby quashed. The refund application moved by the petitioner shall be decided on its merits, within ten weeks, in accordance with law. The writ petition is disposed of."

4. Thereafter, the respondent approached the Assistant Commissioner seeking refund of the excess additional duty of customs paid. The Assistant Commissioner, by order dated 14.11.2015, sanctioned the refund. Revenue filed an appeal before the Commissioner (Appeals) who, by the impugned order, upheld the order in original of the Assistant Commissioner and rejected Revenue's appeal.

5. Aggrieved, Revenue has filed this appeal praying that the impugned order may be set aside along with the order in original

dated 14.11.2018 passed by the Assistant Commissioner. Two grounds have been raised in this appeal as follows:

(i) Limitation

(ii) Unjust enrichment.

6. It is asserted in the appeal that the refund was hit by limitation of one year as prescribed under Section 27(2) of the Customs Act as additional duty of customs was paid between 26.03.2015 to 22.06.2015 while refund application was filed on 24.06.2016. In other words, the application was filed beyond the period of one year and, therefore, was time-barred and should not have been sanctioned.

7. It has also been asserted that the Commissioner (Appeals) erred in holding that the refund claim does not attract the condition of unjust enrichment as the refund claimed is not duty as the importer themselves had filed application under Section 27 indicating the amount paid as duty. Reliance was also placed on the judgment of the Supreme Court in the case of **ITC Limited Vs. Commissioner of Central Excise, Kolkatta-IV**[3] to assert that the duty paid as a result of the self-assessment cannot be refunded unless the self-assessment has been assailed before the Commissioner (Appeals).

8. Learned Special Counsel for the Revenue Shri C. Dhansekaran, vehemently argued the above two aspects and submitted that the Delhi High Court's order was not correct as it was contrary to the judgement of the Constitutional Bench of the

[3] 2019 (368) ELT 216 (SC)

Supreme Court in **Mafatlal Industries Ltd. Vs. Union of India**[4]**.** According to the learned Special counsel since the Delhi High Court's order was not correct, Assistant Commissioner erred in following the High Court's order and sanctioning the refund and the Commissioner (Appeals) erred in upholding such sanction of refund.

9. Learned counsel for the respondent submits that the impugned order is correct and proper and calls for no interference at all. He submits that the Revenue had relied upon the judgement of **Mafatlal Industries Limited** before the Delhi High Court as recorded in para 8 of the judgement and after considering all the submissions made by the Revenue, Delhi High Court held that the amount claimed was not duty and should not have been recovered by the Customs authorities in the first instance given the declaration of law in **SRF Limited** and, therefore, the Revenue cannot resist a legitimate refund claim. He submits that if the Revenue is aggrieved by the judgement of the High Court of Delhi the proper forum to agitate is before the Supreme Court. The Assistant Commissioner being a lower quasi-judicial authority was bound to follow the judgement. He also submits that the judgement of the Delhi High Court is likewise binding on the Commissioner (Appeals) and this Tribunal. Regarding the specific grounds in the appeal of limitation and unjust enrichment, he submits that Revenue had taken up the issue of time bar before the Delhi High Court as recorded in para 9 of the judgment and after considering the submissions of Delhi High Court has held that the

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[4] 1997 (89) ELT 247 (SC)

time bar would not apply in this case. Therefore, there is no force in the submission regarding limitation.

10. As regards the question of unjust enrichment, learned counsel points out that the respondent had submitted self declaration along with a certificate from M/s Naveen Associates, Chartered Accountant dated 18.01.2017 certifying that the amount so deposited in excess by the respondent was not passed on to the consumers or to anyone else. The respondent also submitted a copy of the balance sheet for financial year 2015-16 wherein under assets is a head "customs duty refund receivable". These facts were recorded in paragraph 10 of the order which reads as follows:

> "10. Further w.r.t. the clause of unjust enrichment, I find that the party has submitted a self-declaration and a CA certificate from M/s Naveen Associates, M No. 541412 dated 18.01.2017 certifying that the amount, so deposited in excess, has not been passed on to the consumers or anyone. The party has also submitted a copy of the audited balance sheet for FY 2015-16, wherein the party has showed the amount as *Assets* under the head *Custom Duty Refund Receivable*. Hence the party has overcome the statutory obligation of unjust enrichment by not passing on the burden of the excess amount paid."

11. Before the Commissioner (Appeals), Revenue had contested the Chartered Accountant's certificate on the ground that M/s Naveen Associates who issued the certificate were not the statutory auditors of respondent which is recorded in paragraph 4 of the order as follows:

> "4. **Response of the Respondent**:- The Respondent was served a copy of the appeal filed by the Department for submitting their response. The Respondent submitted response as under :-
>
> 4.1 The ground of limitation u/s 27 of the Customs Act, 1961 and Unjust Enrichment is conclusively decided by the Hon'ble High Court of Delhi in W.P. No. 7853/2017 vide its order dated 06 Aug. 2018 and there is no stay on the operation of the said decision of the Hon'ble High Court of Delhi. The issue of limitation and

> Unjust Enrichment under the present appeal, in fact tantamount to contemptuous act. Even this Appellate Authority has no jurisdiction to sit in appeal against the Judgment dated 06 Aug. 2018 of the Hon'ble High Court of Delhi."

12. Learned counsel submits that this submission was incorrect inasmuch as M/s Naveen Associates were their statutory auditors during the relevant period. Even otherwise, there is no requirement that the Chartered Accountant's certificate has to be issued by any particular Chartered Accountant under the law. All that is required to be proved is that the burden of duty has not been passed on to another person and the respondent has fulfilled this obligation. He, therefore, prays that the appeal may be dismissed.

13. We have considered the submissions made by both sides and perused the records.

14. It is undisputed that the issue was decided by the Hon'ble High Court of Delhi in its judgement dated 06.08.2018 and the matter was remanded to the original authority to decide the refund on merits. It is also evident from the judgment that the question of limitation was asserted by the Revenue before the High Court and it was not accepted. Therefore, there was no error on the part of either the Assistant Commissioner or the Commissioner (Appeals) in sanctioning the refund without considering the limitation as both authorities were bound by the order of the Delhi High Court.

15. As far as the question of unjust enrichment is concerned, we have perused the Chartered Accountant's certificate issued by M/s Naveen Associates who were, as per respondent, their statutory auditors during the relevant period. The balance sheet as on

31.03.2016 mentions under current assets 'other current assets' Rs. 325,398,612. There is a reference to note No. 14 against this entry which gives the breakup of "other current assets". These included "customs duty refund receivable of Rs. 198,598,816"

16. When goods are manufactured or imported land sold there are two ways of treating the cost of the goods - either take the cost of the goods plus all taxes as the cost of the goods and then fix the sale price or take the cost of the goods and taxes but exclude such taxes and duties which are disputed and then decide the sale price. In the first case, the amount incurred as duty will be added to the cost of the goods which will be evident from the balance sheet. In the latter case, the amount paid as duty will not be added to the cost of the goods but it will be treated as "receivable from the Government" This is the latter case. In such a case, the cost of the duty has, evidently, not been passed on to the buyers. By examining what treatment was given to the disputed amount of duty or tax in the accounts, it can easily be verified whether it was passed on, either directly or indirectly, to the customers. In this case it has not been so passed. Learned special counsel for the Revenue vehemently argued that the Chartered Accountant's certificate cannot be relied upon. However, on a query from the Bench, he could not produce any document whatsoever to either establish the fact that duty has been passed on by the respondent or to show that the Chartered Accountant certificate's was incorrect. We, therefore, find no force in this submission of the learned special counsel.

17. To sum up, Revenue is aggrieved by the impugned order on two grounds:

(i) That the refund was time-barred.

(ii) That it was hit by unjust enrichment.

18. The first issue was already decided by the High Court and the Assistant Commissioner and Commissioner (Appeals) were bound to have followed the order of the High Court as they did. We are surprised as to how Revenue has filed this appeal faulting Commissioner (Appeals) and Assistant Commissioner for following judicial discipline and obeying the orders of the Delhi High Court and asserting that they should have defied the Delhi High Court's order. As far as the unjust enrichment is concerned, from the Chartered Accountant's certificate it is evident that the duty was not passed on and it was treated by the respondent as a receivable. Revenue has not produced even a shred of evidence either to establish that the Chartered Accountant's certificate was wrong or to establish that the duty was indeed passed on to the buyers. Learned special counsel also asserted that M/s Naveen Associates were not the statutory auditors of the respondent. Learned counsel for the respondent asserts that they were their statutory auditors during the relevant period. In the absence of any evidence by the Revenue on this count, the submission by the respondent that during the relevant period, M/s Naveen Associates were their Chartered Accountants must be accepted. Even otherwise, there is no requirement in law that a certificate must be issued only by the statutory auditors. So long as the certificate is issued by a

Chartered Accountant and it is consistent with the accounts such as Balance Sheet and Profit and Loss statement, the certificate deserves to be accepted.

19. In view of the above, we find that the appeal filed by the Revenue deserves to be dismissed.

20. The appeal is dismissed with consequential relief, if any to the respondent. Stay application also stands disposed of.

(Order Pronounced on 24/03/2023)

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

(BINU TAMTA)
MEMBER (JUDICIAL)

RM

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 51204 of 2022-SM

(Arising out of order-in-appeal No. CC(A) CUS/D-1/EXPORT/NCH/69/2020-21 dated 17.06.2021 passed by the Commissioner of Customs (Appeals), New Delhi).

Gopal Sardana **Appellant**
Prop. of Sardana Enterprises
525, Pocket-1, Paschim Puri
New Delhi-110063.

VERSUS

Commissioner, Customs **Respondent**
Air Cargo Export, New Customs House
New Delhi-110037**.**

APPEARANCE:

Sh. Akash Deep and Sh. Anil Kumar, Advocates for the appellant
Sh. Divey Sethi, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50993/2022

DATE OF HEARING/DECISION: 10.10.2022

ANIL CHOUDHARY:

The issue involved in this appeal is whether the appellant is entitled to interest and period of interest.

2. Brief facts of the case are that vide Order-in-original dated 28.03.2013, due to dispute in valuation additional duty was demanded Rs.5,39,749/- alongwith equal amount of penalty under Section 114AA. Further, redemption fine of Rs.15 lakhs was imposed. This Tribunal vide Final Order Nos. 50107-50108/2018

dated 12.01.201 allowed the appeal in part by reducing redemption fine to Rs.7,50,000/- and reduced penalty to Rs. 1 lakh under Section 114AA of the Act. Thus, the appellant got relief of Rs.11,89,749/-. On application by the assessee, refund of this amount was allowed on 12.01.2022. This refund was granted pursuant to Order-in-appeal dated 17.06.2021. It is urged that learned Commissioner (Appeals) has not considered the grant of interest, although he has taken notice of such claim in para 5.3 and 5.3.1 of the impugned order.

3. Learned Counsel further assailing the impugned order submitted that interest should also been granted under the provisions of Section 129EE of the Customs Act, which provides for grant of interest from the date of deposit till the date of refund. Further, it is urged that the amount is refundable pursuant to final order of this Tribunal, is in the nature of revenue deposit lying with the Department.

4. Learned Authorised Representative appearing for the Revenue relies on the impugned order. He further urges that as the issue of interest have not been considered in the impugned order, the matter may be remanded for consideration.

5. Having considered the rival contentions and in view of the precedent decision of the Division Bench of this Tribunal in the case of Parle Agro – Final Order No. 70180 -70181/2021 dated 25.05.2021, wherein it has been held that the amount deposited during investigation / audit, on being successful in appeal is

refundable alongwith interest @ 12% p.a. from the date of deposit till the date of refund. Further, co-ordinate Bench of this Tribunal in Final order No. 50737/2022 following the ruling of the Division bench in **Parle Agro** and **Sandvik Asia Ltd. -2007 (8) STR 193 (SC)** have held that the assessee is entitled to grant of interest under Section 129EE of the Act for the period from the date of deposit till the date of refund.

6. Accordingly, in view of my findings and observations, I set aside the impugned order and allow the appeal. The appellant is held entitled to interest on refund from the date of deposit till the date of refund @ 12% p.a.

7. In the result, the appeal is allowed.

(Dictated and pronounced in open Court).

(Anil Choudhary)
Member (Judicial)

Pant

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No.51330 of 2023 (SM)

(Arising out of Order-in-Appeal No.CC(A)Custom/D-II/ICD/TKD/1257/2022-23 dated 20.12.2022 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

M/s Indochem & Polymers **Appellant**
X-58, Okhla Industrial Area,
Phase-II, New Delhi-110 020.

VERSUS

Commissioner, Customs (Import), New Delhi (ICD TKD) **Respondent**
ICD, Tughlakabad,
New Delhi-110 020.

APPEARANCE:
Shri Jitin Singhal, Advocate for the appellant.
Ms. Tamanna Alam, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50577/2023

DATE OF HEARING: 17.04.2023
DATE OF DECISION: 17.04.2023

ANIL CHOUDHARY:

The issue involved in this appeal relates to refund of Special Additional Duty (SAD) under Notification No.102 of 2007-Customs dated 14.09.2007, as amended by Notification No.93/2000-Customs.

2. The brief facts are that the appellant imported goods for trade vide 3 bills of entries during the period 06.08.2008 to 30.08.2008 and paid a total Special Additional Duty (SAD) during 20.08.2008 to 03.10.2008, which is in lieu of sales tax, of Rs.3,25,759/-. Subsequent

to re-sale of the goods, the appellant applied for refund of SAD as allowable under Notification No.102/2007-Customs, on 15.06.2018 The said refund claim was adjudicated vide order-in-original dated 25.02.2019 and the same was rejected on the ground of limitation following the ruling of Hon'ble Bombay High Court in the case of **M/s. CMS Info Systems Ltd. Vs. Union of India – 2017 (349) ELT 236 (Bombay)** holding that the refund claim had to be filed within a period of one year from the date of payment of SAD, in view of the amendment vide Notification no.93/2008-Customs.

3. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), who vide impugned order-in-appeal dated 22.03.2022 was pleased to dismiss the appeal, upholding the order-in-original. Being aggrieved, the appellant is before this Tribunal.

4. Ld. Counsel for the appellant, Shri Jitin Singhal, *inter alia,* urges that the issue is no longer *res integra*. The Hon'ble Delhi High (jurisdictional High Court) have held in the case of **Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi – 2014 (304) ELT 660 (Delhi)** under similar facts and circumstances, refund claim of SAD is not time barred as no such limitation is prescribed under the original notification no.102/2007-Customs. It was also held that period of limitation for the first time, cannot be introduced through subordinate legislation or notification. It was also held that limitation cannot start to run prior to crystalisation of the right to claim refund. The said ruling has been repeatedly followed in a catena of judgements including the case of **CC (Import) Vs. M/s. Gulati Sales Corporation – 2018 (360) ELT 277 (Delhi)** and also in the recent decision of Delhi High

Court in **Premier Timber and Trading Pvt. Ltd. Vs. Principal Commissioner of Customs (Imports) - 2022 7 TMI 885 (Delhi),** wherein also, it was specifically held following the ruling in **Sony India Pvt. Ltd. (supra),** that in absence of the specific provision of Section 27, being made applicable in the said notification, time limit prescribed in Section 27 would not be automatically applicable to refund under Notification No. 102/2007-Cus. Accordingly, he prays for allowing their appeal with consequential benefits.

5. Ld. Authorised Representative for the respondent relies on the impugned order.

6. Having considered the rival contentions, I find that the issue herein is squarely covered by the rulings of the Hon'ble Delhi High Courts cited above, in favour of appellant. Further, the ruling of the Hon'ble Bombay High Court in **M/s. CMS Info Systems Ltd. (supra)** has been distinguished by this Tribunal in **S.R. Traders - 2020-12-TMI-503,** which judgement has been upheld by the Hon'ble Delhi High Court reported at **2022-4-TMI-1167.**

7. In this view of the matter, I allow this appeal and set aside the impugned order. The Adjudicating Authority is directed to grant refund along with interest @ 12% p.a., starting from the end of 3 months from the date of filing of refund application. The appeal is allowed with consequential benefits. Such refund should be granted within a period of 60 days from the date of receipt of copy of this order.

(order dictated in the open court)

(Anil Choudhary)
Member (Judicial)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH
Court No. IV

CUSTOMS APPEAL NO. 50189 OF 2021

[Arising out of Order-in-Appeal No. CC(A)/Customs/D-II/Export/ICD/TKD/322/2020-21 dated 10.07.2020 passed by the Commissioner of Customs, (Appeal), New Customs House, Near IGI Airport, New Delhi.]

ELAN ELECTRONICS INDIA
186, Harsh Vihar
Pitampura **APPELLANT**
New Delhi 110034.

Vs.

COMMISSIONER OF CUSTOMS
(**Appeal**), New Customs House, **RESPONDENT**
New Delhi.

Appearance:

Shri Uday Pathak, Advocate for the Appellant
Shri Gopi Raman, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER(JUDICIAL)

Date of Hearing : December 02, 2022
Date of Decision : 04-01-2023

FINAL ORDER No. 50004 /2023

PER DR. RACHNA GUPTA

Present appeal has been filed to assail the Order-in-appeal No. 322/2020-21 dated 10.07.2020 vide which the order of rejection of refund claim has been upheld by Commissioner (Appeals) being barred by time. The facts in brief giving rise to present appeal are as follows:-

That the appellants had imported 54 sets of battery operated rickshaw in CKD condition without battery and charger at ICD TKD vide Bill of Entry No.4233121 dated 31.12.2013. The declared assessable value of the goods is Rs.16,82,163/-. On the said value Customs duty amounting to Rs.7,76,205/- was also deposited at the time of presentation of Bill of Entry seeking clearance of goods under import for home consumption. However, during the scrutiny of said Bill of Entry, it was observed that the vehicle imported by the appellant required valid certificate of compliance in terms of Rule 126 of Central Motor Vehicle Rules (CMVR), 1989. Since the certificate was not with the appellant-importer, that he vide its letter dated 29.9.2014. requested for re-export of goods, however, to third country in UAE (Dubai).

Pursuant to the said request that the aforementioned Bill of Entry was allowed to be amended from 'home' to 'warehouse' under section 59 of Customs Act, 1962 read with section 69 of the Act and the goods under the said Bill of Entry were allowed to be re-exported. However, penalty of Rs.50,000/- under section 112(a) of Customs Act, 1962 was imposed upon the appellant vide order dated 14.10.2014. Pursuant to the said order the 'let export' order was passed on 12.11.2014. The goods were accordingly re-exported and the appellant filed a refund claim on 28.5.2015 in respect of the amount of Rs.7,76,205/- as was deposited on 03.01.2014 towards the customs duty for the import of impugned goods.

The claim was rejected vide order No. 1962/gs/ 17 dated 4.10.2017 on the ground of time limitation being in contravention of section 27 (1) of Customs Act, 1962 and for being filed in contravention of Explanation A of section 26A (2) of Customs Act. In an appeal against the said order, the Commissioner (Appeals) though has accepted that section 26A(2) of Customs Act was not applicable to the said given circumstances, however still rejected

the appeal while upholding the findings about refund claim to be time barred. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Shri Uday Pathak, learned counsel for the appellant and Shri Gopi Raman, authorised representative for the respondent.

3. Learned Counsel for the appellant has mentioned that the period of one year under section 27(1) of Customs Act has wrongly been invoked from the date of demand of customs duty. It is mentioned that section 26A(1) of the Act has wrongly been invoked whereas the appellant's case is covered under section 27(1B)(b) and the period of limitation should have been calculated from the date of order of re-export. It is further submitted that since the goods have been re-exported and never cleared for home consumption, the intention of evading the duty which was paid at the time when Bill of Entry for home consumption has been filed, is illegal and without any authority of law. Learned Counsel has relied upon the following case laws:

1. **Elin Electronics Ltd. Vs. Commissioner of Customs, Noida, [2018 (363) ELT 933 (Tri.-All.)];**

2. **Siemens Limited Vs. Collector of Customs, [1999 (113) ELT 776 (SC)];**

3. **MV Marketing & Supplies Vs. Commr. of Cus. (Import), Chennai, [2004 (178) ELT 1034 (Tri.-Chennai)];**

4. **CIT Vs. McDowell and Co. Ltd., [(2009) 10 SCC 755]; and**

5. **Em Pee Syndichem Pvt. Ltd. Vs. Union of India, [2012 (279) E.L.T. 340 (Del.)].**

4. While rebutting the submissions, learned Departmental Representative has laid emphasis upon the findings of Commissioner (Appeals), where he has accepted the request of the appellant as far as non-applicability of section 26A of Customs Act, 1962 is concerned. With respect to time bar issue, paragraph 5.3 of the order has been relied upon. Impressing

upon no infirmity in those findings, learned Departmental Representative prays for dismissal of appeal.

5. Having heard the rival contentions, I observe that the sole issue to be decided is:

> "as to whether the time bar under section 27(1) of Customs Act, 1962 is invokable with respect to impugned refund claim."

For the purpose, it is observed that the opening line for section 27 is "claim of refund of duty". Reverting to the facts of this case admittedly, the amount in question Rs 7,76,205/- was paid at the time of presentation of Bill of Entry on 03.01.2014 as duty on the goods / vehicles imported by the appellant. It is also admitted fact on record that those goods since were not allowed to be imported without any requisite certificate. Since the Certificate was not available with the appellant that the appellant made a request for the goods to be re-exported. Admittedly the request was made at the time when the goods were still in the Customs area. The Bill of Entry as was filed for home consumption was allowed to be amended for warehouse and those were allowed to be re-exported vide order dated 14.10.2014. The 'let export order' was passed with respect to the goods which were still lying in the customs area on 22.11.2014.

6. These admitted facts are sufficient admission to the fact that the goods were never cleared for home consumption. There was no occasion for the appellant to actually pay the customs duty. Hence the amount in question cannot be called as the amount of duty to which section 27 applies. As per Article 265 of Constitution of India, no tax shall be levied from or collected except by the authority of law. In terms of section 49 of the Customs Act, 1962, the Revenue was competent to collect customs duty only if the goods would have been cleared for home consumption. Apparently and admittedly that stage could not arrived in the present case and the goods were allowed to be re-

exported. It becomes abundantly clear that the stage of collection of duty was never arrived, there was no need for the Customs Department to ask for any amount as duty. The duty of Rs.7,76,205/- which stand deposited since at the stage prior to scrutiny of the impugned Bill of Entry, hence remained as deposit made by the appellant for which the department has no authority to retain. Resultantly, same cannot be called as amount of duty.

7. I draw my support from the decision of Hon'ble Supreme Court in the case of **Jindal Stainless Ltd. vs. State of Haryana** reported as **[(2017) 12 SCC 1]**. The decision relied upon by the appellant settles the proposal of law that once the goods have been allowed to be re-exported, the importer was entitled to refund of duty. Though redemption fine and penalty can still be imposed, there is otherwise no challenge from the appellant about imposition of penalty and redemption fine but simultaneously, I observe that there had never been challenge by the department to the order dated 14.10.2014 allowing the re-export of the impugned goods. The refund application was filed for the amount as was deposited in the name of duty but was not the liability of the appellant since the goods have been re-exported and were never cleared for home consumption. As already observed above, such an amount was out of scope of being called duty, hence section 27 would not be applicable to such refunds. Resultantly appellant is entitled for the sanction on such refund.

8. I also draw my support from the decision of Hon'ble Supreme Court in the case of **Garden Silk Mills Ltd. vs Union of India** reported as **[1999 (113) ELT 358 (SC)]** wherein the Apex court has held that the taxable event will reach at the time when the goods reach the customs barrier and the Bill of entry for home consumption is filed. It was upheld in this case that the import is complete only after the goods become part of the mass

of goods of the country, i.e. only after order for home consumption. The Hon'ble Supreme Court noticed that no duty was payable prior that order. This decision was relied upon by Hon'ble Delhi High Court in the case of **Em Pee Syndichem Pvt Ltd. vs Union of India** reported as **[2012 (279) ELT 340 (Del)]** wherein it was held that it was only after the order of let-export was made and the goods are re-exported, when the goods had entered the territorial waters, the petitioner could have asked for refund of the amount, if any, deposited in the name of customs duty. It was clarified in this case that in such a case, the said refund shall not be read in isolation and has to be read along with the facts and conduct of the parties, and held that such refund could be sanctioned even prior the goods were not actually re-exported. Thus, the refund is available immediately after the order of re-export.

9. In view of above discussion, I hold that Commissioner (Appeals)_ has wrongly invoked section 27(1) of the Customs Act, 1962 while rejecting the refund claim as barred by time. Section 26A(1) is otherwise not applicable to the facts of the present case. The order is accordingly set aside. Appellant is held entitled for the said refund along with interest at the rate of 6% from the date of payment till the sanction arrived.

10. The appeal stands allowed.

(pronounced in the open court on 04-01-2023)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

ss

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 51978 of 2022(SM)

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/IMP/ICD/TKD/759/2022-23 dated 27.06.2022 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s R S Enterprises **Appellant**
BXXIV-235, Ranjit Singh Nagar,
Kashmir Nagar, Gaushalla Road,
Ludhiana (Punjab)-141008

VERSUS

Commissioner of Customs, New Delhi (ICD TKD) **Respondent**
New Customs House, Near IGI Airport,
New Delhi-110 037

APPEARANCE:
Mr. N.K. Sharma, Advocate for the Appellant
Mr. Viswa Jeet Saharan, Authorised Representative for the Respondent

CORAM:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50125 / 2023

Date of Hearing: 09.02.2023
Date of Decision: 09.02.2023

ANIL CHOUDHARY:

The issue involved in this appeal is whether the appellant is entitled to interest on the refund of differential duty deposited for the purpose of clearance, being successful in appeal.

2. Brief facts are that the appellant had imported goods namely '100 PCT Polyester Spun Yarn, NE30/1' for knitting, by classifying the same under CTH 55094190 under 19 Bills of Entry during the period 06.06.2013 to 12.08.2013. The Assessing Authority at the time of assessment of the said Bills of Entry loaded the value and assessed

the Bills of Entry at enhanced value. The Appellant paid the duty as per assessed Bills of Entry, took deliveries and preferred appeal before the Commissioner (Appeals) who vide the Orders-in-Appeal no. CC(A)CUS/762-768/2013 dated 26.11.2013 and CC(A)CUS/769-780/2013 dated 27.12.2013 ordered that "grounds of enhancement cannot be gauged by mere perusal of the Bills of Entry, the Assessing Officer at ICD, Tughlakabad, New Delhi are directed to disclose the grounds of enhancement of value and issue a Speaking Order under the provisions of Section 17(5) of the Customs Act, 1962, after providing fair opportunity of being heard to the Appellant in the interest of Principles of Natural Justice and under the legal provisions of the Customs Act, 1962, as per the mandate of Section 17(5) of Customs Act, 1962. In the event of failure, the Appellant can seek consequential relief by way of refund as per law".

3. Thereafter, pursuant to remand, fresh order of adjudication was made under Section 17(5) of the Act which was challenged by the appellant before the Commissioner (Appeals), who vide Order-in-Appeal dated 06.07.2021 allowed the appeal on merits, setting aside the enhancement made by the Adjudicating Authority. Being successful in appeal, the appellant applied for refund of the differential duty deposited Rs. 26,84,405/- on 27.07.2021. Thereafter, the refund was granted vide OIO dated 16.11.2021. However, no interest was granted on the refund amount. As interest was not granted, the appellant again filed application for grant of interest on the refund amount on 23.12.2021. The said application was rejected vide OIO dated 15.03.2022, observing that appellant is not entitled to interest under Section 27A of the Act. Being aggrieved

the appellant preferred appeal before the Commissioner (Appeals) for grant of interest. Vide impugned Order-in-Appeal dated 27.06.2022 the Commissioner (Appeals) was pleased to reject the appeal observing that the appellant have filed the refund claim on 27.07.2021 and thereafter, the defect memo was issued in August 2021, in response to, the appellant filed the details and documents requisitioned during August, September till 03.11.2021. Accordingly, observing that the refund have been granted within 13 days from submission of the documents requisitioned, observed that he is not entitled to interest in terms of Section 27A of the Act. Section 27A of the Act, provides for grant of interest where refund is not granted within three months from the date of application for refund.

4. Being aggrieved the appellant is before this Tribunal. Learned Counsel for the appellant inter alia urges that admittedly, there is no consent given by the appellant to the enhancement made by the department in the value of the declared goods at the time of processing of the Bill of Entry. The appellant due to their business exigency, deposited the differential duty for getting the out of charge and delivery of the goods. However, the appellant-importer immediately lost their protest by filing appeal before the Commissioner (Appeals). The Commissioner (Appeals) finding the grievance and deposit of duty under protest, had set aside the enhancement made in the declared value and remanded the matter for proper adjudication by passing speaking order as required under Section 17(5) of the Act. The said order of Commissioner (Appeals) dated 26.11.13, have been accepted by the department. Thus, deposit of duty under protest is evident from the face of record. In

view of the admitted fact that the differential duty was paid under protest, the appellant is entitled to interest on refund from the date of deposit till the date of refund under Section 129EE of the Act. Accordingly, he prays for allowing the appeal with consequential benefits.

5. Learned AR for revenue relies on the impugned order. He further urges that deposit of differential duty without making a prior protest, amounts to acceptance or consent on the part of the appellant.

6. Having considered the rival contentions, I find that it is an accepted fact that appellant had deposited the differential duty as ordered by revenue, but have immediately filed the appeal and thus, the payment of differential duty was under protest, *ipso facto*. I further find that such claim of the appellant of payment under protest was accepted by the Commissioner (Appeals) who remanded the matter for re-adjudication under Section 17(5) of the Act, by order dated 26.11.2013. In this view of the matter, I hold that the appellant is entitled to grant of interest on the refund amount under Section 129EE of the Act. Further, in view of the ruling of the Hon'ble Supreme Court in the case of Sandvik Asia Ltd vs. Commissioner of Income Tax-I, 2007(8) STR 193 (S.C.), which have been followed by Division Bench of this Tribunal in Parle Agro Ltd., grant of interest @ 12% P.A. has been upheld by Hon'ble Punjab & Haryana High Court in the case of Riba Textiles Ltd. 2022(volume 3) TMI 693, wherein interest was granted @ 12% P.A. Accordingly, I allow the appeal and set aside the impugned order. I further direct that grant of interest

from the date of deposit till the date of refund @ 12% P.A. under Section 129EE of the Act, within 45 days of receipt of this order by the Adjudicating Authority. Appeal allowed.

(order dictated in the open Court)

Anil Choudhary
Member(Judicial)

Sb

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 51235 of 2022(SM)

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/IMP/ICD/PPG/1458/2021-22 dated 07.12.2021 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s D.D. International Pvt Ltd **Appellant**
Kutail Road, Kutail Karnal,
Haryana, 132037

VERSUS

Commissioner of Customs, New Delhi **Respondent**
Near IGI Airport,
New Delhi

APPEARANCE:
Mr. Anubhav Goel, Chartered Accountant for the Appellant
Mr. Gopi Raman, Authorised Representative for the Respondent

CORAM:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50127 / 2023

vDate of Hearing: 30.09.2022
Date of Decision: 15.02.2023

ANIL CHOUDHARY:

The issue in this appeal is whether the sanctioned amount of refund has been rightly credited to the Consumer Welfare Fund.

2. The brief facts are that the Appellant is engaged in processing and export of rice. They were issued– "Agri Infrastructure Incentive Scrips" (AIIS) under the Foreign Trade Policy 2009–14. The Appellant thereafter, imported rice polisher machine with spare parts and colour sorter machine, against these scrips vide the Bills of Entry during March 2012 to August 2013. By using the Agri Infrastructure Incentives Scrips the Appellant saved duty of Rs. 10,78,050/-.

3. That in August 2015, DRI Ludhiana Zonal Unit started investigation in the matter of aforementioned import of machinery by use of the incentive scrips. On the direction of DRI, the Appellant deposited Rs. 6,81,304/- vide demand draft dated 02.03.2017. Thereafter, show cause notice dated 09.03.2017 was issued alleging that the machinery goods were not qualified for import under the subject scrips. Show Cause Notice was adjudicated on contest and vide Order-in-Original dated 09.05.2018, the duty benefit availed at the time of import Rs. 10,78,050/- was confirmed along with equal penalty under Section 114A and Rs. 2 lakhs under Section 114AA.

4. Being aggrieved the Appellant preferred appeal before the Commissioner (Appeals), who vide order in appeal dated 22.01.2020 was pleased to allow the appeal and set aside the Order-in-Original. This Order-in-Appeal was accepted by revenue and no further appeal was filed. Thereafter, the Appellant filed refund claim on 03.02.2020 as follows: –

a) Rs. 6,81,304/- deposited on 6 March 2017 at investigation stage

b) Rs. 17,01,269/- deposited on 20 June 2018 during pendency of appeal

c) Rs. 23,82,573/- total amount of refund claim.

5. In response to deficiency memo dated 28.04.2020 and 2nd deficiency memo dated 18.08.2020, the Appellant filed reply and filed the documents as requisitioned. The Deputy Commissioner observed that the bank confirmed the deposits of Rs. 17,01,269/- and Rs. 6,81,304/-. Further, Appellant has submitted CA Certificate certifying that clause of unjust enrichment is not applicable. Vide

Order-in-original dated 31.12.2020, the refund claim was adjudicated on contest observing that the amount is found to be refundable but the Appellant have not satisfied as to the bar of unjust enrichment. Appellant have been unable to prove that the duty burden has not been passed on by them. Thus, amount was credited to Consumer Welfare Fund.

6. Being aggrieved the Appellant preferred appeal before the learned Commissioner (Appeals). It was urged that the machines imported being capital goods and not raw materials, no such machines are sold by way of trade, hence, there was no occasion to pass on the custom duty paid at the time of import. Further, the amount was paid under protest as they had deposited during investigation and also during pendency of the appeal. No unjust enrichment is attracted when the amount has been deposited after out of charge was given, more than 2 to 3 years after import. Further, as the Appellant have contested the demand, the payments were made under protest, *ipso facto*. Accordingly, on such payment/deposit the clause of unjust enrichment is not attracted they relied on the ruling in the case of Commissioner of Customs vs. High Tech Hospital Ltd [2018-361–E.L.T–355(Kerala)] and Commissioner of Customs vs. Venkateshwara Hospitals [2015–323–E.L.T–359 (Madras)].

7. The learned Commissioner (Appeals) observed that the amounts deposited by the Appellant have been claimed as expense in the profit and loss account, and have not been shown as amount recoverable in the books of account. Accordingly, he held the burden

of duty have been passed on indirectly and hence, the Appellant has not rebutted the doctrine of unjust enrichment. Accordingly, the appeal is rejected.

8. Being aggrieved the Appellant is before this Tribunal. The learned Counsel for the Appellant Mr. Anubhav Goel, Chartered Accountant urges that admittedly, the amounts under refund were deposited partly during investigation, after more than 2 years of import of the machinery and partly during pendency of the 1st appeal before the Commissioner (Appeals). In this view of the matter, the amounts had been deposited by way of pre-deposit. Admittedly, Appellant have not sold the imported machines nor cleared the same, hence, there is no way by which the Appellant could have passed on the burden of custom duty. Further, the clause of unjust enrichment is not attracted in case of a deposit during investigation or pre- deposit during appeal. Reliance is placed on the ruling in C.C.E vs Pricol Ltd [2015–320– E.L.T–703(Madras)] wherein, it has been held that the principle of unjust enrichment was not applicable to deposit made during investigation, the High Court relied upon the ruling of Hon'ble Supreme Court in the case of Union of India vs. Suvidhe Ltd. 1997 (94) E.L.T. A159 (S.C.). The Apex Court have held that unjust enrichment is not attracted where amount is deposited during investigation and pendency of appeal, as such deposits are under protest or in the nature of pre-deposit. Accordingly, he prayed for allowing the appeal with consequential benefits.

9. Learned AR for revenue Mr. Gopi Raman relies on the impugned order.

10. Having considered the rival contentions, I find that the order of court below is erroneous and in the teeth of the ruling of Hon'ble Supreme Court in the case of Suvidhe Ltd (supra). Admittedly, the amount under refund claim were deposited partly during investigation and partly during pendency of the 1st appeal. Further, it is evident that the Appellant did not agree with revenue and have contested the SCN as well as the adjudication order. The amount deposited are found to be deposited under protest, *ipso facto*. Further, these amounts are also in the nature of pre-deposit. Accordingly, I hold that the burden of unjust enrichment is not attracted.

11. In view of my findings and observations, I allow this appeal with consequential benefits. The Adjudicating Authority is directed to grant the refund with interest @ 12% per annum from the date of deposit till the date of refund, as held by a division bench of this Tribunal in the case of Parle Agro Ltd. The refund alongwith interest should be disbursed within a period of 45 days from the date of receipt of a copy of this order.

12. Appeal allowed.

(order pronounced in the open Court on .....)

Anil Choudhary
Member(Judicial)

Sb

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No.52180 of 2022 (SM)

[Arising out of Order-in-Appeal No.CC(A)CUS/D-I/Import/NCH/108/2021-22 dated 05.07.2021 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi].

M/s. Star Aerospace Industries **Appellant**
21, Pritam Road, Dehradun,
Uttarakhand-248 001.

VERSUS

Commissioner of Customs, **Respondent**
New Customs House, Near IGI Airport,
New Delhi- 110 037.

APPEARANCE:

Shri Sahil Mullick, Advocate for the appellants
Shri Mahesh Bhardwaj, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No.50208/2023

DATE OF HEARING/ DECISION:17.02.2023

ANIL CHOUDHARY:

The issue involved in this appeal is whether part of refund claim of SAD has been rightly rejected by the Court Below on the ground of limitation.

2. The brief facts are that the appellant imported goods for trading during the period Jan. 2017 to June, 2017, vide 25 bills of entry. At the time of import, the appellant also deposited 'Special Additional Duty' (SAD), which was deposited in lieu of sales tax. The SAD deposit is refundable under Notification No.102/2007-Cus, issued under Section 25 (1) of the Customs

Act; Subject to the conditions that the importer have resold the goods and have paid Sales Tax/VAT on the same and he annexes proof of such deposit of sales tax, as well as furnishes proof of deposit of SAD before the jurisdictional Customs Officer. The appellant with respect to all the 24 bills of entries, filed a common refund claim on 27.03.2018. The said refund claim was adjudicated vide order-in-original and part of claim amounting to Rs.6,71,816/- was allowed, and part of the refund amounting to Rs.13,90,777/- was rejected as time barred. For balance amount of Rs.18,057/-, the same was rejected on the ground being non-availability of the sales invoices. Being aggrieved, the appellant filed appeal before the Commissioner (Appeals) on the ground that non-grant of refund of SAD on resale, amounts to double taxation, which is not permissible under the law. No tax can be collected and retained without authority of law. The ld. Commissioner (Appeals) relying on the ruling of the Bombay High Court in the case of **CMS Info Systems Ltd. Vs. Union of India - 2017-TIOL-79-HC (Mum-Cus)** upheld the rejection on the ground of limitation. Being aggrieved, the appellant is before this Tribunal.

3. Ld. Counsel for the appellant, *inter alia,* urges that the issue is no longer res integra. It has been held by the Hon'ble Delhi High Court in the case of **Sony India Ltd. Vs. Commissioner – CUSAA 3/2014 & C.M. No.829/2014 dated 16.04.2014 reported at 2014 (304) ELT 660 (Delhi)** that limitation for the first time cannot be introduced by way of subordinate legislation or notification. The said ruling has been further followed by the Hon'ble Delhi High Court in the subsequent judgements in **Commissioner Vs. Gulati Sales Corporation – 2018 (360) ELT 277 (Delhi),** and also other judgements. The Hon'ble Delhi High Court have

distinguished the judgement of Hon'ble High Court of Bombay in the case of **CMS Info Systems Ltd. (supra).** Accordingly, he prays for allowing the appeal with consequential benefits.

4. Ld. Authorised Representative for the respondent/Department relies on the impugned order.

5. Having considered the rival contentions, I hold that period of limitation cannot start to run prior to accrual of right to claim refund, as has been held by the Hon'ble High Court in the case of **Sony India Ltd. (supra).** From the documents on record, I find that Save and Except one sale made on 23.01.2017, all other sales have been made from 14.03.2017 onwards. Accordingly, I hold that the appellant have filed the refund claim in proper time and the same is not barred by limitation.

6. In view of my aforesaid findings and observations, I allow this appeal and set aside the impugned order so far it has upheld the rejection of refund claim amounting to Rs.13,90,777/-.

7. The Adjudicating Authority is directed to grant the refund within a period of 45 days from the date of receipt of copy of this order along with interest as per rules. The appeal is allowed.

(Dictated and pronounced in open Court).

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No.52191 of 2022 (SM)

(Arising out of Order-in-Appeal No.CC(A)/CUSTOMS/D-II/IMP/ICD/TKD/2033/2021-2022 dated 17.03.2022 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

Keshar Deo Ramesh Kumar, **Appellant**
1078, Ist Floor, Gandhi Gali,
Fatehpuri, Delhi-110 006.

VERSUS

Commissioner of Customs (Import), **Respondent**
ICD, Tughlakabad,
New Delhi-110 020.

APPEARANCE:

Shri Jitin Singhal, Advocate for the appellant.
Shri Vishwajeet Saharan, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.50284/2023

DATE OF HEARING:20.01.2023
DATE OF DECISION:06.03.2023

ANIL CHOUDHARY:

The issue involved in this appeal relates to refund of Special Additional Duty (SAD) under Notification No.102 of 2007-Customs dated 14.09.2007, as amended by Notification No.93/2000-Customs.

2. The brief facts are that the appellant imported goods for trade and had claimed refund of Special Additional Duty (SAD), as allowable under Notification No.102/2007-Customs on 19.02.2019 The said refund claims was filed on 23.01.2019 and the same were adjudicated vide order-in-original dated 28.02.2019 as follows:-

Table

Bill of Entry No.	Dated	TR-6 Dated	SAD Paid	Amount of Refund claimed	Remarks
9997851	31.04.13	02.05.13	127139	127248	Time barred
2801530	24.07.13	27.07.13	132256	132396	Time barred
2586154	02.07.13	04.07.13	131258	131328	Time barred
2012793	01.05.13	06.05.13	122236	122349	Time barred
			512889	513321	

3. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), who vide impugned order-in-appeal dated 17.03.2022 was pleased to reject the appeal upholding the rejection of refund claims on the ground of limitation, following the ruling of Bombay High Court in the case of **M/s. CMS Info Systems Ltd. Vs. Union of India – 2017 (349) ELT 236 (Bombay)** holding that the refund claim had to be filed within a period of one year from the date of payment of SAD, in view of the amendment vide Notification no.93/2008-Customs.Being aggrieved, the appellant is before this Tribunal.

4. Ld. Counsel for the appellant, Shri Jitin Singhal, *inter alia,* urges that the issue is no longer res integra. The Hon'ble Delhi High (jurisdictional High Court) have held in the case of **Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi – 2014 (304) ELT 660 (Delhi)** under similar facts and circumstances, refund claim of SAD is not time barred as no such limitation is prescribed under the original notification no.102/2007-Customs. It was also held that period of limitation for the first time cannot be introduced through subordinate legislation or notification. It was also held that limitation cannot start to run prior to crystalisation of the right to claim

refund. The said ruling has been repeatedly followed in a catena of judgements including the case of **CC (Import) Vs. M/s. Gulati Sales Corporation – 2018 (360) ELT 277 (Delhi)** and also in the recent decision of Delhi High Court in **Premier Timber and Trading Pvt. Ltd. Vs. Principal Commissioner of Customs (Imports) - 2022 7 TMI 885 (Delhi),** wherein also, it was specifically held following the ruling of **Sony India Pvt. Ltd. (supra)** that in absence of the specific provision of Section 27, being made applicable in the said notification, time limit prescribed in Section 27 would not automatically be applicable to refund under the notification. Accordingly, he prays for allowing their appeal with consequential benefits.

5. Ld. Authorised Representative for the respondent relies on the impugned order.

6. Having considered the rival contentions, I find that the issue herein is squarely covered by the rulings of the Hon'ble Delhi High Courts cited above, in favour of appellant. Further, the ruling of the Hon'ble Bombay High Court in **M/s. CMS Info Systems Ltd. (supra)** has been distinguished by this Tribunal in **S.R. Traders - 2020-12-TMI-503,** which judgement has been upheld by the Hon'ble Delhi High Court reported at **2022-4-TMI-1167.**

7. In this view of the matter, I allow this appeal and set aside the impugned order. The Adjudicating Authority is directed to grant refund along with interest @ 12% p.a., starting from the end of 3 months from the date of filing of refund application. The appeal is allowed with consequential benefits. Such refund should be granted within a period of 60 days from the date of receipt of copy of this order.

[Order pronounced on 06.03.2023]

(Anil Choudhary)
Member (Judicial)

Ckp

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No.51970 of 2022 (SM)

(Arising out of Order-in-Appeal No.CC(A)CUS/D-II/ICD-TKD/IMP/2036/2021-2022 dated 22.03.2022 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

M/s. S.K. Rasayan Udyog Pvt. Limited **Appellant**
X-58, Okhla Industrial Area,
Phase-II, New Delhi-110 020.

VERSUS

Commissioner of Customs (Import), **Respondent**
ICD, Tughlakabad,
New Delhi-110 020.

APPEARANCE:

Shri Jitin Singhal, Advocate for the appellant.
Shri Vishwajeet Saharan, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.50283/2023

DATE OF HEARING:20.01.2023
DATE OF DECISION: 06.03.2023

ANIL CHOUDHARY:

The issue involved in this appeal relates to refund of Special Additional Duty (SAD) under Notification No.102 of 2007-Customs dated 14.09.2007, as amended by Notification No.93/2000-Customs.

2. The brief facts are that the appellant imported goods for trade vide 15 bills of entries during the period 9.05.2008 to 07.08.2008 and paid a total Special Additional Duty (SAD), which is in lieu of sales tax, of Rs.15,37,921. Subsequent to re-sale of the goods, the appellant applied for refund of SAD as allowable under Notification No.102/2007-Customs on 19.02.2019 The

said refund claim was adjudicated vide order-in-original dated 28.02.2019 and the same was rejected on the ground of limitation following the ruling of Hon'ble Bombay High Court in the case of **M/s. CMS Info Systems Ltd. Vs. Union of India – 2017 (349) ELT 236 (Bombay)** holding that the refund claim had to be filed within a period of one year from the date of payment of SAD, in view of the amendment vide Notification no.93/2008-Customs.

3. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), who vide impugned order-in-appeal dated 22.03.2022 was pleased to dismiss the appeal upholding the order-in-original. Being aggrieved, the appellant is before this Tribunal.

4. Ld. Counsel for the appellant, Shri Jitin Singhal, *inter alia,* urges that the issue is no longer *res integra*. The Hon'ble Delhi High (jurisdictional High Court) have held in the case of **Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi – 2014 (304) ELT 660 (Delhi)** under similar facts and circumstances, refund claim of SAD is not time barred as no such limitation is prescribed under the original notification no.102/2007-Customs. It was also held that period of limitation for the first time cannot be introduced through subordinate legislation or notification. It was also held that limitation cannot start to run prior to crystalisation of the right to claim refund. The said ruling has been repeatedly followed in a catena of judgements including the case of **CC (Import) Vs. M/s. Gulati Sales Corporation – 2018 (360) ELT 277 (Delhi)** and also in the recent decision of Delhi High Court in **Premier Timber and Trading Pvt. Ltd. Vs. Principal Commissioner of Customs (Imports) - 2022 7 TMI 885 (Delhi),** wherein also, it was specifically held following the ruling of **Sony**

India Pvt. Ltd. (supra), that in absence of the specific provision of Section 27, being made applicable in the said notification, time limit prescribed in Section 27 would not be automatically applicable to refund under the notification. Accordingly, he prays for allowing their appeal with consequential benefits.

5. Ld. Authorised Representative for the respondent relies on the impugned order.

6. Having considered the rival contentions, I find that the issue herein is squarely covered by the rulings of the Hon'ble Delhi High Courts cited above, in favour of appellant. Further, the ruling of the Hon'ble Bombay High Court in **M/s. CMS Info Systems Ltd. (supra)** has been distinguished by this Tribunal in **S.R. Traders - 2020-12-TMI-503,** which judgement has been upheld by the Hon'ble Delhi High Court reported at **2022-4-TMI-1167.**

7. In this view of the matter, I allow this appeal and set aside the impugned order. The Adjudicating Authority is directed to grant refund along with interest @ 12% p.a., starting from the end of 3 months from the date of filing of refund application. The appeal is allowed with consequential benefits. Such refund should be granted within a period of 60 days from the date of receipt of copy of this order.

[Order pronounced on 06.03.2023]

(Anil Choudhary)
Member (Judicial)

Ckp

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No.51330 of 2023 (SM)

(Arising out of Order-in-Appeal No.CC(A)Custom/D-II/ICD/TKD/1257/2022-23 dated 20.12.2022 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

M/s Indochem & Polymers **Appellant**
X-58, Okhla Industrial Area,
Phase-II, New Delhi-110 020.

VERSUS

Commissioner, Customs (Import), New Delhi (ICD TKD) **Respondent**
ICD, Tughlakabad,
New Delhi-110 020.

APPEARANCE:
Shri Jitin Singhal, Advocate for the appellant.
Ms. Tamanna Alam, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50577/2023

DATE OF HEARING: 17.04.2023
DATE OF DECISION: 17.04.2023

ANIL CHOUDHARY:

The issue involved in this appeal relates to refund of Special Additional Duty (SAD) under Notification No.102 of 2007-Customs dated 14.09.2007, as amended by Notification No.93/2000-Customs.

2. The brief facts are that the appellant imported goods for trade vide 3 bills of entries during the period 06.08.2008 to 30.08.2008 and paid a total Special Additional Duty (SAD) during 20.08.2008 to 03.10.2008, which is in lieu of sales tax, of Rs.3,25,759/-. Subsequent

to re-sale of the goods, the appellant applied for refund of SAD as allowable under Notification No.102/2007-Customs, on 15.06.2018 The said refund claim was adjudicated vide order-in-original dated 25.02.2019 and the same was rejected on the ground of limitation following the ruling of Hon'ble Bombay High Court in the case of **M/s. CMS Info Systems Ltd. Vs. Union of India – 2017 (349) ELT 236 (Bombay)** holding that the refund claim had to be filed within a period of one year from the date of payment of SAD, in view of the amendment vide Notification no.93/2008-Customs.

3. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), who vide impugned order-in-appeal dated 22.03.2022 was pleased to dismiss the appeal, upholding the order-in-original. Being aggrieved, the appellant is before this Tribunal.

4. Ld. Counsel for the appellant, Shri Jitin Singhal, *inter alia,* urges that the issue is no longer *res integra*. The Hon'ble Delhi High (jurisdictional High Court) have held in the case of **Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi – 2014 (304) ELT 660 (Delhi)** under similar facts and circumstances, refund claim of SAD is not time barred as no such limitation is prescribed under the original notification no.102/2007-Customs. It was also held that period of limitation for the first time, cannot be introduced through subordinate legislation or notification. It was also held that limitation cannot start to run prior to crystalisation of the right to claim refund. The said ruling has been repeatedly followed in a catena of judgements including the case of **CC (Import) Vs. M/s. Gulati Sales Corporation – 2018 (360) ELT 277 (Delhi)** and also in the recent decision of Delhi High

Court in **Premier Timber and Trading Pvt. Ltd. Vs. Principal Commissioner of Customs (Imports) - 2022 7 TMI 885 (Delhi),** wherein also, it was specifically held following the ruling in **Sony India Pvt. Ltd. (supra),** that in absence of the specific provision of Section 27, being made applicable in the said notification, time limit prescribed in Section 27 would not be automatically applicable to refund under Notification No. 102/2007-Cus. Accordingly, he prays for allowing their appeal with consequential benefits.

5. Ld. Authorised Representative for the respondent relies on the impugned order.

6. Having considered the rival contentions, I find that the issue herein is squarely covered by the rulings of the Hon'ble Delhi High Courts cited above, in favour of appellant. Further, the ruling of the Hon'ble Bombay High Court in **M/s. CMS Info Systems Ltd. (supra)** has been distinguished by this Tribunal in **S.R. Traders - 2020-12-TMI-503,** which judgement has been upheld by the Hon'ble Delhi High Court reported at **2022-4-TMI-1167.**

7. In this view of the matter, I allow this appeal and set aside the impugned order. The Adjudicating Authority is directed to grant refund along with interest @ 12% p.a., starting from the end of 3 months from the date of filing of refund application. The appeal is allowed with consequential benefits. Such refund should be granted within a period of 60 days from the date of receipt of copy of this order.

(order dictated in the open court)

(Anil Choudhary)
Member (Judicial)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 50460 of 2023

(Arising out of Order-in-Appeal No. CC(A)CUS/D-II/ICD PPG/996/2022-23 dated 11.10.2022 passed by the Commissioner of Customs (Appeals), New Delhi)

M/s FJM Cylinders Pvt Ltd **Appellant**
Plot No. 360-361, Sector 3
Phase-IV, Bawal,
Rewari, Haryana

VERSUS

Commissioner, Customs-New Delhi **Respondent**
New Customs House, Near I.G.I Airport,
New Delhi

APPEARANCE:
Mr. Rohan Pahwa, Advocate for the appellant.
Mr. Gopi Raman, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50739/2023

DATE OF HEARING: 25.05.2023
DATE OF DECISION: 25.05.2023

ANIL CHOUDHARY:

Heard the parties.

2. The issue in this appeal is whether the claim of refund of Anti Dumping Duty, filed under Section 27(1) (b) of the Act has been rightly rejected.

3. Brief facts are that the Appellant is engaged in the manufacturing of High Pressure Gas Cylinders. They have filed a refund claim of Rs. 40,21,173/- for Anti Dumping Duty, paid by M/s Neel Metal Products Ltd., Pace City - II, Sector - 36, Mohammadpur Jharsa, Near

Khandsa Village, Gurugram, Haryana (Importer) while importing "Seamless Steel Tubes" under Bills of Entry No. 5936233 dated 11.04.2018 & No. 5995925 dated 16.04.2018. The Appellant had purchased the impugned goods (Seamless Steel Tubes) from M/s Neel Metal Products Ltd. and their purchase value was inclusive of Anti Dumping Duty paid by Ms Neel Products Ltd. The Refund claim was filed on the ground that Anti Dumping Duty was not leviable if the imported goods were used for manufacture of gas cylinders, by a producer(s) approved by the Chief Controller of Explosives, Petroleum & Explosives Safety Organisation, Government of India.

4. The Adjudicating Authority observed that the Country of Origin of the impugned goods was China and the Anti Dumping Duty was levied in terms of Notification No. 07/2017-Customs (ADD dated 17.02.2017, and that the assessment of the subject Bills of Entry were final and that the party had not filed any appeal before the Commissioner (Appeal) against the assessment of impugned Bills of Entry. Based on the aforesaid findings, refund claim of the Appellant was rejected vide the Order-in-Original.

5. Being aggrieved the appellant preferred appeal before the Commissioner (Appeals) inter alia on the grounds that under Exclusion Clause No. (VI) of Notification No. 7/2017-Cus (ADD) dated 17.02.2017 it is provided that where high pressure seamless steel/ pipe tube are used to manufacture gas cylinders, by producers approved by the Chief Controller of Explosives, Petroleum and Explosive Safety Organisation, Government of India, are excluded from the levy of Anti Dumping Duty.

6. In the facts of the present case, it is admitted fact that the goods- seamless steel tubes were imported by Neel Metal Products Ltd, who paid Anti Dumping Duty at the time of import, imported vide two separate bills of entry dated 11.04.2018 and 16.04.2018 totalling Rs. 40,21,173/- Admittedly, appellant purchase the same said goods from Neel Metal vide invoice No. 1810069009 dated 31.07.2018. Admittedly, appellant is a manufacture of high pressure gas cylinders wherein, the seamless tubes are the inputs. Admittedly, appellant is duly authorised by the Chief Controller of Explosives. Admittedly, appellant filed the refund claim within four months from the date of purchase, wherein such claim was filed on 12.11.2018.

7. After filing of the refund claim deficiency memo dated 08.01.2019 was issued for the following defects:-

(i) importer is Neel Metal Products but refund claim have been filed by FJM Cylinders Pvt Ltd (appellant)

(ii) Original (importer) copy of bill of entry not submitted.

(iii) Certificate of Chartered Accountant with respect to unjust enrichment not submitted.

(iv) To clarify, if the importer is approved by Chief Controller Explosives.

8. In response, the appellant appeared before the concerned deputy Commissioner and filed the required details. Thereafter, the refund was adjudicated vide OIO dated 05.03.2019 rejecting the claim on the finding that the bill of entry was assessed on final basis and thereafter no appeal was filed, hence, the same attained finality.

9. Being aggrieved the appellant preferred appeal before the Commissioner (Appeals) who was also pleased to uphold the order of rejection of refund.

10. Being aggrieved the appellant is before this Tribunal.

11. The learned Counsel for the appellant states that there is no dispute on the factual matter, the issue before this Tribunal is-whether rejection of refund claim by the purchaser/ manufacturer of goods from the importer, who is entitled to exemption from Anti Dumping Duty under Notification No. 7/2017-Cus (ADD), refund have been rightly rejected. It is further urged that such rejection of refund is against the spirit of law, particularly Section 27(1) (b) of the Act. Learned Counsel further urges that the court below have mis-directed itself and have recorded irrational and erroneous findings for rejecting the refund claim. The scope of enquiry in the matter was, whether the goods in question have borne Anti Dumping Duty, and secondly, whether the appellant have borne such duty on purchase of the goods from the importer and thirdly, whether appellant have passed test of unjust enrichment and finally whether appellant is entitled to refund under Notification No. 07/2017-Cus., read with Section 27(1)(b).

12. Learned Counsel states that there is no findings as regard the aforementioned premises and the refund have been rejected for reason unknown to law, and in total disregard to the provisions of Section 27 (1) (b) of the Act. Accordingly, he prays for allowing the appeal with consequential benefits.

13. Learned AR for revenue relies on the impugned order.

14. Having considered the rival contentions, I am satisfied that the rejection of refund is on the face of it illegal and against the provisions of law particularly, Section 27 (1) (b) of the Act. Section 27 (1) (b) provides for refund to a person, when such person has borne the duty or interest, which was not legally chargeable from him under the scheme of the Act r/w Rules and notification thereunder. Admittedly, in the facts of the present case, appellant being an authorised manufacturer is entitled to exemption from Anti Dumping Duty on the seamless tubes purchased from the importer (Neel Metal Products) which have borne Anti Dumping Duty at the stage of import. Accordingly, I hold that the appellant is entitled to refund of the amount of Anti Dumping Duty Of Rs. 40,21,173/- and the impugned order is set aside.

15. I further direct the adjudicating authority to disburse the said amount of Anti Dumping Duty within a period of 45 days from the date of receipt of this orders alongwith interest @ 6% p.a. starting from the end of 3 months from the date of application, till the date of disbursement.

16. Appeal allowed.

(order dictated in the open court)

(Anil Choudhary)
Member (Judicial)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 51597 of 2022

(Arising out of Order-in-Appeal No. CC(A) CUS/D-II/Prev./379/22-23 dated 24/26.05.2022 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi).

M/s. Sri Sai Imports **Appellant**
1190, A/A, Vasant Kunj
New Delhi-110070.

VERSUS

Commissioner of Customs (Prev.) **Respondent**
New Customs House, Near IGI Airport
New Delhi-110037.

APPEARANCE:

Dr. J. Arthur Prem, Consultant for the appellants
Sh. Vishwa Jeet Saharan, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No.50110/2023

DATE OF HEARING/ DECISION: 24.01.2023

ANIL CHOUDHARY:

Heard the parties.

2. The issue involved in this appeal is whether the refund claim of the appellant has been rightly rejected on the ground of limitation.

3. Admittedly, such amount was deposited at the time of investigation, when there was no adjudicated dues.

4. The admitted facts are that the appellant is an importer of Ball Valves/Check Valves etc. The dispute was raised by the Commissionerate of Customs (Preventive), Delhi with regard to undervaluation of the goods. Accordingly, the appellant was obliged

to make a deposit during investigation stage of Rs.23,58,786/- towards differential duty liability. Thereafter, deposited an amount of Rs.59,72,165/-, which is prior to the issue of show cause notice dated 6.1.2012. Thereafter, the show cause notice was adjudicated on contest vide order-in-original dated 29.10.2012, and the differential duty was confirmed and appropriated. Being aggrieved, the appellant carried the matter in appeal before this Tribunal and vide Final Order No.A/87044/2019 dated 23.09.2019, this Tribunal allowed the appeal setting aside the order-in-original. Thereafter, the appellant filed a refund claim of Rs.13,08,338/- (balance after adjustment) on 10.12.2020 before the Dy. Commissioner of Customs (Refund), Nhava Sheva, Maharashra. The said claim was returned to the appellant with the direction to file the claim where the payment was made. The Asstt. Commissioner of Customs (Refund), Customs Preventive, New Delhi adjudicated the refund claim and rejected the same on ground of limitation. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), who was pleased to uphold the rejection of refund claim relying on the ruling of this Tribunal in the case of **M/s. S.S. Dyes & Chemicals – 2016 (331) ELT 477 (Tribunal-Mumbai).**

5. Being aggrieved, the appellant is before this Tribunal.

6. Ld. Counsel for the appellant, *inter alia,* urges that the present refund claim is under Section 129 EE of the Customs Act, as it was a refund of amount paid during investigation, which is in the nature of the pre-deposit. Further, when the appeal was decided by this Tribunal in September, 2019, thereafter, due to disturbances due to COVID and in view of the general condonation granted by the Hon’ble

Supreme Court, the rejection of the refund claim on the ground of limitation is bad. He further urges that as the appellant was obliged to make pre-deposit during investigation stage, and they were contesting the demand in appeal. Thus, on the very facts and circumstances, the payment was made under protest. Accordingly, he prays for allowing their appeal with consequential benefits.

7. Ld. Authorised Representative for the respondent relies on the impugned order. Further, ld. Authorised Representative states that there is nothing on record that the payment made by the assessee during investigation stage was under protest. He further states that Section 129 EE applies to the deposit made during appellate stage.

8. Having considered the rival contentions, I find that even deposit made during investigation is available for adjustment from the amount of pre-deposit under Section 129 E. Further, in the facts of the present case, I find that the appellant –assessee was contesting the demand right from the stage of the investigation and had further carried in appeal. Thus, such deposit amounts to the deposit made under protest, *ipso facto*. In this view of the matter, I hold that no limitation is applicable in the facts and circumstances of the case. I further find that the appellant is entitled to refund under the provisions of Section 129EE of the Act. Accordingly, the appeal is allowed. The Adjudicating Authority is directed to grant refund with interest as allowable under Section 129EE of the Act. Appeal allowed.

(Dictated and pronounced in open Court).

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

Customs Appeal No. 51655 of 2021

(Arising out of Order-in-Original No. CC(A)/CUSTOMS/D-II/IMP/ICD/TKD/161-163/2021-22 dated 07.05.2021 passed by Commissioner of Customs (Appeals), New Customs house, Near IGI Airport, New Delhi].

Suzuki Motorcycle India Pvt. Ltd. **...Appellant**
2nd Floor, Nelson Mandela Road,
Vasant Kunj,
New Delhi - 110070

VERSUS

Commissioner of Customs **...Respondent**
ICD (Import), Tughlakabad,
New Delhi

WITH

Customs Appeal No. 51656 of 2021

(Arising out of Order-in-Original No. CC(A)/CUSTOMS/D-II/IMP/ICD/TKD/161-163/2021-22 dated 07.05.2021 passed by Commissioner of Customs (Appeals), New Customs house, Near IGI Airport, New Delhi].

Suzuki Motorcycle India Pvt. Ltd. **...Appellant**
2nd Floor, Nelson Mandela Road,
Vasant Kunj,
New Delhi - 110070

VERSUS

Commissioner of Customs **...Respondent**
ICD (Import), Tughlakabad,
New Delhi

AND

Customs Appeal No. 51657 of 2021

(Arising out of Order-in-Original No. CC(A)/CUSTOMS/D-II/IMP/ICD/TKD/161-163/2021-22 dated 07.05.2021 passed by Commissioner of Customs (Appeals), New Customs house, Near IGI Airport, New Delhi].

Suzuki Motorcycle India Pvt. Ltd. **...Appellant**
2nd Floor, Nelson Mandela Road,
Vasant Kunj,
New Delhi - 110070

VERSUS

Commissioner of Customs **...Respondent**
ICD (Import), Tughlakabad,
New Delhi

APPEARANCE:

Ms. Jyoti Pal and Shri Amitabh Amrit, Advocates for the Appellant
Shri M. R. Dhania, Authorised Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 18.04.2024
Date of Decision: 25.04.2024

FINAL ORDER No. 55628-55630/2024

JUSTICE DILIP GUPTA:

The issue that arises for consideration in all these three appeals is whether the period of limitation of one year would be applicable to claims filed for refund of Additional Duty of Customs[1] in terms of Notification No. 102/2007-Cus dated 14.09.2007 [2], as amended by Notification No. 93/2008-Cus dated 01.08.2008[3].

2. Suzuki Motorcycle India Pvt. Ltd.[4] is engaged in the import and sale of motorcycles in India. During the period April 2014, March 2015 and December 2015, the appellant imported various models of motorcycles through three Bills of Entry. The appellant paid Additional Duty under section 3(5) of the Customs Tariff Act, 1975 [5] that provides that if the Central Government is satisfied that it is necessary in the public interest to levy on any imported article such Additional Duty as would counter- balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazzette, direct that such imported article

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1. **Additional Duty**
2. **the Notification dated 14.09.2007**
3. **the Notification dated 01.08.2008**
4. **the appellant**
5. **the Tariff Act**

shall, in addition, be liable to Additional Duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.

3. The notification dated 14.09.2007 issued under section 25(1) of the Customs Act, 1962 [6] exempts goods falling within the First Schedule of the Tariff Act, when imported into India for subsequent sale from the whole of the Additional Duty of customs leviable under section 3(5) of the Tariff Act. However, the exemption contained in the notification shall be given effect to upon fulfillment of certain conditions laid down in paragraph 2 of the notification. The said notification is reproduced below:-

Notification dated 14 September,2007

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

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6. the Customs Act

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents alongwith the refund claim:

(i) document evidencing payment of the said additional duty;

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled."

4. The aforesaid notification dated 14.09.2007 was amended on 01.08.2008. Paragraph 2(c) was substituted by providing that the importer shall file a claim for refund of the said Additional Duty paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of the said Additional Duty. The said notification dated 01.08.2008 is reproduced below:-

Notification dated 1 August, 2008

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 102/2007-Customs, dated the 14th September, 2007 which was published the Gazette of India, Extraordinary, vide number G.S.R.

> 598(E), dated the 14th September, 2007,namely, In the said notification, paragraph 2, for sub-paragraph (c), the following shall be substituted, (c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of the said additional duty of customs."

5. The appellant filed three refund applications on 09.04.2018 seeking refund of the Additional Duty amounting to Rs. 28,78,347/- (Rs. 11,73,660/- + Rs. 6,76,076/- + Rs. 10,28,611/-) in respect of the aforesaid three Bills of Entry in terms of the Notification dated 14.09.2007 as amended by Notification dated 01.04.2008.

6. The Assistant Commissioner, by three separate orders, rejected these three refund applications. The reason given by the Assistant Commissioner for rejecting the refund applications is that the refund claims were not filed within one year from the date of payment of duty as required under the Notification. The findings recorded in one such order dated 11.07.2018 are reproduced below:

> "3. I have carefully gone through the facts of the refund claim and the provisions of the Customs Notification No. 102/2007 -Cus in the light of the procedure laid down by the Govt. Of India in this regard.
>
> 4. I find that as per para 2(c) of Notification No.102/2007 dated 14.09.2007 as amended vide Notification No. 93/2008-Customs dated 01.08.2008 "the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of the said additional duty of customs". **On scrutiny of the documents it is found that the party has filed the refund claim in respect of Bill of Entry No. 5234867 dt. 17.04.2014 against which payment of duty was made on 19.04.14 and the refund**

claim was filed on 19.04.2018. Thus refund claim has not been filed within one year from the date of payment of duty as laid down in the said notification and thus Time Barred. Therefore, on the basis of available documents, it is proved that the party has failed to fulfilled the requisite condition mentioned in the said notification.

5. The party has also not submitted the original copy of Bill of entry (duplicate importer copy)."

(emphasis supplied)

7. Feeling aggrieved, the appellant file three separate appeals before the Commissioner (Appeals) who by a common order dated 07.05.2021 dismissed all the three appeals and the relevant findings are reproduced below:

"5.3 **It is noted that the appellant is relying upon case of M/s. Sony India and subsequent cases which followed the ratio of this judgment. However, case of M/s. Sony India (supra) related to the period prior to amendment of Notification no. 102/2007- Cus. by Notification no. 93/2008 – Cus and in the said judgment, Hon'ble High Court examined the retrospective applicability of the amending notification. Hence, the case of M/s. Sony India is not applicable to the present case. In the present case, imports were made in 2014 and 2015 which is much beyond amendment in parent notification.** At the time of import as well as the time of filing refund application, the parent notification governing refund (.e. 102/2007- Cus) had the clause that the refund claim must be filed within one year from the date of payment of duty. **There is no dispute that rejected claims were filed beyond one year from date of payment of duty. Hence, the rejection of refund claim is proper and legal.**

5.4. **Hon'ble Mumbai High Court in case of CMS Info System Ltd. (2017 (349) ELT 236 (Bom.)]** and Hon'ble Tribunal in case of RM. Impex Pvt. Ltd. [2020-TIOL- 1271- CESTAT- Del.], J. G. Impex [Customs Appeal No. 52393 of 2018 decided on 25.10.2018] and CC, Hyderabad Customs Vs. Surya

> Telecom Pvt. Ltd. (CESTAT- Hyderabad in Appeal No. CI31110 & 31111/2017 decided on 02.07.2018) **had distinguished case of M/s Sony India and held that time limit of one year applies to SAD refunds after amendment Notification No. 93/2008- Cus.**
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> 5.5 **There is no indication in the said Notification to condone any delay or that such period can be extended by the competent authority on sufficient cause being shown.** In this regard, I rely on the judgment by Hon'ble High Court of Gujarat in the case of Indian Oil Corporation Vs. UOI [2016 (342) ELT 48 (Guj.)], wherein it has been held that limitation prescribed for refund cannot be extended. Thus, the said condition of Notification can not be considered a mere procedural one and thus non-following of said condition can not be considered a mere procedural lapse. Therefore, the case laws cited by the appellant in this regard are not applicable."
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> **(emphasis supplied)**

8. The Commissioner (Appeals) held that since the refund claims were filed beyond one year from the date of payment of duty they were rightly rejected. The judgment of the Delhi High Court in **Sony India Pvt. Ltd.** vs. **Commissioner of Customs, New Delhi**[7] was found to be not applicable as the period involved was prior to amendment made in the Notification dated 14.09.2007 on 01.08.2008, by which the limitation of one year was introduced.

9. Ms. Jyoti Pal, learned counsel for the appellant assisted by Shri Amitabh Amrit, made the following submissions:

(i) The refund applications filed by the appellant cannot be considered as time barred as the time limit prescribed under the Notification dated 14.09.2007, as amended by Notification dated 01.08.2008 has

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7. 2014 (304) E.L.T. 660 (Del.)

been read down by the Delhi High Court in **Sony India**;

(ii) The impugned order, instead of following the judgment of the jurisdictional Delhi High Court in **Sony India,** has relied upon the judgment of the Bombay High Court in **CMS Info Systems Ltd.** vs. **Union of India**[8] which has taken a view contrary to the view taken by the Delhi High Court. It is a well settled principle that when a jurisdictional High Court has expressed a view on an issue and there are conflicting views taken by the other High Courts, the Tribunal should follow the decision of the jurisdictional High Court;

(iii) Reliance has also been placed by the learned counsel for the appellant on the decision of the Principal Bench of the Tribunal in **Commissioner of Customs – New Delhi (ICD TKD)** vs. **Radial Rubber Industries**[9], which decision was upheld by the Delhi High Court in **Commissioner of Customs New Delhi** vs. **Radial Rubber Industries**[10]; and

(iv) Refund cannot be denied for a mere procedural lapse and the appellant is entitled to interest under section 27A of the Customs Act. In this connection, reliance has been placed on the decision of the Supreme Court in **Mangalore Chemicals & Fertilizers Ltd.** vs. **Deputy Commissioner**[11].

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8. 2017 (349) E.L.T. 236 (Bom.)
9. 2020 (2) TMI 1212 – Cestat New Delhi
10. CUSAA 43/2021 decided on 19.04.2022
11. 1991 (55) E.L.T. 437 (S.C.)

10. Shri M. R. Dhania, learned authorised representative appearing for the department, however, supported the impugned order and submitted that the decision of the Delhi High Court in **Sony India** is distinguishable as it pertains to a period that was before the amendment was made on 01.08.2008 in the Notification dated 14.09.2007. In the present case, the imports were made after the amendment was made by Notification dated 01.08.2008 and, therefore, the condition requiring refund claims to be filed within one year from the date of payment of duty would be applicable. Learned authorised representative also submitted that in terms of section 27 of the Customs Act, the refund application was required to be filed within one year from the date of payment of duty. Learned authorised representative also placed reliance upon the decision of the Mumbai Tribunal in **CMS Info Systems** as also the decisions of the Principal Bench of the Tribunal in **Commissioner of Customs (Import)** vs. **M/s. R.M. Impex**[12] and **C. C. – New Delhi (ICD TKD) (Import)** vs. **JG Impex Pvt. Ltd**[13].

11. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

12. As noticed above, the sole question that arises for consideration in these three appeals is as to whether the period of limitation of one year stipulated in the Notification dated 14.09.2007, as amended by the Notification dated 01.08.2008, would be applicable in matters relating to refund claims of Additional Duty. The Assistant Commissioner has rejected the refund claims for the reason that they

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12. 2019 (5) TMI 1239 – CESTAT New Delhi
13. 2018 (10) TMI 1483 – CESTAT New Delhi

were filed after a period of one year from the date of payment of duty and thereby not in terms of the conditions stipulated in the aforesaid two Notifications. The Commissioner (Appeals) has upheld the order passed by the Assistant Commissioner holding that the condition stipulated the Notification, which cannot be considered to be merely procedural, were not complied and the judgment of the Delhi High Court in **Sony India** has been distinguished for the reason that it was a case relating to the period prior to the amendment made in the Notification dated 14.09.2007 by Notification dated 01.08.2008 whereas the present matters relate to imports made after the amendment was made by Notification dated 01.08.2008 which provides that the claim for refund of Additional Duty has to be filed before the expiry of one year from the date of payment of the Additional Duty.

13. At this stage it would be appropriate to take note of the provisions of section 3(8) of the Tariff Act as it stood at the relevant time and it is as follow:-

> "3(8) The provisions of the Customs Act, 1962 (52 0f 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."

14. Section 27 of the Customs Act deals with claims for refund of duty and the relevant portion is as follows:-

> "**27. Claim for refund of duty. –**
>
> (1) Any person claiming refund of any duty or interest,-
>
> (a) paid by him; or
>
> (b) borne by him,

> may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:"

15. The provisions of the Notification dated 14.09.2007 as amended on 01.08.2008 and the aforesaid provisions of the Tariff Act and the Customs Act were examined by the Delhi High Court in **Sony India**. It was held that since Additional Duty levied under section 3(5) of the Tariff Act is refundable only on a subsequent sale, no limitation can possibly be imposed for filing a refund claim from the date of payment of such Additional Duty. The High Court further observed that neither section 27 of the Customs Act nor the provisions of the amended Notification dated 01.08.2008 can impose a limitation period and such limitation can only be introduced by legislation. The High Court also noticed that the expression "so far as may be" in section 3(8) of the Tariff Act was significant and this would mean that the provisions of Customs Act would be applicable only "to the extent possible". Thus, the High Court concluded that the period of limitation contemplated under section 27 of the Customs Act would not be applicable to a refund made under the Notification dated 14.09.2007 as amended by Notification dated 01.08.2008, more particularly when the customs authority also understood that section 27(1) of the Customs Act would not be applicable. The relevant portions of the judgment of the Delhi High Court are reproduced below:-

> "10. **That the importer is required to produce invoices of sale, documents evidencing payment of sales tax/VAT etc. clearly indicates that the benefit of this notification can be availed only once sale of the imported goods is complete.** The exemption is clear in its intent to allow a refund of the

SADC paid under Section 3(5) of the CTA because the importer has suffered the incidence of SADC (meant to counter-balance sales tax/VAT leviable on a like article in India) on import, and then of actual sales/VAT on sale of these imported goods. In this light, it is necessary to examine the CUSAA 3/2014 applicability of any limitation period, whether under the amending notification or under section 27 of the Customs Act.

11. xxxxxxxxx

12. The provisions of the Customs Act on the rules and mechanism for refund is incorporated by reference into the CTA only "so far as may be" applicable **Since SADC levied under section 3(5) is refundable only on subsequent sale (i.e. the point at which sales tax/VAT liability arises), it is the opinion of this Court that no limitation period can possibly be imposed for advancing a refund claim. This is because the right to claim refund only accrues to the importer once sale, an entirely market driven event, is complete. Given the vagaries of the market, the importer has limited control over when the sale is complete. To uphold a limitation period starting from the date of payment of duty, as prescribed in the amending notification, would amount to allowing the commencement of a limitation period for refund claims before the right of refund has even accrued. To this extent, this Court is of the opinion that the refund provisions under the Customs Act are inapplicable to the duties levied under Section 3(5) of the CTA. Thus, neither section 27 nor a notification under section 25(1), CUSAA 3/2014 Page 8 such as the amending notification no. 93/2008-Cus dated 1.08.2008 can be used to impose a limitation period on the right to claim refund of additional duty of customs paid under Section 3(5). If a limitation period is sought to be imposed in respect of refund claims in a case where the importer advances a refund of SADC paid owing to having incurred sales tax/VAT liability on subsequent sale of goods, it must be introduced by legislation, given the expropriatory consequences of such a limitation period.**

14. **The expression "so far as may be" in this context, under Section 27 is significant as well as instructive.** The levy under CUSAA 3/2014 section 3 (5) is conditional upon the Central Government's opinion that it is necessary to "counterbalance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article.."; the rate of duty - where more than one levy exists, would be the highest of such rates and the terms of imposition of SADC would be spelt out in the notification. In this case, the regime existing before the notification of 2008 did not specify any period of limitation - and perhaps advisedly so. Some customs authorities apparently started applying section 27, drawing inspiration from section 3(8) which led to confusion. In Notification No.102/2007-Customs dated 14.09.2007 there was no period of limitation; by Circular No.6/2008-Customs, an amending notification providing for one year period from the date of payment of the additional duty of customs was issued, through Notification No.93/2008-Customs dated 1.8.2008, amending Para 2(c) of the 2007 Notification. The net effect of these was that a one year period was insisted upon for refund applications. That period was calculable from date of payment of duty (SAD). **Dr Partap Singh & Anr v. Director of Enforcement, Foreign Exchange Regulation Act & Ors., 1985 (3) SCC 72 is an authority for the proposition that the use of the phrase "so far as may be" in a later statute, with reference to provisions in an earlier statute, means that the provisions of the referred (earlier) statue are to be followed "to the extent possible.**

15. xxxxxxx

16. **Section 27(1) of the Customs Act prescribes a time limit of expiry of "one year, from the date of payment of such duty or interest...".** Section 27(1B) lists out three contingencies when the one year limit applies with modified effect. That provision has the effect of shifting the date from which the refund claim is to be reckoned. **All that can be inferred from the term "so far as may be" would be that specific provisions relating**

to the mechanism applicable for refund, in the Customs Act, applied; not the period of limitation. The Customs authorities had never understood Section 27(1) as to mean that a one year period of limitation was applicable. Audioplus (supra) and United Chemicals Industries (supra) are both testimony to this. It is the circulars/notifications of 2008 and No. 16/2009 which for the first time harped on the one year period of limitation. Circular No 6/2008, dated 28-4-2008 issued by the C.B.E. & C. stated that:

"4. Time-Limit:

"4.1 In the Notification No. 102/2007-Cus., dated 14-9-2007, no specific time-limit has been prescribed for filing a refund application. Under the circumstances, a doubt has been expressed that whether the normal time-limit of six months prescribed in Section 27 of the Customs Act, would apply. In the absence of specific provision of Section 27 being made applicable in the said notification, the time-limit prescribed in this section would not be automatically applicable to refunds under the notification. Further, it was also represented that the goods imported may have to be dispatched for sale to different parts of the country and that the importer may find it difficult to dispose of the imported goods and complete the requisite documentation within the normal period of six months. Taking into account various factors, it has been decided to permit importers to file claims under the above exemption upto a period of one year from the date of payment of duty. Necessary change in the notification is being made so as to incorporate a specific provision prescribing maximum time-limit of one year from the date of payment of duty, within which the refund could be filed by any person. It is also clarified that the importers would be entitled to refund of duties only in respect of quantities for which the prescribed documents are made available and the claims submitted within the maximum prescribed time of one year. Unsold stocks would not be eligible for refunds."

Notification No. 93/2008, dated 1-8-2008 was issued prescribing the period of limitation as one year from the date of payment of additional duty of Customs.

17. **Plainly, therefore, Section 27 was understood as not applying to SAD cases, even though it was in the statute book for many years.** Yet, with the introduction of the circular and then the notification (No. 93), the Customs authorities started insisting that such limitation period which was prescribed with effect from 01.08.2008 (by notification) became applicable. There is a body of law that essential legislative policy aspects (period of limitation being one such aspect) cannot be formulated or prescribed by subordinate legislation. Khemka and Co. (Agencies) Private Ltd. v. State of Maharashtra, (1975) 35 STC 571 and other decisions are authority on the question that in matters which deal with substantive rights, such as imposition of penalties and other provisions that adversely affect statutory rights, the parent enactment must clearly impose such obligations; subordinate legislation or rules cannot prevail or be made, in such cases. The CUSAA 3/2014 imposition of a period of limitation for the first time, without statutory amendment, through a notification, therefore could not prevail.

18. **For these reasons, this Court holds that the amending notification must be read down to the extent that it imposes a limitation period.** The question of law framed is therefore, answered in favour of the assessee and against the revenue. The appeal accordingly succeeds and is allowed without any order as to costs."

(emphasis supplied)

16. The Special Leave Petition filed by the department to assail the aforesaid judgment of the Delhi High Court in **Sony India** was dismissed on 23.02.2016 on the ground of limitation, but the question of law was kept open.

17. In **Pee Gee International vs. The Commissioner of Customs ICD Tughlakabad**[14], the Delhi High Court following its judgment in **Sony India**, also held that the limitation of one year provided for in the Notification dated 14.09.2017 as amended on 01.08.2018, would not be applicable. The relevant observations are as follows:-

> "5. **This Court has recently in its judgment Sony India Pvt. Ltd. v. The Commissioner of Customs, New Delhi (CUSAA 3/2014, decided on 16-4-2014 [2014 (304) E.L.T. 660 (Del.)]) held that the expression "so far as may be" occurring in Section 3(5) of the Customs Tariff Act cannot ipso facto bring in or refer to the period of limitation prescribed in Section 27 of the Customs Act. It was held that the nature of the duty is unlike the regular incident of customs duty, which is definite; special additional duty is to be compensated the moment conditions for refund are fulfilled. The prevailing view of the Revenue - based upon which it issued Circulars and Notifications in 2008 that the period of limitation of one year was to be calculated based upon the date of payment of the S.A.D. and not based upon the date of further sale or payment of VAT, was held to be erroneous.** In this view of the matter, it is held that the appeal, at least as far as the undisputed amounts with respect to the 5 bills of entry are concerned, requires to be allowed. xxxxxxxxx."
>
> **(emphasis supplied)**

18. This is also what was held by a Division Bench of the Tribunal in **Radial Rubber Industries**.

19. Subsequently, the Delhi High Court also examined this issue in **Commissioner of Customs, New Delhi, ICD, Import** vs. **Bhimeshwari Overseas**[15]. After following the earlier a decision of

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14. 2016 (343) E.L.T. 72 (Del.)
15. 2023 (1) TMI 1316 – Delhi High Court

the Delhi High Court in **Sony India**, the High Court dismissed the appeal filed by the department. The relevant portions of the judgment are reproduced below:

> "6. **The principal issue involved in the present appeal relates to the applicability of time period to claim refund of the Special Additional Duty of Customs (SAD) on goods imported in terms of the Notification No. 102/2007-CUS.**
>
> 7. Aggrieved by the rejection of refund claimed by the Adjudicating Authority, the respondent preferred an appeal before the Commissioner of Customs (Appeals), New Delhi. **The learned Commissioner of Customs (Appeals), relying upon the judgment passed by this Court in Sony India Pvt. Ltd. v. Commissioner of Customs: 2014 (304) ELT 660, allowed the appeal filed by the respondent by order dated 24.10.2017. The appeal filed by the appellant challenging the order dated 24.10.2017 was dismissed by the learned CESTAT by its order dated 21.02.2018 (impugned order).**
>
> 8. The impugned order indicates that the learned CESTAT had followed its earlier decision in Commissioner of Customs, New Delhi v. M/s. Siya Paper Mart Pvt. Ltd.: final order No. 58613/2017 dated 27.12.2017. The said decision in Commissioners of Customs, New Delhi v. M/s. Siya Paper Mart Pvt. Ltd. (supra) was rendered following the decision of this Court in Sony India Pvt. Ltd. v. Commissioner of Customs: 2014 (304) ELT 660, whereby this Court had held that the rejection of refund of the SAD, on the ground of limitation, was not sustainable.
>
> 9. **Concededly, the decision of this Court in Sony India Pvt. Ltd. v. Commissioner of Customs (supra), covers the controversy whether the time limit prescribed under Section 27 of the Customs Act, 1962 is applicable in case of refund of the SAD.**
>
> 10. **Mr. Pratap Singh Ahluwalia, learned counsel appearing for the appellant, states that the Customs Authorities had filed a Special Leave**

> **Petition seeking leave to defend against the decision of this Court in Sony India Pvt. Ltd. v. Commissioner of Customs (supra). However, the said petition was dismissed by the Supreme Court by an order dated 26.02.2016 on the ground of delay, but the question of law was left open.**
>
> 11. **He also points out that the Bombay High Court in CMS Infosystem Ltd. v. Union of India: 2017 (349) ELT 236 (BOM) has taken a contrary view.**
>
> 12. **This Court has, in a number of matters, dismissed the appeals filed by the Customs Authorities in view of the decision in Sony India Pvt. Ltd. v. Commissioner of Customs (supra).** In Commissioner of Customs v. S.R. Traders: CUSAA 36 of 2021, decided on 18.04.2022, a Coordinate Bench of this Court has observed that decision in Sony India Pvt. Ltd. v. Commissioner of Customs (supra) would be binding on other benches of this Court. In CUSAA 69/2019 captioned as Commissioner of Customs v. Tanvir Trading Import, this Court observed that it found no reasons to differ with the aforesaid view and, accordingly, dismissed the appeal.
>
> 13. We are of the view that the present appeal is required to meet a similar fate."
>
> **(emphasis supplied)**

20. The Special Leave Petition filed by the department to assail the aforesaid judgment of the Delhi High Court in **Bhimeshwari Overseas** was dismissed by the Supreme Court in **Commissioner of Cusotms (Import), ICD, New Delhi** vs. **Bhimeshwari Overseas**[16] and the order is reproduced below:

> "2. This Court is of the opinion that the impugned order does not call for interference. The special leave petition is accordingly dismissed.
>
> 3. Pending application (s), if any, also stand disposed of."

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16. 2023 (385) E.L.T. 807 (S.C.)

21. The Delhi High Court also examined this issue in **Commissioner of Customs, New Delhi, Import** vs. **Nanak Electronics Pvt. Ltd.**[17] and an order similar to the order passed by the Delhi High Court in **Bhimeshwari Overseas** was passed. The appeal was dismissed and the Special Leave Petition filed by the department before the Supreme Court was also dismissed. This decision is reported in **Commissioner of Customs, New Delhi, Import** vs. **Nanak Electronics Pvt. Ltd.**[18]. The relevant portion is reproduced below:

> "Delay condoned.
>
> In view of the order dated 04.07.2023 passed by this Court in SLP (C) Dy. No. 23340/2023 which has not been interfered with the order impugned therein. The special leave petition, accordingly, stands dismissed.
>
> Pending application(s), if any, shall stand disposed of.

22. Learned authorized representative of the department has, however, placed much emphasis on the judgment of the Bombay High Court in **CMS Infosys System**. This judgment was rendered in a writ petition filed under article 226 of the Constitution for quashing the condition imposed by the notification dated 01.08.2008 fixing a time limit of one year for filing a refund claim from the date of payment of Additional Duty. The writ petitioner had placed reliance upon the judgment of Delhi High Court in **Sony India** as would be seen from the paragraphs that are reproduced:-

> "33. It is submitted that the Hon'ble High Court of Delhi has clearly opined and held that the provisions of the Customs Act on the rules and mechanism for refund are incorporated by reference in Section 3(5) of the CTA only "so far as may be" applicable. Since SADC is

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17. 2023 (1) TMI 1315 – Delhi High Court
18. 2023 (7) TMI 1319 – SC Order

> levied under Section 3(5) and that is refundable only on subsequent sale, then, no limitation period can possibly be imposed for advancing a refund claim. We have carefully perused the above observations and in the light of the analysis of the statutory provisions and the scheme of refund by us, with greatest respect, we are unable to agree with the High Court of Delhi on this point. 34. Mr. Patil would submit that the importer shall pay on sale of the said goods appropriate sales tax or value added tax, as the case may be, is equally a condition and further requirement is providing of copies of documents along with refund claim. Else, no refund is admissible. We are of the opinion that it is not possible to guess as to whether the refund application would be held to be non-maintainable purely on the grounds or for the reasons suggested. If it is made within a period of one year from the date of payment of the additional duty of customs, then, because there is no subsequent sale and the documents evidencing that, as also proof of payment of the sales tax or local taxes are required to be produced, that their production is also mandated in a particular period and within a particular time limit is not something which we are required to call upon and decide. We have before us a case of rejection of a refund application simply because it was not filed within one year from the date of payment of the additional duty of customs."

23. It would be seen from the aforesaid paragraphs of the judgment of the Bombay High Court that the contention that an importer has to pay appropriate sales tax or value added tax on the sale and also provide copies of documents with the refund claim, otherwise the refund would not be admissible was not examined by the Bombay High Court for the reason that it was not possible to guess whether the refund application would be held non-maintainable on these grounds. The High Court also observed that this issue was not required to be decided by the High Court because High Court was dealing with a case where the refund application had been rejected

because it was not filed within one year from the date of payment of Additional Duty. The Delhi High Court, on the other hand specifically dealt with such a situation and held that the limitation cannot start form the date of payment of Additional Duty since a refund application cannot be filed in the absence of a sale having subsequently taken place and the relevant documents concerning such sale were filed with the refund application.

24. In any view of the matter, the issue as to which judgment of the High Courts should be followed if conflicting views have been taken was decided by a Larger Bench (a five Member Bench) of the Tribunal in **Collector of Central Excise, Chandigarh** vs. **Kashmir Conductors**[19]. One issue that was addressed by the Larger Bench was what should be done when the Tribunal is faced with conflicting decisions of High Courts. The Larger Bench of the Tribunal held that if the jurisdictional High Court has taken a particular view on an interpretation or proposition of law, that view has to be followed but if the jurisdictional High Court has not expressed any view in regard to the subject matter and there are conflicting views of other High Courts, then the Tribunal will be free to formulate its own view.

25. Thus, the view taken by the Delhi High Court in **Sony India** has to be followed.

26. A Division Bench of the Tribunal in **JG Impex**, however, attempted to distinguish the judgment of the Delhi High Court in **Sony India.** After referring to section 27 of the Customs Act, the Division Bench observed:

> "8. The words used in the provision makes it clear that statute has not distinguished the nature of duty or interest, the refund whereof is claimed. Hence, even if

19. 1997 (96) E.L.T. 257 (Tri.)

> we do not look into the amended Notification No.93/2008, the period of limitation as applicable for filing the refund claim under Notification 102/2008 will otherwise be a period of one year in accordance of the aforesaid Section 27 of the Customs Act."

27. As noticed above, the Notification dated 14.09.2007 requires fulfilment of certain conditions. The importer has to pay on the sale of the goods appropriate sales tax or value added tax and has to provide copies of documents with the refund claim evidencing payment of said Additional Duty, invoices of sale of the imported goods in respect of which refund of the said Additional Duty is claimed and documents evidencing payment of appropriate sales tax by the importer on the sale of such imported goods. These conditions were examined by the Delhi High Court in **Sony India** while arriving at a conclusion that the limitation provided in the Notification dated 01.08.2018 that the refund has to be made within a period of one year from the date of payment of Additional Duty has to be read down in as much as the right to claim refund could accrue to an importer only when the subsequent sale is completed and given the vagaries of the market, the importer has limited control over when the sale would be complete. It is for this reason that the Delhi High Court held that to allow the limitation period to start from the date of payment of duty as prescribed under the amended notification, would allow commencement of a limitation period for refund even before the right to claim refund actually accrued. The Delhi High Court, therefore, held that neither section 27 of the Customs Act nor the amended notification dated 01.08.2008 can impose a limitation period on the right of an importer to claim refund of Additional Duty and in any case such limitation can only be introduced by legislation. The Division

Bench of the Tribunal in **JG Impex** relied upon 27 of the Customs Act, which was held to be not applicable in case of refund of Additional Duty by the Delhi High Court in **Sony India**. The decision of the Delhi High Court in **Sony India** was binding on the Tribunal

28. Learned authorised representative also made an attempt to defend the impugned order by placing reliance on the last sentence of paragraph 12 of the judgment of the Delhi High Court in **Sony India** wherein it was observed that limitation in respect of refund claims for Additional Duty must be introduced by legislation and since section 27 of the Customs Act had since been amended by increasing the period of limitation for filing the appeal from six months to one year, it would follow that the period of limitation of one year stipulated in section 27 of the Customs Act would be applicable.

29. It is not possible to accept this submission of the learned authorised representative of the department. The Delhi High Court in paragraph 12 clearly held that section 27 of the Customs Act would not be applicable in a case where refund of Additional duty is sought. Infact in paragraph 16 of the order, the Delhi High Court referred to the amended provisions of section 27(1) of the Customs Act since the limitation of one year was referred to in paragraph 17 and the Delhi High Court observed 'plainly, therefore, section 27 was understood as not applying to SAD cases, even though it was in the statue book for many years'.

30. The inevitable conclusion, therefore, that follows from the aforesaid discussion is that the order dated 07.05.2021 passed by the Commissioner (Appeals) that has been impugned in the present appeals denying refund claim to the appellant deserve to be set aside

and are set aside. The appellant would be entitled to refund with consequential relief(s). The appeals are, accordingly, allowed.

(Order pronounced on **25.04.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Jyoti

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

REGIONAL BENCH- COURT NO.1

Service Tax Appeal No. 10214 of 2021

(Arising out of Order No. CCESA-SRT-APPEALS-PS-235-2019-20 dated 26.07.2019 passed by Commissioner (Appeals) - Surat)

Vistas Designers Private Limited **...Appellant**
Plot No. 256, Road No. 2, Near Kheteshwar Hotel
GIDC Sachin, Surat, Gujarat-394230

VERSUS

CGST & Central Excise- Surat **...Respondent**
CGST & Excise Commissionerate, Surat
Central Excise Building, Chowk Bazar, Surat
Gujarat-395001

APPEARANCE:
Shri S. Suriyanarayanan, Advocate appeared for the Appellant
Shri M.P. Solanki, Assistant Commissioner (AR) appeared for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO. 10072 /2025

DATE OF HEARING: 30.01.2025
DATE OF DECISION:30.01.2025

SOMESH ARORA

In the instant case the appellants are aggrieved since they discharged service tax on advance receipt payment during the period 2016-17 when Finance Act, 1994 was in force. Later on when the GST Regime came into force from 01.07.2017, they again paid the tax on the same advance payment and made the final payment on the whole supply (including advance as above) after 01.07.2017. Having paid the tax twice under two different tax regimes, they sought refund of payment which was made on advance receipt by them prior to 30.06.2017 under Finance Act, 1994. The department has disputed and rejected the refund on the ground that the same was correctly paid under the provisions of Finance Act, 1994. Learned Advocate appearing for the appellant seeks to rely on the decision of M/s Thirumal Facade Solutions vs Commissioner GST and Central Excise Chennai as reported in 2023 (2) TMI 1252 CESTAT-Chennai in which the issue was decided in similar circumstances in favour of assessee by way of remand by making suitable observation even on merits.

2. The Learned Authorised Representative opposes the prayer on the ground that tax was appropriately paid under the provisions of Finance

Act, 1994 as it then existed and therefore, there was no question of allowing the refund of duty which was paid in accordance with law.

3. This court has gone through the rival contentions. It is of the view that the issue of double taxation on the same transaction under two tax regime was considered in para 4 on merits of the aforesaid case which is reproduced below:

> *"4. I find that that the appellant is involved in civil construction and works contract service and the completion of a project is spread over a period of time. They have filed a Trans1 declaration for the service tax paid on advances after the introduction of GST on 01/07/2017. On being pointed out by the Department about having wrongly carried forward the prepaid service tax to TRAN-1, they reversed the same in the GST return filed in the month of January 2019. Consequent to reversal, they filed refund claim on 12.3.2019 for the refund of prepaid service tax. The cause of action took place only after the introduction of GST due to which they had to pay duty once again under the GST regime for part taxes paid under Service tax for their projects. The matter is hence not time barred. The factual question is whether tax has been discharged twice for the same activity. The transition from one tax regime to another has its own challenges for tax payers and an overtly legalistic view is not called for in this difficult period. The Appellant has made available documents that would facilitate the verification of double taxation as claimed. Since the department has asked the Appellant to reverse the prepaid service tax claimed as per GST TRAN – 1, and if the facts on verification are found in order then the amount has to be refunded in cash to the Appellant. The ends of justice would be met if Revenue verifies the facts of the activity being taxed twice and decides on the refund application accordingly."*

Therefore after considering the merits of the matter and concluding that the double taxation was avoidable even under the two tax regimes the matter was remitted by the Learned Single Member Bench, in that case, due to the natural justice not having been followed. This court finds that the observations made on the aspect of double taxation under two different tax regime are relevant and deserves to be followed. The reason for this are as follows:

- The provisions of Finance Act 1994, at the relevant time, required taxes to be paid in advance especially for the contract which were going to run for long. Accordingly, the tax was discharged by the party in accordance with those provisions.
- Under GST Regime taxes were again required to be paid on value of any supply which included the supply completed. The GST provisions also enabled the credit under the Finance Act to be carried forward under the GST Regime by filing of Trans-I returns etc, so there was a continuity of the credit availability under the new tax regime.
- As far as Central Tax Department is concerned, the transition from Finance Act, 1994 to GST was a continuous process under

which the tax liability could not have been escaped by the party and also the credit available during the transition was allowed to adjust as input credit even under GST Regime. Therefore, as far as Central Tax Department is concerned, there cannot be double taxation allowed under the two tax regimes which though were different in scope of levy, as same was on provision of service under Finance Act, 1994 and on supply of goods and services under GST Regime, yet the same through saving clauses provided continuity to the department as well as party under transition provisions and there were several clauses available which allowed taxes unpaid to be recovered by the department as also refunds not paid to be allowed at a later stage and even input credit to be availed by the party.

4. Due to the special features available in GST Regime, the Learned Member of Single Member Bench of Chennai (in cited decision) has correctly held that there cannot be a double taxation. It is for department to choose whether it would like to refund tax or give credit under GST regume. Since in this case tax on the same transaction has been suffered twice, therefore, as per the provision of Finance Act, 1994 including provisions of refund as have been borrowed from Central Excise Act, 1944, the refund is permissible and deserves to be allowed. Matter is therefore, allowed in principle with direction to the department to consider the same as per law. Appeal allowed with aforesaid direction.

(Dictated & Pronounced in the open court)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Neha

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

BANGALORE

Regional Bench Court No. 3

Customs Appeal No. 3325 of 2012

[Arising out of Order-in-Appeal No. 145/2012 dated 31.08.2012 passed by the Commissioner of Customs (Appeals), Bangalore]

M/s Tommy Hilfiger Arvind Fashion Pvt. Ltd.
No. 4, Brunton, 1st Cross Road
Bangalore – 560 025 **.....Appellant**

VERSUS

Commissioner of Customs Bangalore
C.R. Buildings, Queens Road
Bangalore – 560 001 **..... Respondent**

Appearance:
Mr. N. Anand, Advocate for Appellant
Mr. Rajesh Shastry, Authorized Representatives for Respondent

Coram:
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

FINAL ORDER NO. 21670 / 2024

Date of Hearing: 26.07.2024
Date of Decision: 26.07.2024

M/s. Tommy Hilfiger Arvind Fashion Pvt. Ltd., the appellant inter alia is engaged in import of readymade garments and resell to the customers through their branches located at various places in the country.

2. The brief facts are the appellant imported readymade garments and discharged customs duties including Special Additional Duty of customs (SAD) levied under Section 3(5) of Customs Tariff Act, 1975. The appellant sold the imported goods through their branches and paid VAT or Central Sales Tax as the case may be. The Readymade

garments due to the peculiarity of the goods do not have any specific part no. or identification number and since they are sold through their various branches, the appellant has an established internal accounting and logistic system through a customized software 'Voyager' to track the movement of the imported goods till the final sale. The imported goods are as per the purchase order placed and supported by vendor invoices packing list, bill of lading etc., and on receipt at the warehouse, the warehouse keeper verifies the goods with import documents and they are segregated on the basis of style/size/colour and a 'Goods Receipt notes'(GRNs) are self-generated and a unique style codes/alpha numeric codes are allotted to each and every imported goods/items/merchandise. Thereafter, the imported goods are transported to various showroom, and they are sold at the showroom to the customers on payment of VAT/CST. The appellant submits that goods are correlated through style code, alpha numeric code and it is software system generated and is reliable and foolproof. The appellant filed refund claim in terms of Notification Nos. 102/2007-Cus. dated 14.09.2007 read with Circular Nos. 6/2008-Cus. dated 26.04.2008, 16/2008-Cus. dated 13.10.2008 and 18/2010-Cus. dated 08.07.2010. During the period of dispute, the appellant filed 8(eight) periodical refund claims claiming refund of SAD paid of Rs. 12,50,439/- along with all the requisite documents prescribed for filing such refund claim. Further they have also submitted the Chartered Accountant certificate to the effect that the alpha-numeric code procedure followed by the appellant enabled tracking the movement of the goods till their final sale, thereby correlation between goods imported and their sale in India is ascertained from the alpha-numeric code.

3. The 8 (eight) refund claims of SAD were adjudicated by a common Order-in-Original No. 72/2012 (AC-Refunds) ACC dated 27.02.2012, wherein the claims were rejected on the grounds that the appellant did not satisfactorily prove that the imported goods and the goods sold are one and the same by way of one to one correlation, since the description of the Bills of entry was not matching with the description of the goods in the sales invoices. Assailing the rejection order, the appellant filed appeal before Commissioner (Appeals), which was also rejected vide the impugned order. Aggrieved by the same, the appellant filed this appeal before this Tribunal.

4. The learned counsel for the appellant during the hearing reiterated the grounds urged in the appeal memorandum and submitted that they have complied with the conditions of Notification No.102/2007-Cus. read with Board Circular 06/2008-Cus.; the objective behind the above Notification is to create level playing field for the domestic manufacturers and the importers; a domestic manufacturer is allowed Cenvat credit of SAD, whereas a trader of imported goods pays both SAD and also pays VAT/CST on sale in India and he is not be unnecessarily burdened; the adjudicating authority and the appellate authority have rejected the appeal on the ground that the description of goods in the bills of entry and sales invoice are not matching; this aspect has been clarified by due certification by the Chartered Accountant of the appellant. The learned counsel further submits that as per Board Circular No. 06/2008-Cus. dated 28.04.2008 at para 5, it is clarified that; "a certificate from the statutory auditor/chartered accountant, who certifies the financial accounts under the Companies Act or any other statute would be required along with the original

tax/duty payment documents as proof of payment of appropriate Sales Tax/VAT for the purposes of para 2 (d) & (e) of the said Notification"; it is undisputed that in all the 8(eight) refund claims the requisite documents as required under Notification No. 102/2007-Cus. read with Circular No. 06/2008-Cus. have been submitted, however, the lower authorities have not considered and rejected the refund claims, which is not tenable.

5. The learned counsel submits that the issue is no *more res integra* and has been settled as per the following judicial decisions:

a. **Commissioner of Customs, Bangalore Vs. Apple India Pvt. Ltd. – 2014 (301) E.L.T. 675 (Tri.-Bang.)**
b. **Commissioner of Customs, Bangalore Vs. Apple India Pvt. Ltd. – 2014 (309) E.L.T. 29 (Kar.)**
c. **Commissioner V. Apple India Pvt. Ltd. – 2015 (320) E.L.T. A277 (S.C)**
d. **Commissioner of Customs (Preventive), Noide Vs. Aadya Overseas Ltd. – (2024) 19 Centax 416 (Tri.-All.)**

6. The learned Authorized Representative (AR) for the Revenue reiterated the findings in the impugned order.

7. Heard both sides and perused the records.

8. I find in this case the appellant has imported readymade garments and paid customs duties including Special Additional Duty (SAD) and sold the garments through their branches across the country. After the sale of the garments the appellant has filed 8 (eight) refund claims for the refund of SAD paid on import of the goods. The department has rejected the refund claims on the grounds that there is no correlation between the items imported and the items sold to the customers through their branch offices. I find that the appellant has put in place a system of generation of alpha-numeric code for every

Readymade garment on its import and this code is thereafter used in the accountal, movement and sale of the imported goods. I find that the appellant has also submitted a Chartered Accountant (CA) certificate certifying that the goods imported have been sold on payment of VAT/CST. I find that the department has rejected the refund claims on the grounds that there was no proper correlation between the imported goods and the goods sold through their branch offices. I find the department has not disputed that the 'Voyager' software developed and being used by the appellant for the purpose of accounting of the imported goods and their subsequent sale is not reliable/can be manipulated. I find that the goods imported i.e., Readymade garments would not have any identification number akin to machinery/ apparatus/ equipment etc., therefore the methodology adopted by the appellant of generating an alpha-numeric code at the time of receipt into their warehouse on import appears to be proper and needs to be acknowledged as a reliable system for accountal of such goods, unless the contrary is proved. Further I find that the appellant has submitted a chartered accountant certificate certifying that the goods imported have been sold on payment of applicable VAT/CST. I find in these circumstances the rejection of the refund claims is unsubstantiated and not tenable.

9. In view of the above discussion the appeal is allowed with consequential relief, if any, in accordance with law.

(Operative portion of the order was pronounced
in open court on 26.07.2024)

(Pullela Nageswara Rao)
Member (Technical)

iss

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COURT No. III

Customs Appeal No. 55422 of 2023

(Arising out of Order-in-Original No. CUS-APR-ASS-2702-2023-GR-3/4/6-O/o Pr COMMR-CUS-ACC(I) DELHI/10817 dated 03.08.2023)

TASHA GOLD PVT LTD
Plot No. N-19, Site-V
Kasna Industrial Area,
Greater Noida,
Gautam Buddha Nagar
Uttar Pradesh-201310

Appellant

Vs.

PRINCIPAL COMMISSIONER OF CUSTOMS, NEW DELHI, ACC (IMPORT)
Air Cargo Complex
Import, New Customs
House, Near Igi Airport,
New Delhi-110037

Respondent

APPEARANCE:
Shri Arjun Raghuvendra, Shri Jayant Kumar & Shri Soham Bandopadhyay, Advocates, for the Appellant
Shri. Nagendra Yadav Authorized Representative for the Respondent

CORAM:

HON'BLE MR.SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MS.HEMAMBIKA R.PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/51595/2023

DATE OF HEARING: 26.10.2023
DATE OF DECISION: **05.12.2023**

PER:SOMESH ARORA

The Appellant has filed the present appeal against the letter/order dated the 03.08.2023 addressed by the Respondent, wherein the Principal Commissioner of Customs rejected the request for provisional release of the impugned goods imported under B/E No. 3625730 dated 06.12.2022 under Section 110A of the Customs Act, 1962 ("the Act")

2. In the impugned letter/order, the Respondent has mentioned that the provisional release of the impugned goods has been rejected, because-

a. The imported goods fall under category of 'prohibited goods' of the Act, since the gold content of the imported goods is "found to be above 95% and the license issued by DGFT to the Appellant was for import of Gold Dore Bars (having gold content not exceeding 95%).

b. CBIC Circular no. 35/2017 Customs dated 16.08.2017 in the guidelines for provisional release of seized goods pending adjudication under Section 110 A of the Act has prescribed that provisional release of the goods prohibited under the Customs Act, 1962 or any other Act for the time being in force shall not be allowed.

Aggrieved by the above rejection of provisional release the Appellant however is challenging the impugned letter/order before uson the following grounds-

A. Impugned goods are not prohibited goods-

3. "Prohibited Goods" are defined in Section 2(33) of the Customs Act, 1962 as meaning "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." The Gold Dore bars which are imported by the appellant are therefore not ‘prohibited goods' in accordance with the said definition.

4. Foreign Trade Policy (FTP) states that imports are free except when regulated by way restriction as laid down in ITC (HS). Gold Dore bars have conditions imposed and therefore fall under the category of restricted goods'. The appellant-company being a refinery was issued import license (with actual user condition) by the DGFT for import of Gold Dore Bars. Gold dore bars are imported under ITC (HS) for 7108 12 00, for which the only

condition imposed is that Gold Dore is subject to actual user conditions by refineries. The said condition has been complied with by the Appellant.

5. The dispute in the present case is regarding the alleged non-compliance with Notification No. 12/2012-Cus., dated 17.03.2012. This notification was superseded in the year 2017 by Notification 50/2017-Customs dated 30.06.2017. Further, the notification whose benefit has been claimed by the Appellant is Notification No 96/2008-Cus dated 13.08.2008 and all required conditions under that notification are fulfilled by the Appellant. The Appellant has not claimed the benefit of Notification no. 50/2017- Cus dated 30.06.2017.

6. However, for the sake of abundant clarity, the compliance of conditions under Notification no. 50/2017-Cus dated 30.06.2017 are also discussed. Sl. No. 354 of Notification 50/2017-Cus. dated 30.06.2017, on GDB having gold content not exceeding 95% requires conditions No. 9 and 40 to be fulfilled, the compliance regarding the same are as follows:

Condition No.	Condition	Compliance
9.	The importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty Rules, 2017)	The procedure is followed by the importer. Also therefore is no allegation in the impugned order that any procedure as prescribed in any of these Rules have not been followed by the Appellant.
40. (a)	The goods are directly shipped from the country in which they were produced and each bar has a weight of 5 KG. or above;	Thos condition is satisfied in respect of 26 out of 27 gold dore bars imported by the Appellant. One bar weighing 4.240 kg has been shipped by

		the exporter erroneously and the foreign exporter has accepted that such import was their mistake. A copy of the email from the foreign exporter M/s. equinox in this regard is placed on record.
40. (b)	The goods are imported in accordance with the packing list issued by the mining company by whom they were produced;	Condition is satisfied as the import was as per the packing list and the same was also provided to the customs authorities who have not pointed out any discrepancy. Further the condition does not state that the packing list issued by the mining company has to be submitted at time of import. A copy of the packing list is placed on record.
40 (c)	The importer produces before the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, an assay certificate issued by the mining company or the laboratory attached to it, giving detailed precious metal content in the Dore bar	Condition is satisfied as assay certificate furnished by mining company makes it apparent that the goods conform to the conditions of import license being of up to 95% purity. Copy of the Assay Certificate provided by the miner is placed on record.
40 (d)	The gold Dore bars are imported by the actual user for the purpose of refining and manufacture of standard gold bars of purity 99.5% and above;	The Appellant has imported the said gold dore bars for the purpose of refining and manufacture of standard gold bars of purity 99.5%. Hence, the said condition stands

		fulfilled.
40 (e)	The silver Dore bars are imported by the actual user for the purpose of refining and manufacture of silver bars of purity 99.9% and above.	Not Applicable

7. Out of the 27 gold dore bars, there is one gold dore bar of less than 5 kg weight. The import of this gold bore is a genuine error by the foreign exporter as evidenced by their email attached. The said gold bar was declared to the proper officer at the time of import as weighing 4.240 kg and there is no misdeclaration at any point in time.

7.1 In this context, it was submitted that in the course of business, such errors may happen and the Customs Act, 1962 is conscious of the possibility of such errors occurring. Section 26A of the Act provides for refund of import duty on such goods and the legislative intent is very clear in this regard. The relevant extract of the said section is as follows-

> *"Section 264. Refund of import duty in certain cases. -*
> *(1) Where on the importation of any goods capable of being easily identified as such imported goods, any duty has been paid on clearance of such goods for home consumption, such duty shall be refunded to the person by whom or on whose behalf it was paid, if- (a) the goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods:*
>
> ***Provided** that the goods have not been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;*
>
> ***Provided** that the period of thirty days may, on sufficient cause being shown, be extended by the Principal Commissioner of Customs or Commissioner of Customs for a period not exceeding three months: Provided further that nothing contained in this section shall apply to the goods*

> *regarding which an offence appears to have been committed under this Act or any other law for the time being in force."*
> *(emphasis supplied)*

7.2 As can be seen, the legislature in its wisdom has foreseen a scenario where there can be imported goods which are "not in conformity with the specifications agreed upon between the importer and the supplier of goods" and allows for refund of duty paid on such goods.

7.3 Therefore, in accordance with section 26A, the Appellant is also entitled to the refund of import duty paid on the import of this 4.240 kg gold bore which is not accordance to the agreed specifications between the Appellant and the foreign supplier.

7.4 It was submitted that such goods can, be exported in accordance with Rule 10 of Customs (Import of Goods at Concessional Rate of Duty or for Specified End Use) Rules, 2022 (hereafter SEU Rules) notified by Notification No. 74/2022 Customs (N .T.) dated 09.09.2022. This rule provides for re-export or clearance of defective goods. The relevant extract of the said rule is as follows-

> *10. Re-export or clearance of unutilised or defective goods. -*
> *(1) The importer who has availed the benefit of a notification shall use the goods imported in accordance with the conditions mentioned in the concerned notification within the period and with respect to unutilised or defective goods, so imported, the importer shall have an option to either re-export or clear the same for home consumption, within the said period, namely (i) within the period specified in the notification; (ii) within six months from the date of import, where the time period is not specified in the notification: Provided that, the said period of six months can be further extended by the jurisdictional Commissioner for a period not exceeding three months, if sufficient reason is shown that the causes for not conforming to the time period were beyond the importer's control.*
>
> *(2) Any re-export of the unutilised or defective goods referred to in sub rule (1) shall be recorded by the importer in the monthly statement by providing the details of necessary export documents: Provided that the value of such goods for*

re-export shall not be less than the value of the said goods at the time of import.

(3) The importer who intends to clear unutilised or defective goods for home consumption shall have an option of voluntary payment of applicable duty along with interest on the common portal and the particulars of such clearance and the duty payment shall be recorded by the importer in the monthly statement.

Therefore, the defective gold dore bar which has not met the may be a specifications will be returned to the exporter. One bar weighing 4.240 kg is a case of genuine mistake and is not at
case of misuse of the import license or any mala fide object nor disregard for the statute.

8. Further, the impugned order in holding the goods as "prohibited goods" has referred to and relied upon a test report dated 27.01.2023. However, the Appellant has never been provided with a copy of such test report dated 27.01.2023 with regard to the goods imported vide Bill of Entry No. 3625730 dated 06.12.2022. This amounts to a violation of the principles of natural justice.

8.1 The impugned order has been passed without providing the relied upon document - the test report dated 27.01.2023-and an opportunity of fair hearing to the Appellant. It is a settled principle that an order passed without following natural justice is bad in law and must be set aside on that ground alone.

8.2 Appellant places reliance on the judgment of Hon'ble High Court of Delhi in Ganesh Sawant v. Commissioner of Customs (Appeals), (2023) 8 Centax 218 (Del.) in which it is held that even where the statute does not explicitly provide for issuance of notice or provision of opportunity of hearing, the revenue authorities are required to grant the same to ensure that natural justice is done. The failure to adhere to these well-established legal

prerequisites renders the impugned order bad in law and should therefore be set aside on this count alone.

9. On the question of the impugned goods failing to adhere to the prescribed gold content, the Appellant submitted that there are three test reports which show that the impugned goods comply with the gold content requirement.

9.1 The test/assay report dated 01.12.2022 provided by the mining company indicates the gold content for all the 27 bars part of the impugned consignment. It shows that gold content in the bars range from 92.8% to 94.8%, thereby adhering to the requirement prescribed in the law.

9.2 Further, at the port of import, the proper officer drew samples and sent it to the CRCL laboratory for testing. The CRCL lab report dated 24.02.2023 indicates that the gold content is 94.70%. This again confirms that the gold bars in the consignment are adhering to the requirement prescribed in the law.

9.3 Lastly, DRI drew three samples and sent them to the CRCL laboratory for testing. The CRCL lab reports for these samples dated 18.01.2023 indicate that the gold content is marginally above 95% i.e., 95.10%, 95.26% and 95.17%.

9.4 With regard to the last test report, the Appellant had addressed an RTI application dated the 17.08.2023 to the seeking the information with respect to Method of testing of gold percentage in gold dore bars employed by CRCL, CRCL/SOP-13 method of testing percentage of gold in gold dore bars, Margin of error in CRCL/SOP-13 method of testing. CRCL has responded to the inquiries of the Appellant vide response dated 18.09.2023 as follows-

a. Method of testing of gold percentage in gold dore bars employed by CRCL- Indian Standard 1418:2009 and CRCL/SOP-13.

b. CRCL/SOP-13 method of testing percentage of gold in gold dore bars- Gravimetric Method, c. Margin of error in CRCL/SOP-13 method of testing- Permissible Error=+/-0.25%.

9.5 It must be noted that the method employed for testing in this case the Gravimetric method which is not the prescribed standard method for test as prescribed. Notwithstanding the same, the gold content according to this report is marginally above 95% i.c., 95.10%, 95.26% and 95.17% and these are within the permissible limits and thus cannot be held as prohibited goods.

10. This was not the first time that the Appellant had been importing gold Dore bars from LDCs. There have been 103 consignments imported previously from 20.11.2018 to 09.12.2022 before the impugned consignments. Each of these consignments were cleared by the proper officer for home consumption without holding any of them as prohibited.

10.1 It was submitted that Gold Dore Bars are not under self-assessment or the Risk management system (RMS). Each consignment of gold bar is provisionally assessed by the proper officer and samples were drawn and tested by CRC for gold content. Without such testing and assessment, there was no clearance for home consumption.

10.2 On all the previous 103 consignments, the same procedure was carried out and each of them was found to be compliant with law. 33 out of the said 103 consignments were also subjected to first check. None of the 103 consignments were at any point held as prohibited. Therefore, the impugned

order contradicts the assessment of previous consignments by the department and such reversal in stand by the revenue without any material change in facts is bad in law.

B. Notwithstanding the above, the reliance on CBIC Circular No 35/2017 to deny provisional release is violative of Section 110 A and therefore cannot be relied upon as held in multiple judicial precedents.

11. Para 3.2 of the impugned order records that as per CBIC Circular No. 35/2017-Cus dated 16.08.2017, it has been prescribed that provisional release of goods prohibited under Customs Act, 1962 or any other law for the time being in force shall not be allowed.

12. Relevant para of Circular No. 35/2017 reproduced below for reference:

> **Circular 35/2017 - Guidelines for provisional release of seized imported goods pending adjudication under Section 110A of the Customs Act, 1962- Reg.**
> para. 2. While provisional release of seized imported goods under Section 110A of the Customs Act, 1962 may normally be considered by the competent adjudicating authority upon request made by the owner of the seized goods, provisional release shall not be allowed in the following cases-
>
> > i. Goods prohibited under the Customs Act, 1962 or any other act for the time being in force;
> >
> > ii. Goods that do not fulfill the statutory compliance requirements/ obligations in terms of any Act, Rule, Regulation or any other law for the time being in force;
> >
> > iii. Goods specified in or notified under Section 123 of the Customs Act, 1962;
> > iv. Where the competent authority, for reasons to be recorded in writing believes that the provisional release may not be in the public interest.

13. The Appellant relied on the judgment of the Hon'ble High Court of Delhi in Additional Director General (Adjudication) v. Its My Name Pvt. Ltd., 2021 (375) E.L.T. 545 (Del.) wherein it was held that Para 2 of Circular No

35/2017 is contrary to the parent statute - Section 110A of the Customs Act and is void.

14. The Appellant placed reliance on the judgement of the Hon'ble High Court of Bombay in Sidharth Vijay Shah v. Union of India, 2021 (375) E.LT. 53 (Bom.) in which it was held that no limitation was imposed in Section 110A that goods categorized as prohibited goods under Section 2(33) cannot be subjected to provisional release under Section 110A. It was also held that even filing of appeal before Hon'ble CESTAT cannot be a bar on order of provisional release.

15. It was submitted that adherence to the said Circular No. 35/2017 cannot be made to refuse provisional release of goods. Section 110A of the Customs Act provides that seized goods can be released and does not make any difference between prohibited and non-prohibited goods. The interpretation of Section 110A the Hon'ble Delhi High Court in Its My Name (supra) is reproduced below:

> *"48. Clearly, provisional release may be allowed, under Section 110A of the Act, of "any goods, documents or things seized". The Court, as the interpreter of the legislation, cannot profess to greater wisdom than the legislator. Where the Legislature has not thought it appropriate to limit, in any manner, the nature of goods, documents or things which may be provisionally released, under Section 110A, in our view, it is no part of the function of a Court to read, into the said statutory provision, any artificial limitation, not to be found therein."*

(Emphasis supplied)

16. The Hon'ble High Court also opined that Section 110A the Customs Act does not distinguish between prohibited and non-prohibited goods and such distinction is found in Section 125 of Customs Act but even therein prohibited goods may be released on payment of redemption fine. The Appellant humbly states that it is entitled to provisional release of goods and more so when it has paid duty although it was not statutorily due. The

impugned order denying provisional release is without legal basis/ and is liable to be set aside.

C. Goods can be categorised as "prohibited" only after adjudication-

17. Categorization of goods is a subject to adjudication and in regard to the fact of the present case, the customs authorities entertain such a view at the time of seizure does not make the goods prohibited goods. For seizure, the officer must have reason to believe that goods are liable for confiscation and in the instant case, it has been stated that goods are prohibited. However, it is submitted that such belief or act of seizure does not establish that the goods are prohibited goods.

18. The High Court of Madras in Al Qahir International v. Commissioner of Customs, Tuticorin, 2021 (378) EL.T. 784 (Mad.) has held that the question of goods being prohibited is a matter of adjudication and since both importer and customs authorities prior to adjudication have their own grounds for opposite views, the balance of convenience was in favour of the assessee-importer and goods could not be termed as prohibited goods till such time adjudication was completed.

19. The appellant thus submitted that the impugned gold is not prohibited goods in as much as all documents to examine description, purity etc., have been submitted and purity is below 95% as per report dated 27.02.2023 even as per testing conducted by the department.

D. Appellant has satisfied the conditions of applicable Notification No. 96/2008-Cus.-

20. The appellant had claimed the benefit of preferential tariff scheme under Notification No. 96/2008-Cus., dated 13.08.2008 and the subject

goods fall under tariff item 7108 1200 which are 'restricted goods' as per ITC (HS) Import Policy.

21. It is submitted by the appellant that the only condition as per ITC (HS) Import Policy is that Gold Dore bars can be imported against import license with Actual User (AU) condition. The Appellant-company being a refinery has been issued license by DGFT and is permitted to import the Gold Dore Bars with Actual User Condition.

22. Notification No. 96/2008-Cus. Provides for preferential tariff scheme for imports from 'Lesser Developed Countries' (LDC). The subject goods are imported from Republic of Rwanda which falls under the category of LDC. One of the conditions of Notification 96/2008 is that the importer should satisfy that the subject goods in respect of which exemption is claimed are from a country listed in the Schedule of the said Notification.

23. The said condition mentioned in the first proviso to Notification No. 96/2008 is reproduced below for reference:

> *When imported into India from a country listed in the Schedule to this Notification:*
> *"Provided that the importer proves to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, that the goods in respect of which the exemption under this notification is claimed are of the origin of the country listed in the schedule to this notification, in accordance with provisions of the rules of origin, published in the notification of the government of India in the Ministry of Finance (Department of Revenue), No. 100/2008-Cus (N.T.), dated 13th August 2008."*

24. The Appellant has submitted the 'Certificate of Origin' (COO) which was issued and certified by Rwanda Chamber of Commerce, Industry and Agriculture for claiming exemption under Notification 96/2008 and therefore, eligible for benefit under the said Notification. It is pertinent to note that

there is no specific condition in ITC (HS) that for import of Gold Dore Bars, conditions under Notification No. 50/2017 have to be fulfilled. The appellant has not claimed exemption benefit under Notification No. 50/2017-Cus and therefore, they are not required to fulfil conditions prescribed in Notification No. 50/2017-Cus.

25. On the question of choosing a beneficial notification, it is submitted that an importer is free to choose the notification which is more beneficial to him. In case of Share Medical Care V. Union of India, 2007 (209) ELT 321 (S.C), Hon'ble Supreme Court held that if applicant is entitled to benefit under two different notifications or under two different heads, he can claim the one which is more beneficial and it is duty of authorities to grant such benefits if applicant is entitled to such benefit.

(Emphasis supplied)

E. **Seizure of the entire consignment is not valid-**

26. Section 110 of Customs Act stipulates that "any goods are liable to confiscation under this Act". That is only such goods which are confiscable which are improperly imported on account of infractions listed in Section 111 of the Customs Act. Goods which are not tainted by the same and those which have been properly imported cannot be seized. It is submitted that the continued seizure and detention of the entire consignment is without sanction of law.

27. The Appellant drew attention to Innovation, Secunderabad and Another v. Central Board of Excise and Customs and Another, 1984 (15) E.LT. 91 (A.P.) wherein in the context of confiscation of various goods, the goods were segregated into three categories with specific violation - smuggling (restricted goods), non- maintenance of records and a third category for which no specific violation was mentioned. The department

contended that the third category of goods are also liable for confiscation since in respect of other goods, the facts and conduct of the importer rendered them liable for confiscation. However, the Hon'ble High Court held that confiscation of the third category of goods was bad since it was on the basis of a presumption drawn from the facts relating to other category of goods. It is submitted that the entire consignment of 27 gold dore bars cannot be detained because one article was found to be not of prescribed weight.

F. <u>Collection of customs duty on prohibited goods is without authority of law-Amount paid liable to be refunded- Submitted</u>

28. The Appellant submitted that customs duty is payable on goods imported into India and as per Section 2(23) import, with its grammatical variations and cognate expressions, means bringing into India from a place outside India.

29. Section 12 of the Customs Act defines dutiable goods and states that duties of customs shall be levied at such rates as may be specified under Customs Tariff Act, 1975 on goods imported into India.

30. It was submitted that for collection of customs duty, activity of import should be completed. The Hon'ble Supreme Court in Garden Silk Mills Ltd v. Union of India, 1999 (113) E.LT. 358 (S.C.) has held that import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed.

31. The Appellant also wishes to place reliance on the interpretation of the word "import" as pronounced by the Hon'ble Supreme Court in Mangalore Refinery & Petrochemicals Ltd. v. C.C., Mangalore, 2015 (323) E.L.T. 433 (S.C.) wherein it was held that act of import which triggers levy of customs duty is complete only after the goods are cleared for home consumption or warehoused as the case may be.

32. The goods have been seized by the DRI and they having declared the goods to be prohibited in nature (and hence cannot be imported), customs duty cannot be on the same.

33. The amount of Rs. 15,20,96,571/- (Rupees Fifteen Crores Twenty Lakhs Ninety-Six Thousand Five Hundred and Seventy-One only) is already paid vide TR Challan 4336 dated 20.12.2023 under major head "customs duty" cannot be appropriated by the revenue authorities since the collection of such duty is without authority of law and the same is liable to refunded with applicable interest.

G. <u>Denial of provisional release of goods even though duty has been paid, is not sustainable-</u>

34. Since the subject goods were needed immediately due to business urgency, as per the instructions of DRI, duties were paid without claiming exemption under Notification No. 96/2008 under protest vide TR-6 Challan No. 4336 dated 21.12.2022 seeking release of goods. It is reiterated that the Appellant is eligible for claiming exemption under Notification No. 96/2008-Cus., having imported gold dore bars from the Republic of Rwanda which is listed as an LDC and the documents for claiming the exemption such as Certificate of Origin are in order. The appellant had earlier imported gold from other LDCs and had availed the exemption. The payment of duty

was made under instructions from DRI and not voluntarily by accepting liability.

35. However, even though the duty (as directed by the department) has been paid, the goods were detained under a panchnama and a detention memo was issued on the same day. The panchnama and the detention memo, has no material evidence mentioned based on which it is alleged that the Appellant has misused exemption notification.

36. It is submitted that the gold dore bars imported by the Appellant are not prohibited goods rather they are 'restricted' under ITC (HS) which can be imported by refineries like the appellant in this case. Therefore, the subject goods can be provisionally released as they are not prohibited under the Customs Act.

37. It is further submitted by the Appellant that he has the right to get the goods released under the provisions of Section 110A of the Customs Act, 1962. Section 110(1A) provides the certain goods being perishable or hazardous nature of any goods, on account of depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, may be directed to be disposed of by the Central Government.

38. It is submitted by the Appellant that as per the above provisions it is evident that the goods may be released by taking a bond with such security as may be required. Further, In the present case, the appellant has deposited the duty as required and hence, provisional release of the goods may be granted.

H. <u>The entire proceeding is arbitrary on multiple counts and is therefore bad in law.</u>

39. The test report on which the impugned order is relied on is dated 27.01.2023. However, the Appellant has neither been provided with a copy of such test report dated 27.01.2023 nor has the Appellant been heard in the matter. This approach is grossly arbitrary and amounts to a violation of the principles of natural justice.

40. The 103 consignments previously imported were never held as prohibited. The impugned order contradicts the assessment of all these previous 103 consignments of the department and such reversal in stand by the revenue without any material change is entirely arbitrary.

41. The Appellant was forced to pay the entire customs duty on the impugned shipment for clearance of import but then the import was never cleared but seized. This whole process of demanding duty on an import which was not liable to duty and then seizing the consignment after the deposit was made reeks of arbitrariness.

42. The reliance on a test report dated 27.01.2023 when there are three other test reports including the source Assay certificate provided by the mining company and the CRCL test reports which clearly show the gold content is within limit is arbitrary.

Appellants also inter alia, took various grounds on the point of natural justice

<u>Case of the Department</u>

43. The Appellant had filed BE No. 3625730 dated 06.12.2022 for clearance of goods i.e. Gold Dore Bars (having gold content not exceeding

95%)." They classified the goods under CTH 71081200 and claimed the benefit of notification No. 96/2008 and notification No. 50/2017 . The Department has seized the goods on reasonable belief that the Appellant has misused the benefit of S.No. 354 of notification No. 50/2017-Cus dated 30.06.2017 and Country of Origin benefit notification No. 96/2008-Cus dated 13.08.2008. Thereafter, the inventory of the goods was prepared on 23.01.2023 before the Commissioner (Appeals). The Appellant requested for provisional release of the goods and filed W.P. (C) No. 1137/2023 before the Hon'ble Delhi High Court. The DRI produced 3 Test Reports dated 18.01.2023 before the High Court wherein the gold content was shown above 95%. The Hon'ble High Court has disposed of the W.P. (C) No. 1137/2023 vide order dated 06.07.2023 with a direction to the Commissionerate to expeditiously dispose of the application, if any of the Appellant for provisional release. The Pr. Commissioner, through the Assistant Commissioner vide letter dated 03.08.2023 conveyed for rejection of the provisional release request. Aggrieved, the Appellant filed appeal No. C / 50422 / 2023 before this Hon'ble Tribunal.

44. Department on the other hand submitted that the appellant has violated the following conditions of Notification No. 50/2017-Cust dated 30.06.2017.

(a) With the import of Gold Dore Bar weighing less than 5 Kg. Condition No-40 (a) of the Notification No-50/2017-Cus stands violated.

(b) Condition 40 (b) of the Notification specifies that the goods are imported in accordance with packing list issued by the company. But while filing the Bill of Entry appellant has not submitted the packing list of the Miner. It is the statutory requirement while importing Gold

Dore Bars that it should be in accordance with the packing list issued by Mining and it was not left to the discretion of the supplier. The packing list nowhere mentioned the Sr.No. of Box in which this 4.240 KG of Gold Dore Bar was placed.

(c) Assay Certificate seems to be not genuine.

45. Since the genuineness of the Assay Certificate appears to be doubtful and fake the representative samples were drawn and sent to CRCL for verification of the content mentioned in Assay Report. Thus, on the basis of reasonable belief for mis-use of Notification No- 50/2017-Cus dated 30.06.2017 and Notification No-96/2008-Cus dated 13.08.2008, the goods were detained under Detention Memo dated 23.12.2022.

46. Further, as has been submitted supra, the appellant also needs to refer to the condition sheet of the License DGFT License No-0111003380 dated 23.03.2022 issued by the DGFT for the import of Gold Dore Bars otherwise which import of Gold Dore Bar is a prohibited item. Import of Gold Dore Bars can only be permitted when an importer has valid DGFT Import License with actual user conditions and follows Notification No- 12/2012 Cus dated 17.03.2012 as a mandatory condition (Later Notification No - 50/2017 dated 30.06.2017 has been issued in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2012 -Customs, dated the 17th March, 2012).

47. Representative samples were drawn by the officers of Respondent on 23.12.2022 in presence of authorised representative of the appellant and the Customs Officer. Further CRCL vide report dated 27.01.2023[with regard to purity content of Gold Dore Bar] has reported the content of Gold beyond 95% (above 95%). The appellant imported all the 27 Gold Dore Bars vide single Bill of Entry as one consignment. And since separate Bills of Entry

were not filed independently in respect of each bar. Therefore the whole consignment was found liable for confiscation in the event of fake Assay Report.

48. The Appellant has presented only the small part of the Hon'ble High Court Order in the matter of Its My Name Private Limited (cited supra). Hon'ble High Court of Delhi has made the following observations which requires attention:-

> *"12. Undisputedly, the Import Policy alludes to Gold Dore bars being permitted for import against an "import license with Actual User [AU] condition". As was noticed hereinabove, the import permission which was granted to the petitioner specifically alluded to the notification of 2012. The permission which was granted to the petitioner mandatorily required it to comply with the conditions imposed in that notification. We are also of the firm opinion that once that notification came to be superseded by the 2017 notification [and which was the notification which held the field at the time when the import was effected] the petitioner was bound to comply with the conditions relating to weight and purity as stipulated therein.*
>
> *13. It is also not the case of the petitioner that it had, at any time, approached the respondents to seek amendment of the conditions which stood added to the import permission. In view of the aforesaid, it would be impermissible for the petitioner to now contend that the notifications of 2012 and 2017 would not be applicable. In view of the aforesaid, we find ourselves unable to sustain the submission of the petitioner being entitled to import Gold Dore bars solely on the basis of the notification of 2008."*

49. Thus Hon'ble High Court of Delhi has clearly stated that the appellant has to comply with the conditions as mentioned under Notification No-50/2017-Customs dated 30.06.2017 as amended, since the appellant has violated the condition 40 of the notification, the goods are liable for confiscation.

50. It is submitted that as per DGFT Policy issued vide Notification No-49/2015-20 dated 05.01.2022, import of Gold Dore Bars is restricted and the same can be understood as under:

ITC(HS) Code	Item Description	Policy	Existing Policy Condition	Revised Policy
71081200	Other Unwrought forms	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies). Gold Dore can be imported by refineries against a license with AU condition	Import allowed through nominated agencies notified RBI (in case of Banks), DGFT (for other agencies) and IFSCA (for qualified jewelers International Bullion Exchange) Gold Dore can be imported by refineries against an import license with AU condition.

51. From the above policy condition it is clear that except Gold Dore import of other items falling under CTH 71081200 is allowed only through nominated agencies as notified by RBI &DGFT (for other agencies) and IFSCA. In so far as import of Gold Dore Bar is concerned the same is not allowed even through RBI and DGFT (for other agencies) and IFSCA. The same is only permitted for refineries only against an import License with Actual User Condition.

50.1 However, firstly it has been seen from the application filed by the appellant before DGFT that appellant has itself applied for import of Gold Dore Bars under CTH 71082000, whereas Appellant is importing Gold Dore Bars under CTH 71081200. It is to further bring to notice that the Appellant has been importing Gold Dore Bars since 2019 and that the CTH earlier applied was under CTH 71081200.

50.2 Secondly the Gold Dore Bars which the appellant has imported vide Bill of Entry No-3625730 dated 06.12.2022 is having Gold Content above 95% which does not come under the scope of Import Policy and the License so issued to the appellant.

51. That, the contents of paragraph under reference are false, frivolous and mis leading and in response to the same it is submitted that the appellant has been issued import License with import condition to follow Notification No-12/2012-Cus dated 17.03.2012 as a mandatory condition (Later Notification No-50/2017 dated 30.06.2017 has been issued in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2012 -Customs, dated the 17th March, 2012.In view of the above it is submitted that once the mandatory conditions of the import license are not met..

52. The goods in question are restricted in nature subject to conditions of the Import license, without which the goods are not allowed to be imported. Whereas Section Z(33) of the Customs Act, 1962 defines the Prohibited goods, the same is reproduced below:-

> *"...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 includes such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with..".*

52.1 Therefore, all goods where in which non-observance of any of the conditions subject to import has not complied with falls under the category of prohibited goods as per Customs Act 1962. The case laws mentioned at S.. 1 to 4 of the Revenue's Case Compilation also supports Revenue's view

that if there is any violation of the condition of the gold imported, the gold becomes prohibited and should not be released.

53. The subject goods are beyond the prescribed boundaries of import license issued to the petitioner. And are thus do not subject for provisional release under Section 110A of the Customs Act, 1962.

54. That, the contents of paragraph under reference are false, frivolous and mis leading and in response to the same it is submitted that the Hon'ble High Court of Delhi in their Order dated 06.07.2023 at Para 13

clearly specify that

> *"the Import Policy alludes to Gold Dore bars being permitted for import against an "import license with Actual User [AU] condition". As was noticed hereinabove, the import permission which was granted to the petitioner specifically alluded to the notification of 2012. The permission which was granted to the petitioner mandatorily required it to comply with the conditions imposed in that notification. We are also of the firm opinion that once that notification came to be superseded by the 2017 notification..."*
>
> *Further at para 14 Hon'ble High Court observed that "...we find ourselves unable to sustain the submission of the petitioner being entitled to import Gold Dore bars solely on the basis of the notification of 2008.."*

55. Therefore, all goods where in which non-observance of any of the conditions subject to import has not complied with falls under the category of prohibited goods as per Customs Act 1962.

55.1 The subject goods are beyond the prescribed boundaries of import license issued to the Appellant and are thus do not subject for provisional release under Section 110A of the Customs Act, 1962 in view of guidelines prescribed under the judgments of Hon'ble Madras High Court and Hon'ble

Delhi High Court prescribed in the CBIC Circular-35/2017-Cus dated 16.08.2017.

Further, the department vide further submission dated 06.11.2023 indicated that date of report as got clarified by them was actually 18.01.2023 only and not 27.01.2023 as has inadvertently gone on record in impugned order. So department sets at rest the controversy that report dated 27.01.2023 was not supplied to the appellants

56. A part from above, during course of hearing, appellants additionally submitted and relied on the decision of M/s. TATA CHEMICAL LTD. VS. C.C. (P), JAMNAGAR as reported in 2015-TIOL-S.C.-CUS. to emphasize that once a Chemical analysis report is submitted by the party, department if it desires to have another report, then the Proper Officer has to give recorded reasons to subject imported goods to another chemical test. They placed reliance on para 14 of the decision of the Apex Court to buttress their argument and to state that there is nothing to show that the Proper Officer had exercised option of recording its reasoning. And to contrary, the Proper Officer when it dids second testing had found the goods in order as per description given by them and only then had allowed the clearance. Appellants further stated that in the same decision lays down in para 17 that even the testing of sampling is required to be done in accordance with the procedure laid down by ISI or BIS and any deviation will make such testing liable to be rejected. Further advocate relied on the decision of Saurashtra Chemicals Division of Nirma Ltd Vs. C.C.-Jamnagar (prev), in which following the decision of Apex Court in the matter of TATA CHEMICAL Ltd., cited (supra), Ahmedabad Bench had rejected the BSI/ISI report, as the sample were not drawn as per prescribed procedure of BIS. It was their contention that in this case also there is a requirement of BIS in relation to IS No. IS 1418 : 2009 that determination of Gold, in Gold Bullion, Gold Alloy and Gold Jewelry has to be done according to cupellation (Fire Assay Method) and the same not having been

done by the DRI according to that method, the report in any case is liable to be rejected or cannot be preferred over the first report in the matter submitted by them in relation to all the 27 samples which was based on Fire Assay Method as distinguished from the report of DRI which was based on random checking of three samples which was on the basis of SOP-13. They also stated that the random test report of three bars being relied upon by DRI, out of 27 Gold Bars only indicated purity of 95.10, 95.26, 95.17 which was exceeding requirement of 95% only by miniscule percentage and that too albeit when done by wrong methodology. They also seek to rely on the following RTI report obtained by them from office of CRCL as reproduced below:-

भारतसरकार
वित्तमन्त्रालय, राजस्वविभाग
केन्द्रीयअप्रत्यक्ष कर एवंसीमाशुल्कबोर्ड
केन्द्रीयराजस्वनियन्त्रणप्रयोगशाला
हिलसाइडरोड, पूसा, नईदिल्ली- 110012

Government of India
Ministry of Finance, Department of Revenue
Central Board of Indirect Taxes & Customs
Central Revenues Control Laboratory
Hillside Road, Pusa, New Delhi - 110012
Tel.:011-21520123/25843494 Fax: 011-25843495
Email: dir.crcl-cbec@nic.in Website:http://crcl.gov.in

C.No. 1-CE-II/SB/RTI/2022-23 Dated: 15th September 2023

To

Shri R.P. Meena
Chemical Examiner Grade-I (CPIO)
Central Revenues Control Laboratory
Hill Side Road, Pusa, New Delhi-110012

Subject: Information Under RTI act,2005 regarding.

Sir,

Please refer to your letter C.No.99-Estt./RTI/57/2021-22/3997 dated 14th September, 2023 on the subjected cited above, enclosing therewith a copy of RTI application dated 17.08.2023 received from shri Sohan Bandhyopadhyay, 152, Metro view Apartment, 4th Floor, Dwarka Sector -13, Pocket-B, Kakrola, New Delhi-110078, which is transferred from CPIO & US- Cus-III/IV, Central Board Of Indirect Taxes & Customs, North Block, New Delhi, received in this office on 14th September, for seeking information under RTI Act,2005.

In this regard, the point wise reply is given below-

Sr. No.	Queries	Reply
1.	What is the method of testing of gold percentage in Gold Dore Bars being done by Central revenues Control Laboratory (CRCL)?	Indian standard 1418:2009 and CRCL/SOP-13
2.	What is the test method CRCL/SOP-13 for testing of percentage of gold in gold dore bars?	Gravimetric Method
3.	What is the Margin of error in testing of Gold Dore bars through test method CRCL/SOP-13 ?	Permissible Error = ±0.25%

Yours faithfully

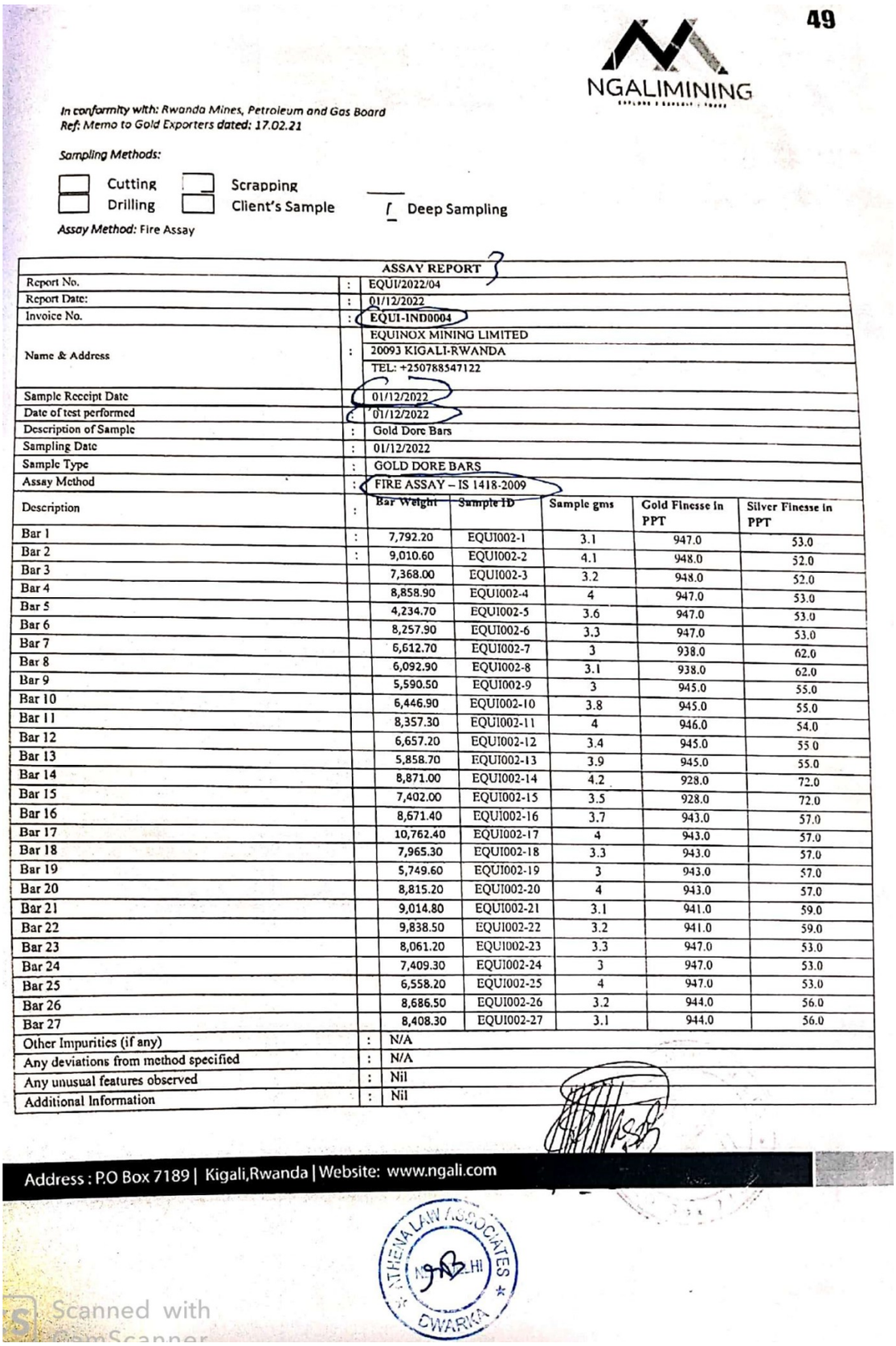
15/09/2023

(Dr. Sujan Biswas)
Chemical Examiner Gr-II
CRCL, New Delhi-12

56.1 It was therefore, their submission that even seizure needs to be vacated and all benefits as was being permitted to them for their earlier imports at least 103 consignments from year 2018 to 2020, which were cleared by the Customs earlier should be allowed to them without any hinder by Customs department/DRI and the whole seizure is vacatable as even the percentage is in accordance with tolerance limit permitted as above of ±/.25 as indicated by the CRCL as per above RTI response and also it is clear from the response of RTI that CRCL while following SOP-13 for testing percentage of gold in Gold Dore Bars has Followed Gravimetric Method and not a "Fire Assay Method" as is prescribed under Indian Standard 1418-2009. Therefore, report based on which seizure has been made is rejectable.

57. We have considered the rival submissions and various materials including case law as put forth by both sides. At this stage, we have to only decide about previsional release under Section 110A of the Customs Act, 1962 and various conditions for the same on merits of the matter, as well as sustainability of the seizure made in the light of materials which have come on record, the matter can be appropriately decided by adjudicating authority when it is eventually decides the matter when results of whole investigations by way of final show cause notice is placed before it. At this stage, we are mainly concerned that till the time investigation gets over and matter gets adjudicated, interests of both parties do not suffer and balance is maintained. We find that in instant case, three samples were subjected to test at various stages. Firstly, as per the requirement of the impugned notification before importing the goods from source country from the Lab of mining company which is placed at page 49 of the paper book. Secondly, we find that at the running page 56 of the paper book, Customs had drawn a sample and obtained report while granting discharge of the cargo on 24.02.2023 which found the purity to be 94.70 which was conformity with

the report of mining which company is available at running page 49 and which is reproduced below:- (To be termed as 1st report)



49

NGALIMINING

In conformity with: Rwanda Mines, Petroleum and Gas Board
Ref: Memo to Gold Exporters dated: 17.02.21

Sampling Methods:

☐ Cutting ☐ Scrapping
☐ Drilling ☐ Client's Sample ☑ Deep Sampling

Assay Method: Fire Assay

ASSAY REPORT

Report No.	:	EQUI/2022/04
Report Date:	:	01/12/2022
Invoice No.	:	EQUI-IND0004
Name & Address	:	EQUINOX MINING LIMITED 20093 KIGALI-RWANDA TEL: +250788547122
Sample Receipt Date		01/12/2022
Date of test performed		01/12/2022
Description of Sample	:	Gold Dore Bars
Sampling Date	:	01/12/2022
Sample Type	:	GOLD DORE BARS
Assay Method	:	FIRE ASSAY – IS 1418-2009

Description	:	Bar Weight	Sample ID	Sample gms	Gold Finesse in PPT	Silver Finesse in PPT
Bar 1	:	7,792.20	EQUI002-1	3.1	947.0	53.0
Bar 2	:	9,010.60	EQUI002-2	4.1	948.0	52.0
Bar 3		7,368.00	EQUI002-3	3.2	948.0	52.0
Bar 4		8,858.90	EQUI002-4	4	947.0	53.0
Bar 5		4,234.70	EQUI002-5	3.6	947.0	53.0
Bar 6		8,257.90	EQUI002-6	3.3	947.0	53.0
Bar 7		6,612.70	EQUI002-7	3	938.0	62.0
Bar 8		6,092.90	EQUI002-8	3.1	938.0	62.0
Bar 9		5,590.50	EQUI002-9	3	945.0	55.0
Bar 10		6,446.90	EQUI002-10	3.8	945.0	55.0
Bar 11		8,357.30	EQUI002-11	4	946.0	54.0
Bar 12		6,657.20	EQUI002-12	3.4	945.0	55.0
Bar 13		5,858.70	EQUI002-13	3.9	945.0	55.0
Bar 14		8,871.00	EQUI002-14	4.2	928.0	72.0
Bar 15		7,402.00	EQUI002-15	3.5	928.0	72.0
Bar 16		8,671.40	EQUI002-16	3.7	943.0	57.0
Bar 17		10,762.40	EQUI002-17	4	943.0	57.0
Bar 18		7,965.30	EQUI002-18	3.3	943.0	57.0
Bar 19		5,749.60	EQUI002-19	3	943.0	57.0
Bar 20		8,815.20	EQUI002-20	4	943.0	57.0
Bar 21		9,014.80	EQUI002-21	3.1	941.0	59.0
Bar 22		9,838.50	EQUI002-22	3.2	941.0	59.0
Bar 23		8,061.20	EQUI002-23	3.3	947.0	53.0
Bar 24		7,409.30	EQUI002-24	3	947.0	53.0
Bar 25		6,558.20	EQUI002-25	4	947.0	53.0
Bar 26		8,686.50	EQUI002-26	3.2	944.0	56.0
Bar 27		8,408.30	EQUI002-27	3.1	944.0	56.0
Other Impurities (if any)	:	N/A				
Any deviations from method specified	:	N/A				
Any unusual features observed	:	Nil				
Additional Information	:	Nil				

Address : P.O Box 7189 | Kigali,Rwanda | Website: www.ngali.com

ATHENA LAW ASSOCIATES DWARKA

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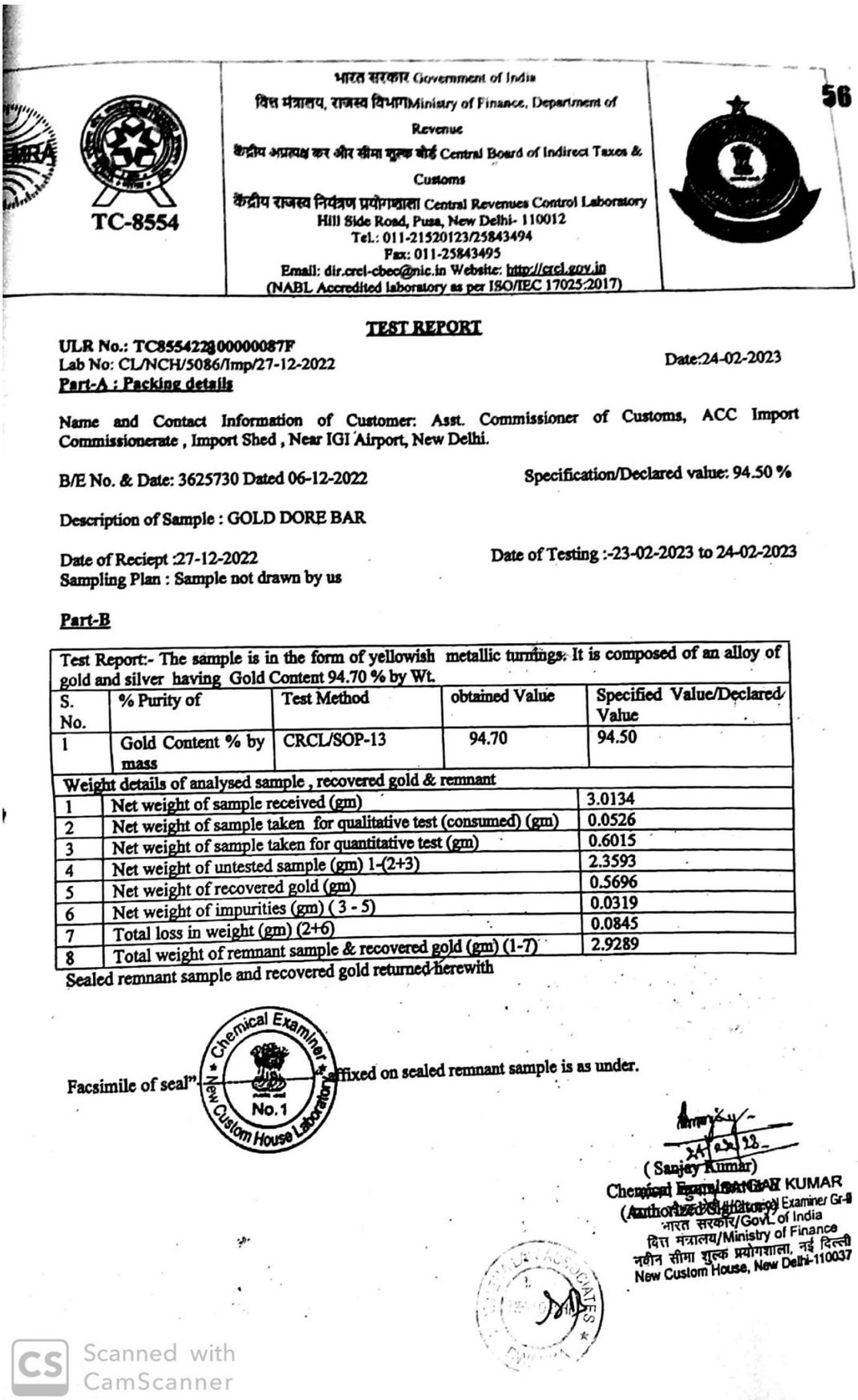
Report drawn by port Customs was as follows (To be termed as 2nd report)



भारत सरकार Government of India
वित्त मंत्रालय, राजस्व विभाग Ministry of Finance, Department of Revenue
केंद्रीय अप्रत्यक्ष कर और सीमा शुल्क बोर्ड Central Board of Indirect Taxes & Customs
केंद्रीय राजस्व नियंत्रण प्रयोगशाला Central Revenues Control Laboratory
Hill Side Road, Pusa, New Delhi- 110012
Tel.: 011-21520123/25843494
Fax: 011-25843495
Email: dir.crcl-cbec@nic.in Website: http://crcl.gov.in
(NABL Accredited laboratory as per ISO/IEC 17025:2017)

TC-8554

56

TEST REPORT

ULR No.: TC855422300000087F
Lab No: CL/NCH/5086/Imp/27-12-2022 Date:24-02-2023

Part-A : Packing details

Name and Contact Information of Customer: Asst. Commissioner of Customs, ACC Import Commissionerate , Import Shed , Near IGI Airport, New Delhi.

B/E No. & Date: 3625730 Dated 06-12-2022 Specification/Declared value: 94.50 %

Description of Sample : GOLD DORE BAR

Date of Reciept :27-12-2022 Date of Testing :-23-02-2023 to 24-02-2023
Sampling Plan : Sample not drawn by us

Part-B

Test Report:- The sample is in the form of yellowish metallic turnings. It is composed of an alloy of gold and silver having Gold Content 94.70 % by Wt.

S. No.	% Purity of	Test Method	obtained Value	Specified Value/Declared Value
1	Gold Content % by mass	CRCL/SOP-13	94.70	94.50

Weight details of analysed sample , recovered gold & remnant		
1	Net weight of sample received (gm)	3.0134
2	Net weight of sample taken for qualitative test (consumed) (gm)	0.0526
3	Net weight of sample taken for quantitative test (gm)	0.6015
4	Net weight of untested sample (gm) 1-(2+3)	2.3593
5	Net weight of recovered gold (gm)	0.5696
6	Net weight of impurities (gm) (3 - 5)	0.0319
7	Total loss in weight (gm) (2+6)	0.0845
8	Total weight of remnant sample & recovered gold (gm) (1-7)	2.9289

Sealed remnant sample and recovered gold returned herewith

Facsimile of seal" Chemical Examiner * New Custom House Laboratory * No.1 affixed on sealed remnant sample is as under.

(Sanjay Kumar)
Chemical Examiner Gr-II
(Authorized Signatory)
भारत सरकार/Govt. of India
वित्त मंत्रालय/Ministry of Finance
नवीन सीमा शुल्क प्रयोगशाला, नई दिल्ली
New Custom House, New Delhi-110037

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57.1 We also find that last report of the CRCL obtained by DRI which is a running page 21 (to be termed as 3rd report) indicates slightly higher

percentages in three samples than the prescribed 95% but largely within the tolerance limits of ±/.25 indicated by the CRCL itself and its reply of RTI. Further, the report based on which seizure has been made has subjected sample to a test other then Fire Assay Method as is prescribed by BIS. While noting above material, we will not like to comment about maintainability or otherwise of the seizure. at this stage, as there is always a possibility that investigating agency during the process of investigation may chance upon and collect any further evidence strengthening their case on legal and for factual basis. However, we find that out of 27 Gold Bars admittedly 1 bar below was 5kg i.e. of 4.240 kg which is claimed to be erroneously imported due to error on the part of exporter by the appellants and the same in any case shall not be allowed to be imported under the conditions of Notification No. 50/2015-Cus dated 30.06.2017 or Notification No. 96/2008-Cus. Further, we also find that the appellants had initially claimed benefit of Notification No. 96/2008-Cus dated 13.08.2008 based on the country of origin being of Republic of Rwanda. However, on the behest of Investigating Agency and under protest to get release of consignment, they paid duty under protest on TR-6 challan No. 446 dated 21.12.2022. However, the goods were not released to them detention was converted into seizure. We find that the differential duty which was paid on the goods which were to be released but eventually not released was to the extent of 15.20 Crores (approx) which is with the department available for any appropriation, if so needed. We, further find that the another Gold Bar 4.240 which cannot be subjected to claim of exemption at present. The fate of the same whether being eligible for re-export are not has to be decided by the adjudicating authority, at the time of adjudication, the same will have a value exceeding Rs. 2.5 crores. We find that availability of this amount of security exceeding Rs. 17.5 crores along with execution of bond of full value of the goods should suffice to safeguard the interest of revenue. While attempting to

balance both the rival interests, we have been guided by the following facts and propositions-

1. Appellant is an established importer and a person in this business having validly imported 103 consignments from the Year 2018 till the date of impugned consignment. This being 104th consignment and cannot be termed as a "fly by night" operator and that at the moment consignment test report regarding the purity which has been chosen to be relied upon by the department has deviation within tolerance limits and also the difference is so miniscule that by preponderance of probability propensity to do smuggling cannot be inferred, prima facie, on the part of appellants. We also find that huge working capital of the appellant is standing bloked because of the present litigation in terms of duty discharged and gold held by the department. Further, we find that M/s. NEYVELILIGNITE CORPORATION LIMITED VS. UNION OF INDIA in the matter reported in 2009 (242) ELT 487 (Mad.), it was held in para 31-32 that goods which are exempted from duty subject to conditions cannot become prohibited if one or more of the conditions of exemption notification are violated, they only become dutiable. Again we prima facie find that Section 110A which deals with provisional release of seized goods does not place any fetter by distinguishing between prohibited, restricted or dutiable goods. Even if under Section 125 in relation to gold under Section 123 for violation, 'the gold becomes become absolute confiscatable, it is clear it cannot be in relation to dutiable gold which becomes eligible to higher duty on claim of exemption being refused as upheld in cited decision (supra) of M/s. NEYVELILIGNITE CORPORATION LIMITED. Further, we find that para 2 of CBEC Circular No. 35/2017-Cus issued by CBEC relating to guidelines for provisional release of seized imported goods pending adjudication has been struck down as being against the statute vide para 51 of the decision in the matter of ADDITIONAL DIRECT GENERAL

ADJUDICATION vs. ITS MY NAME PVT. LTD. as reported in 2021 (375) ELT 545 (Delhi). Paras 72-73 & 51 the decision of the jurisdiction High court are relevant in this regard and the same are reproduced below:-

"51.*The Learned ASG also placed pointed reliance on Circular No. 35/2020-Cus. supra, issued by the C.B.E. & C., para 2 of which absolutely proscribes provisional release of "goods prohibited under the Customs Act, 1962 or any other Act for the time being in force", "goods that do not fulfil the statutory compliance requirements/obligations in terms of any Act, Rule, Regulation or any other law for the time being in force; and "goods specified in or notified under Section 123 of the Customs Act, 1962". Mr. Ganesh relied on Agya Import Ltd. (supra), which holds that para 2 of the said Circular was merely in the nature of a "general guideline", and did not incorporate any mandate. We, having perused para 2 of Circular No. 35/2017-Cus. supra, vis-a-vis Section 110A of the Act, are not inclined to be so magnanimous. According to us, para 2 of Circular No. 35/2017-Cus. is clearly contrary to Section 110A and is, consequently, void and unenforceable at law. It is not permissible for the C.B.E. & C., by executive fiat, to incorporate limitations, on provisional release of seized goods, which find no place in the parent statutory provision, i.e. Section 110A of the Act. Executive instructions may, it is trite, supplement the statute, where such supplementation is needed, but can never supplant the statutory provision. [Lok Prahari v. State of U.P., (2016) 8 SCC 389, which digests several earlier decisions]. By excluding, altogether, certain categories of goods, from the facility of provisional release, para 2 of Circular No. 35/2017-Cus. supra clearly violates Section 110A, whereunder all goods, documents and things, are eligible for provisional release. Goods, which are eligible for provisional release under Section 110A of the Act, cannot be rendered ineligible for provisional release by virtue of the Circular. (Be it noted, here, that we refer to the "eligibility" of the goods for provisional release, as distinct from the "entitlement" thereof, which has to be determined by the adjudicating authority in exercise of the discretion conferred on her, or him, by Section 110A.) Para 2 of Circular No. 35/2017-Cus., therefore, effectively seeks to supplant Section 110A, to that extent, and has, therefore, to be regarded as void and unenforceable at law."*

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"72. *Insofar as the quantity of 25400.06 grams of gold jewellery, covered by the registered, apprised, dated and signed Bill of Entry, dated 20th April, 2019, is concerned, therefore, the decision, of the Learned Tribunal, to allow provisional clearance, cannot be said to be perverse, so as to give rise to any substantial question of law, as would warrant interference, in appeal, by us. We may repeat, in this context, that the decision, as to whether the gold jewellery ought, or ought not, to have been provisionally released, was entirely discretionary. The facts before the Learned Tribunal, which are also before us, cannot be said to be such as would render the exercise of discretion, by the Learned Tribunal, in favour of provisional release of the 25400.06 grams of gold jewellery, perverse. Absent such perversity, no case, in our view, can be said to exist, as would justify our interference, with the exercise of discretion by the Learned Tribunal, in exercise of our jurisdiction under Section 130 of the Act.*

> ***73.****We may hasten to add, here, that our view, in this regard, does not discountenance, in any manner, the allegation, of the DRI, that the entire quantity of 51172.4 grams of gold jewellery was, in fact, being smuggled into India, or that it was, consequently, liable to confiscation. That is a matter to be decided in adjudication. Provisional release of the gold jewellery does not, in any manner, inhibit the adjudicating authority from holding that the jewellery was, in fact, liable to confiscation, or passing appropriate orders in that regard. It is precisely for this reason that, at the time of provisional release, the importer is required to furnish a bond, covering the full value of the imported goods, along with security, in accordance with law. Allowing provisional release of the seized gold jewellery does not, therefore, interfere, in any manner, with due adjudication of the show cause notice, or with the jurisdiction, of the adjudicating authority, to hold the gold jewellery liable to confiscation. The mere fact that imported goods, consequent on adjudication may, possibly, be held to be liable to confiscation at a later stage, cannot be a ground to refuse provisional release. Else, Section 110A of the Act would, in our view, be largely rendered nugatory and otiose."*

Ruling being of jurisdictional High Court on validity of Circular as well as on scope of powers under Section 110A is binding on us and is worthy of following in substance.

58. Therefore, We are of the view that goods even if there is any remote possibility of being found prohibited or restricted at the time of adjudication is there, cannot be subjected to non release in terms of Section 110A. In view of foregoing, we allow the provisional release of 26 Gold Dore weighing 5 kg plus more, subject to the following conditions:-

1. That the duty paid at the time of seeking release of goods of Rs. 15.20 crores approximately, even if voluntarily paid or paid under protest shall not be sought for refund by the appellants and shall remain available to the department till culmination of adjudication.
2. One Gold Dore Bar weighing 4.24 kg will remain available with the department as security and shall not be released including release for re-export if sought by the party till adjudication is over. Apart from above security the party shall furnish a bond binding itself to pay equivalent of full value of consignment plus 20% in lieu of penalty thereon, to the department.

3. That the provisional release by the department, shall be done within two weeks of compliance and documentation of formalities as per para (1) and (2) above, by the appellant.

59. Accordingly, appeal is disposed of.

(Order pronounced in the open court on **05.12.2023**)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(HEMAMBIKA R.PRIYA)
MEMBER (TECHNICAL)

Prachi

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 51709 of 2021-SM

(Arising out of order-in-appeal No. CC(A)/CUS/D-II/Prev./NCH/493/2020-21 dated 30.06.2021 (05.07.2021) passed by the Commissioner (Appeals), New Custom House, New Delhi).

Shri Rajesh Kumar **Appellant**
A-112, 1st Floor, Chander Nagar
Ghaziabad, Uttar Pradesh.

VERSUS

Commissioner of Customs (Prev.) **Respondent**
New Customs House, Near IGI Airport
New Delhi.

APPEARANCE:

Sh. Aakarsh Srivastava & Sh. Utkarsh Srivastava, Advocates for the appellant

Ms. Tamanna Alam, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No. 51030/2022

DATE OF HEARING: 12.08.2022
DATE OF DECISION: 31.10.2022

ANIL CHOUDHARY:

The appellant is in appeal against imposition of penalty of Rs. 40 lakhs under Section 112(b)(i) of the Customs Act.

2. Brief facts of the case are that the appellant was working in the bullion market as a broker in Kucha Mahajni, Chandani Chowk, Delhi. He was mainly selling gold/ bullion received on consignment basis from the consignor, for commission, which was Rs. 500/- to Rs.1,000/- per kg.

3. On the basis of specific information, the Directorate of Revenue Intelligence, Delhi Zonal Unit, New Delhi searched premises of the appellant situated at Kucha Mahajani, Chandani Chowk, Delhi on 14.10.2016 (Friday). During search 20.643 kgs. of gold of foreign origin, having total market value of Rs. 6,46,57,189/- was recovered from Shop No. 7 where the appellant and Sh. Pankaj Kumar Singh, an employee of Sh. Amit Goel (consignor) were present. On enquiry Sh. Rajesh Kumar could not produce any document for legal possession of the gold and informed that the said gold was received from Sh. Amit Goel, Director of M/s Pace Commodity Brokers Pvt. Ltd., through his employee Sh. Pankaj Kumar Singh. During search in Shop No. 8 located adjacent to Shop No. 7, currency of total face value of Rs.6,44,00,000/- was found. The appellant informed that this was sale proceeds of smuggled gold sold on that day and also sold during previous week. On a reasonable belief that the recovered gold was smuggled into India and that the said cash amount was sale proceeds of smuggled gold, the same appeared to be liable for confiscation under Section 111 of the Customs Act, 1962. Officers of DRI seized the same under the provisions of section 110 of the Act vide panchnama dated 14.10.2016.

4. The appellant in his statement dt. 15.10.2016 recorded under Section 108 of the Act, inter alia stated that-

i. He was a broker in sale-purchase of gold, and he earns commission of Rs. 800-1000 per kg. of gold.

ii. He mainly dealt in foreign origin gold and main sellers of foreign origin gold through him were Sh. Amit Goel and Sh. Atul Goel of Safdarjung Enclave, New Delhi.

iii. Their two employees namely that Sh. Santosh and Sh. Pankaj Kumar Singh came to him to deliver gold bars of foreign origin belonging to Sh. Amit Goel and Sh. Atul Goel.

iv. He used to receive gold bars and sold to purchasers, and gave the money received from buyers to the seller.

v. Sh. Amit Goel had called him on 14.10.2016, that he wanted to sell gold and accordingly he sent Sh. Pankaj Kumar Singh and Sh. Santosh with 27 kgs. gold, out of which 7 kgs. was sold immediately for Rs. 2,04,76,000/-.

vi. The currency of Rs. 6.44 crores recovered and seized from his shop contained the money received from the sale of 7 kgs. of gold which amounted to Rs. 2,04,76,000/-, and the remaining money was sale proceeds of gold bars of foreign markings of Sh. Amit Goel, sold by him (Rajesh) during last week.

vii. Sh. Pankaj Kumar Singh had visited him 4-5 times in last four-five months and Sh. Santosh Kumar had visited him 6-7 times during last six months, and each time they have brought foreign origin gold of Sh. Amit Goel.

viii. Out of 20.643 kgs. of gold, 20 kg. has been brought on that day and 0.643 kgs. was remaining portion of gold sent earlier by Sh. Amit Goel.

5. Sh. Pankaj Kumar Singh vide his voluntary statement dt. 15.10.2016, inter alia, stated that he along with Sh. Santosh (another employee of Sh. Amit Goel) had gone to the shop of the appellant, Shop No. 7 and 8, 1164, Kucha Mahajani, Chandani Chowk, New Delhi, to deliver him foreign marked gold bars totally weighing 27 kgs.

6. Both the appellant and Sh. Pankaj Kumar Singh retracted their statement before Hon'ble CMM, Patiala House Court on 20.10.2016 and 18.11.2016 respectively. Statement of the appellant was again recorded by DRI on 27.01.2017 wherein he again inter alia stated that Sh. Amit Goel used to send the foreign origin gold to him through Sh. Pankaj Kumar Singh and Sh. Santosh Kumar.

7. Searches were conducted at the office premises as well as residential premises of Sh. Amit Goel. Nothing incriminating was recovered during searches. Statement of Sh. Amit Goel was recorded under Section 108 of the Act on 18.11.2016, 20.12.2016 and 30.01.2017 wherein, he inter alia stated that-

i) his job was of market analysis and research across asset classes and disseminating his research results to his clients.

ii) he knew the appellant for last 10 months and had been interacting with him to ascertain the price information of bullion market and had never had any financial dealing with the appellant.

iii) he had nothing to do with the seized gold and the currency, and why did the appellant take his name, is not known to him.

8. From the call detail records it appeared to Revenue that Sh. Pankaj Kumar Singh was present in the office of Sh. Amit Goel between 9 hrs. to 11 hrs. on 14.10.2016 and thereafter he went to Kucha Mahajni and reached there by 13 hrs.

9. Sh. Manoj Kumar and Sh. Ajay Mahto, both employees of the appellant, who were present in the shop at the time of seizure of gold and Indian currency notes, in their respective voluntary statements dated 15.10.2016, recorded under Section 108 of the Customs Act, 1962, stated, inter alia, that they were working at Sh. Rajesh Kumar's shop; that appellant purchased foreign marked gold in heavy quantity from different persons and sold in retail to other jewellers; that sometimes, many retailers of gold came to the shop of Sh. Rajesh Kumar i.e. Shop No. 7 & 8, Kucha Mahajni, Chandni Chowk, Delhi to purchase gold from the appellant, that sometimes the appellant sent them (Ajay and Manoj) to other jewellers' shops to deliver gold and receive payments; that one Sh. Pankaj Kumar Singh along with Sh. Santosh, both employees of one Sh. Amit Goel, visited the shop of the appellant to sell gold; that Pankaj Kumar Singh always came with (at least) 15-20 kgs. gold and take the payment later on after the same was sold by the appellant; that the gold seized by DRI officers on 14.10.2016 was brought by Sh. Pankaj Kumar Singh, for which payment was to be received by Sh. Pankaj from the appellant; that the appellant dealt in foreign marked gold bars similar to those seized on 14.10.2016 by DRI officers from the shop of the appellant; the marking on those gold bars dealt earlier by the appellant were similar to the markings that were on the seized gold bars; that they (Ajay and Manoj) did not know

that these gold bars had been procured illegally and that the seized currency of Rs. 6.44 crores was the proceeds of foreign marked gold bars sold by the appellant.

10. Sh. Amit Goel was summoned by the Revenue for his statement four times during the month of October, 2016. But instead of joining the investigation, he approached the Hon'ble Delhi High Court in writ petition for restraining the Revenue for taking any coercive action including his arrest. Thereafter, on the direction of the Hon'ble High Court, Sh. Amit Goel appeared before the authority on 18.11.2016 and on subsequent dates, wherein his statement was recorded as stated hereinabove. He inter alia also admitted that Sh. Pankaj Kumar Singh was his employee and was known to him for the last ten years. He admitted that the appellant is also known to him for the last ten months with whom he have been interacting regularly. However, he denied any financial dealing or trade dealing with the appellant nor claimed the ownership of the seized gold and currency. Sh. Amit Kumar also admitted that Sh. Santosh Kumar Singh is his regular employee.

11. Further, as per the CDR/CAF, it was evident that Sh. Amit Goel had called Sh. Rajesh Kumar on his landline from his mobile numbers 57 times during the period 01.10.2016 to 14.10.2016, even before the search on 14.10.2016 at 13.31 hrs there was conversation for about 47 seconds. Further on the date of seizure i.e. 14.10.2016, Sh. Amit Goel had conversed with Sh. Rajesh Kumar the appellant six times from his mobile numbers. The call detail recording have been obtained by Revenue from the respective telecom operator, with certificate under Section 65B of the Indian Evidence Act, 1972.

12. Pursuant to investigation, show cause notice dated 12.04.2017 was issued to the appellant alongwith Sh. Amit Goel, Sh. Pankaj Kumar Singh and Sh. Santosh Kumar Singh, calling upon them to show cause individually as to why the seized gold weighing 20.643 kg. (of gold bars) having market value of Rs. 6,46,57,189/- seized from the shop premises of this appellant be not confiscated under the provisions of Sections 111(d), 111(o) and 111(p) of the Act with further proposal to confiscated the seized Indian currency of Rs. 6,43,74,000/- being sale proceed of the gold under Section 121 of the Customs Act with proposal to impose penalty individually on all the noticees under Section 112 of the Customs Act.

13. In the course of adjudication proceedings, this appellant had sought cross examination of Sh. Amit Goel and Sh. Atul Goel (brother of Sh. Amit Goel). Sh. Amit Goel had appeared for cross examination on 21.03.2017, in answer to question - how do you know the appellant Sh. Rajesh Kumar and what kind of dealing you have with him?

Ans. I got introduced to Sh. Rajesh Kumar sometimes in end of 2015 at a social gathering. I used to take research inputs from Sh. Rajesh Kumar on phone of the bullion market for his research input, what he wanted to understand was the demand and supply of gold and silver so that we could understand the price movement of gold and silver prices in a better way. To question 7 – why do you want to obtain these mentioned above technical information from a person (Rajesh Kumar) who is just as a broker in Kucha Mahajani?

Ans. I did not know whether Sh. Rajesh Kumar is a broker or whether he trades in the bullion market in his personal capacity or for his

customers. He had introduced himself as a key player in the Delhi bullion market in our only meeting till date. The information that I asked from him had nothing to do with technical aspects. It was only about the demand and supply forces for the bullion prices.

14. Sh. Pankaj Kumar Singh had appeared for cross-examination, which was held on 17.06.2018 wherein he inter alia stated that he was drawing monthly salary of Rs. 25,400/- working with M/s Pace Stock Broking Services Pvt. Ltd., of which Sh. Amit Goel was the Director. In reply to question that how you came in contact with Sh. Rajesh Kumar, he stated that he never knew him before and had gone there on 14.10.2016 to seek employment.

15. Cross examination of this appellant was taken at the instance of Sh. Amit Goel by his Counsel on 03.05.2018, wherein this appellant stated that he is only class 8th pass and just literate. He inter alia stated that he can read and write only Hindi. In response to the question if he was paying income tax, he answered in the affirmative. He also stated that he has also rented out one of the shop to Sh. Neeraj Mehta, monthly rent of Rs. 50,000/- p.m. w.e.f. 01.07.2016. In answer to question, where from gold was recovered, he stated that Shop No. 7 from the bag of Pankaj. At the relevant time he was sitting in shop No. 13. He further stated that he was detained by the DRI on the day of search and taken him to their office around midnight. Further without any summons, his statement was recorded. In answer to the suggestions made by the Counsel of the appellant – you deposed to DRI and in particular - alleging that the gold was sent by Sh. Amit Goel was false to save yourselves. In answer the appellant stated that no,

whatever I said in regard to Sh. Amit Goel is correct. Further, during his cross examination on 03.05.2017, the appellant in answer to question No. 40 as to how much sale and purchase of gold do you do in a day. The appellant in answer stated that in a day, I transact approximately between 3 to 8 kg. On some days it can exceed 20 kgs. His business is only of brokerage. During his cross examination Sh. Amit Goel admitted the fact that he knew Sh. Pankaj Kumar Singh and Sh. Santosh Kumar who are working in his office as an employee for the last 8-10 years. He also stated that he is Research Analyst and Chief Investment Strategist of the company – M/s Pace Stock Broking Services Pvt. Ltd., and have been working since 1995.

16. Ld. Counsel for the appellant further submits that from the statement of Sh. Amit Goel, it is evident that he is highly educated and technically well equipped. Thus, he was having several channels of information and very unlikely that he was frequently calling this appellant to know the market rate of gold etc. Admittedly, this appellant works as a broker in the bullion market in Chandani Chowk, Delhi. Further, Sh. Pankaj Kumar Singh admitted at the time of search that he had brought the gold on behalf of his master – Sh. Amit Goel. Thus, although the gold was seized from this appellant, but in fact the gold was in the constructive possession of Sh. Amit Goel as it was lying in the cloth bag brought by his employee Sh. Pankaj Kumar Singh. Further, there is hardly any truth in the subsequent statement of Sh. Pankaj Kumar Singh wherein he stated that admittedly he was drawing salary of Rs. 25,400/- from M/s Pace Stock Broking Services Pvt. Ltd., controlled by Sh. Amit Goel. Thus, there is no truth in the subsequent

statement that he came to look for work / employment at the shop premises of the appellant. The averments of this appellant are also supported by fact, at the time of search and seizure in presence of Sh. Pankaj Kumar Singh, that the gold was seized from the cloth bag which has been brought by Sh. Pankaj Kumar Singh on behalf of Sh. Amit Goel, which statement was never objected to by Sh. Pankaj Kumar Singh. Under such facts and circumstances, this appellant has no reason to doubt the nature of gold being smuggled. Further, the provisions of Section 111(d) are not attracted in case of 'town seizure' and thus the order of confiscation under Section 111(d) is bad in law. The fact of gold brought for sale by Sh. Pankaj Kumar Singh alongwith Sh. Santosh Kumar on behalf of Sh. Amit Goel is also supported by the statement of the two employee of Sh. Rajesh Kumar recorded at the time of search - namely Sh. Manoj Kumar and Sh. Ajay Mahto. These facts are also supported by the statement of Sh. Pankaj Kumar Singh dated 15.10.2016 wherein he stated that he came to the shop of the appellant on 14.10.2016 alongwith Santosh Kumar, both employees of Sh. Amit Goel and brought 27 kgs. of gold for sale, out of which part was sold and balance 20.643 kgs. of gold was found and seized by the officers alongwith sale proceeds of Rs. 6,43,74,000/- of the gold already sold. It is further urged that as per the report of the Jewellery Appraiser, obtained by the Revenue, seized gold bars were of 995.0 purity. Admittedly, the smuggled / imported gold is usually of 999.0 purity. Thus, the assumption of Revenue that the gold appears to be smuggled, only on the basis of foreign marking, is without any reasonable basis. As such foreign marking are also put in local sanchas at Delhi to increase the saleability/ marketability of the gold. In the facts and

circumstances, the gold seized from the appellants is not prohibited goods. Further, gold is imported into India freely by the authorised importers and also by Indian citizen returning from abroad on payment of duty.

17. It is also urged that, the Adjudicating Authority have held in para 23.3.6 of the order-in-original, that although gold was recovered from the premises of this appellant, the de-jure possession of the gold is proved to be that of Sh. Amit Goel, which was brought to this appellant by Sh. Pankaj Kumar Singh/ Sh. Santosh Kumar, both employees of Sh. Amit Goel. It is further urged that neither this appellant nor Sh. Amit Goel have applied for release of the gold in their favour, as both of them had denied the ownership of the gold. Further, in the cross-examination, this appellant have stated that at the end of business hours, if any gold is not sold on the same day then the seller/ consignor takes back the unsold gold. This fact is also evident from the fact that Sh. Pankaj Kumar Singh was sitting at the shop of Sh. Rajesh Kumar – appellant on 14.10.2016 to take back the sale proceeds of the gold including unsold gold brought by him. In such facts and circumstances, the seizure and confiscation of cash found at the time of search is bad in law and on facts. Thus, no case is made out that this appellant was dealing or facilitating the sale of smuggled gold, as alleged.

18. The show cause notice was adjudicated on contest and vide order-in-original dated 31.01.2019 the Additional Commissioner have been pleased to confiscate absolutely the seized gold weighing 20.643 kgs. having market value of Rs. 6,46,57,189/- under Section 111(d), (o) and (p) of the Customs Act. Further, confiscated Indian currency

face value of Rs. 6,44,00,000/- actual value of Rs. 6,43,74,000/- under Section 121 of the Customs Act, holding the same to be sale proceeds and further imposed penalty of Rs. 40 lakhs under Section 112(b)(i) of the Customs Act and also imposed penalty of Rs. 50 lakhs on Sh. Amit Goel as well as Rs. 1 lakh each on Sh. Pankaj Kumar Singh and Sh. Santosh Kumar.

19. Being aggrieved, this appellant had preferred appeal before the learned Commissioner (Appeals) who vide the impugned order-in-appeal observed that the appellant has admitted that he had sold smuggled gold having foreign marking earlier in cash without any bill/ invoice. Further, recovery of Indian currency having face value of Rs. 6.44 crore corroborates the admission of dealing in smuggled gold. Further, observed that the appellant was aware that he was dealing in smuggled gold and accordingly upheld the order of penalty dismissing the appeal. Being aggrieved, the appellant is in appeal before this Tribunal.

20. Heard the parties.

21. The preliminary objection was taken by the Revenue that this appeal be heard by Division Bench as the Revenue's appeal against the order-in-appeal of Sh. Amit Goel arising from the common order-in-original, is pending before the Division Bench. I find that this objection of Revenue is without any merit as appeal of the other appellant Sh. Amit Goel is separately dealt with by the Commissioner (Appeals). Secondly, this appellant had requested for a copy of order-in-appeal under RTI Act (of Amit Goel) being Order-in-appeal dated 28.02.2020.

Revenue denied to give the copy of the said order observing that the desired information cannot be given as the same cannot be disclosed as per Section 8(1)(i) of the RTI Act, 2005.

22. Having considered the rival contentions and on perusal of records, I find that this appellant is engaged in selling of gold as a consignment agent/ broker, wherein the owner of the gold either himself brings or through his trusted persons/ employee. This appellant after retaining his brokerage returns the sale proceeds and unsold gold, if any, to the consignor, normally on the same day. This fact is evident on the face of the record, as on the day of search and seizure, this appellant has stated that he has received gold for sale from Sh. Amit Goel through his employee Sh. Pankaj Kumar Singh who has come to his shop alongwith Sh. Santosh Kumar. Further, this appellant stated in presence of Sh. Pankaj Kumar Singh that he has received the gold from Sh. Amit Goel through Sh. Pankaj Kumar Singh, and this statement was not disputed rather affirmed by Sh. Pankaj Kumar Singh in his statement recorded on the same day or simultaneously. It is further evident from the facts on record that the seized gold 20.643 kgs. has been found in the cloth bag brought by Sh. Pankaj Kumar Singh. Thus, I hold that the gold was actually in possession of Sh. Pankaj Kumar Singh who was present in the shop. Thus, I hold that although this appellant was facilitating the sale of gold, the gold was in defacto and de-jure possession of Sh. Pankaj Kumar Singh on behalf of his master Sh. Amit Goel. Further, frequent inter action of this appellant with Sh. Amit Goel is proved from the call detail records obtained by Revenue, wherein on the date of search and seizure, there were six

conversations between them for about 216 seconds. I further find that there was no reason for this appellant to doubt that the gold received for sale on consignment basis is of smuggled nature. These facts are also supported by the statement of the employees of appellant - Sh. Manoj Kumar and Sh. Ajay Mahto at the time of search and seizure by the officer. Further, Sh. Amit Goel has admitted that Sh. Santosh Kumar and Sh. Pankaj Kumar Singh are his employee working for him for the last 8-10 years. The fact of dealing in gold on consignment sale basis by this appellant is also proved by his statement during cross-examination wherein he has categorically stated that at the end of business hours/ day the unsold gold is taken away by the owner or his representative. Further, as per the phone - tower location, Revenue found that Sh. Pankaj Kumar Singh came to the shop premises of the appellant on 14.10.2016 from the office of Sh. Amit Goel. Thus, the contention of having received the gold from Sh. Amit Goel is also corroborated by this undisputed fact. Further, I find that the subsequent change of statement of Sh. Pankaj Kumar Singh does not inspire confidence, has evidently been made in order to save his employer - Sh. Amit Goel from penal consequences. Further, the panch witness Sh. Yogesh - President of Bullion Association has also supported the contention of this appellant, that he is a broker dealing in bullion on consignment basis for brokerage. These facts are also corroborated with the Income Tax record of this appellant wherein he has declared annual income during the financial year 2014-15 to 2017-18 in the range of Rs. 3.9 to Rs. 9 lakhs. Admittedly, Sh. Amit Goel is a wealthy person of substantial means, which also support the contention of this appellant.

23. I further find substance in the submission of ld. Counsel for the appellant that investigation does not adduce any evidence to arrive at a definite conclusion, if the gold was smuggled or not. Penalty under Section 112(b) requires *mens rea* to be established i.e. conscious knowledge of the appellant that he was dealing in smuggled gold. This fact is not coming out from the evidence on record. Admittedly, it is a case of town seizure and not a seizure (or near) in customs area or in the vicinity of international border. Thus, the suspicion of Revenue that the gold is smuggled does not lead to inevitable evidence that the gold is smuggled. Admittedly, the seized gold was of 99.5% purity, whereas normally the smuggled gold is of 99.9% purity. On this score also there can be no presumption of gold being smuggled only on the basis of foreign marking. In absence of any chain of events supporting movement of smuggled gold from the border area or customs area to town or a person coming from an international border, I hold that simply possession of foreign marking gold without a bill does not lead to the conclusion that it is smuggled. It has been so held by this Tribunal in the case of **Nand Kishore Modi vs. CC (Prev.), West Bengal - 2015 (325) ELT 781 (Tri Kolkata)**. This Tribunal has held in the case of **Sanjiv Kumar & Others vs. CCE, Lucknow** vide Final Order No. 72924-72926/2018 dt. 27—(Tri. All.) that mere foreign marking on gold without any corroborative evidence is at best heresay evidence.

24. In view of my findings and observations, I hold that the confiscation of gold under the facts and circumstances is bad in absence of condition precedent, as provided under Section 111(d), (o) and (p) of the Customs Act. I hold that the appellant has not violated any of the

provisions of Section 111 as alleged. I further hold that appellant is not involved in acquiring possession of or is any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knew or has reason to believe are liable to confiscation under Section 111. Accordingly, I hold that no penalty is imposable on the appellant in the facts and circumstances under Section 112(b)(i). Accordingly, penalty imposed on this appellant is set aside.

26. Thus, the appeal is allowed with consequential benefits, in the aforementioned terms.

(Pronounced on 31.10.2022).

(Anil Choudhary)
Member (Judicial)

Pant

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. II

Custom Appeal No. 50146 of 2020 (SM)

(Arising out of Order-in-Appeal No. CC(A)/CUS/Prev./NCH/88/2019 dated 31.10.2019 passed by the Commissioner of Customs (Appeals), New Delhi)

Muzaffar Ali Sheikh **Appellant**
R/o H. No. 83-A New Colony Soura,
Near Naribal Masjid Srinagar,
Jammu & Kashmir-190011.

Versus

Commissioner of Customs, New Delhi **Respondent**
New Customs House, Near IGI Airport,
New Delhi-110037.

Appearance

Shri S. Sunil, Advocate - for the appellant

Shri Jasbir Singh, AR - for the respondent

CORAM:HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing: 23.12.2020
Date of Decision: 21.01.2021

Final Order No. 51025/2021

Anil Choudhary:

The appellant is a qualified MBA and lives in U.K. and is working there since November, 2008 for livelihood, the appellant is citizen of India, resident of Srinagar (J&K). The appellant arrived in India from U.K. on 23.09.2015 in

the morning and after Customs clearance, he came out of the airport at New Delhi. Thereafter, in day time, he went to the P.P. Jewellers, Karol Bagh, from where he took delivery of 2 gold bangles for which he had placed orders earlier and was issued sales invoice no.10278. On the same day, in the evening, he was in the process of boarding domestic flight to Srinagar at Terminal T-1D. As he was carrying two gold bangles and was also in possession of 151 gold coins, he was detained by the CISF at the airport and was handed over to the Air Intelligence Unit of Income Tax at the airport. The AIU officers recovered 151 yellow metal coins appearing to be gold along with 2 bangles of yellow metal appearing to be gold. Thereafter, the officers of Income Tax Department handed over the appellant along with gold coins, gold bangles and luggage to the officers of the Customs (Preventive), New Customs House, New Delhi, who brought him along with his goods and luggage to Room No.34, New Customs House, New Delhi. A Panchnama was drawn. The appellant informed that all the coins were of gold and he had brought them from London. The said items (coins) were received by him from his father-in-law as a gift at the time of his marriage, which was solemnized in October, 2011. He had taken the said 151

gold coins with him in November, 2011 to London for the purpose of obtaining loan against gold. These are the same coins, which are of Indian origin, which prevailed during British India period, which he had brought back with him. He also produced the original receipt no.10278 dated 23.09.2015 issued by P.P. Jewellers in respect of the two gold bangles. As per the said invoice, the gold bangles were of 45.22 gms. of total sale value of Rs.1,29,000/- including VAT.

2. Thereafter, the appellant was served notice under Section 102 of the Customs Act for personal search, for which he granted his consent. In his personal search, nothing incriminating was found. The officers returned the two gold bangles to the appellant immediately. On further inquiry, if the appellant had any documents for legal possession of 151 yellow metal coins, stated to be of gold by him, the appellant could not produce any documents. Thus, it appeared to the Revenue that the said 151 gold coins recovered from the possession of the appellant, have been illegally smuggled into the country and thus, were liable for confiscation under the Customs Act. The gold coins were resealed in plastic containers and the appellant was served summons for 24.09.2015 at

1100 hrs. on 24.09.2015. The appellant and Mr. Neeraj Gupta, Jewellery Appraiser appeared, who gave his appraisement report dated 24.09.2015, according to which, 151 coins of gold are of 916 fineness/purity, each weighing 8 gms. (total weight 1208 gms.) and valued at Rs.26.92,149/- (Tariff Value). Xerox copies of 151 gold coins were also taken and annexed to the Panchnama. The report of the Jewellery Appraiser, Mr. Neeraj Gupta is as follows:-

Sl. No.	Description of Item	Total Weight (In grams)	Value Appraised (Rs.)
	151 gold coins of 916 purity and each coin weighing eight (8)gms. Each coin has marking as given below: Side 1: picture of man facing towards left depicted in centre and "EDWARDVS VII D:G: BRITT: OMN: REX:F:D: IND: IMP:" marked on the circumference. Side 2 : picture of warrior with sword in his hand and riding a member of equine family. No. from 1902 to 1910 marked on coins and each coin having only one number.	1,208	26,92,149/-
	Total	**1,208**	**26,92,149/**

3. Statement of the appellant was recorded under Section 108 of the Customs Act, 1962, wherein he, *inter alia*, stated that he was resident of 90, Rochfords

Gardens, Slough, SL 2, XJ, United Kingdom and possessing Indian passport No.F9179966 dated 03.08.2006. He had gone to UK to pursue his MBA and got admission in University of Northampton, from where he has completed his MBA in November, 2008. Thereafter, he started working in UK as Supply Chain Administrator in TESCO till December, 2014. Thereafter, in December, 2014, he joined Telefonica O2 as Network Engineer, and since then, he is working in the said company. He further stated that he came to Delhi from London through Air India Flight AI- 112 on 23.09.2015 to celebrate Eid with his family at Srinagar and to take back his family to London. After completing the immigration formalities and collecting his baggage, he left the IGI Airport (Terminal 3) and went to Karol Bagh to collect the gold bangles from P.P. Jewellers. He collected the gold bangles after making the payment of balance amount Rs.29,000/-. The order for the bangles was placed earlier on 9.9.2015, on which day he had made advance payment of Rs.1 lakh. Thereafter, after some other shopping, he reached the IGI Domestic Airport Terminal-I at about 3 p.m. and got checked in his luggage. He was about to board the flight, the CISF personnel at security area, called him to identify his checked in baggage. When

he was asked to open his baggage, they found 151 coins of gold as well as two gold bangles. On finding the gold coins and bangles, the CISF stopped him from boarding the flight and informed the Customs Department and Income Tax Department. After the Income Tax officers completed their proceedings, they handed over the gold coins, gold bangles and luggage along with the appellant to the officers of Customs Preventive. He further stated that 151 gold coins, which he had received from his father-in-law - Shri Ali Mohammad Rather as a gift in marriage in 2011, and thereafter, he went to London in November, 2011 and took the said 151 gold coins with him to avail loan against gold. He had not declared the said gold coins at the time of his departure in November, 2011 nor he had made any declaration on his arrival in November, 2011 at London Airport. According to his knowledge, no duty is leviable on the gold coins in UK. Thereafter, when he was coming back to India, he brought the 151 gold coins with him. Further, he did not declare these gold coins to Indian customs under the impression that it is not required. After the Customs clearance, he had left the Airport. That his father-in-law was a resident of Wantpora, Srinagar, Kashmir, had died in April, 2012 i.e. after about 6 months of his marriage.

Thereafter, the appellant was released on furnishing of bail bond and again was summoned for submission of evidences/documents in respect of 151 gold coins recovered and seized under Panchnama dated 23/24.09.2015.

4. The appellant appeared on 30.09.2015 and submitted the following documents vide covering letter dated 30.09.2015:-

(a) Marriage Certificate in original (order version) and

(b) Its translation in English;

(c) Affidavit of his mother-in-law (Ms. Hajra) and photocopy of her passport.

(d) Property valuation documents of his mother-in-law by an approved Government valuer.

(e) Chartered Accountant's certificate of his mother-in-law.

5. On perusal of the marriage certificate of the appellant dated 14.10.2011 with Ms. Fozia Muzaffar, the details of dower and other gifts were mentioned as follows:-

The amount of dower mutually agreed;	Rs.1,30,000/- INR in the form of Gold

	(Jewellery /coins)
The portion of dower that has been disbursed.	Rs.1,30,000/- INR in the form of Gold (Jewellery /Coins)
The portion of dower willingly remitted by the bride	X
The portion of the dower yet to be disbursed by the bridegroom	X
Value of additional gifts or jewellery or value of coins at that time	Rs.7,55,000/- INR
Portion of additional gifts or jewellery or value of coins at that time pending with bridegroom.	X

6. As per the affidavit of Ms. Hajra, wife of late Ali Mohd. Rather, mother-in-law of the appellant, indicated that, '30 Edward Gold Coins' had been gifted by her to her daughter, Ms. Fouzia Muzaffar on her marriage.

7. From the aforementioned facts on record, it appeared to Revenue that as per the statement of the appellant, he had never filed any declaration about the gold coins to the Customs Authorities at the time of taking outside India or on return to India (destination). Admittedly, 151 gold coins were recovered from the appellant. As per the marriage certificate submitted by the appellant, which was in urdu language read with its English translation, which *inter alia,* states that the

marriage was solemanised between Mr. Muzaffar Ali Sheikh (appellant) and one Ms. Fozia Muzafar on 14.10.2011, "Rs.1,30,000/- INR in the form of gold (jewellery/coins) had been mutually agreed as dower and disbursed and further mentions that the value of additional gifts or jewellery or value of coins given at the time of marriage = Rs.7,55,000/- INR. It was stated by Ms. Hajra - Mother-in-law of the appellant in her affidavit that only 30 Edward Gold coins were gifted by her to her daughter on her marriage, but did not submit any document in support of her contention. It appeared to Revenue that none of the documents/evidences produced satisfy the possession of the 151 gold coins totally weighing 1208 gms. It further appeared to Revenue that the said 151 gold coins have been imported in India illegally, in contravention of the provisions of the Customs Act read with Foreign Trade Policy and Notification thereunder. Further, it appeared to Revenue that the appellant was liable for compliance with the law and should have possessed IEC No. etc. An eligible passenger may also import gold through baggage or through the nominated agencies, as permissible. It also appeared that seized gold coins were illegally imported in contravention of the Prohibition/ Restriction/ Regulations

imposed by the Government. Further, it appeared to Revenue that irregular import tantamounts to smuggling, as gold is restricted item. It also appeared that, in Marriage Certificate (Nikah Nama), there is mention of only mehar and gifts made to the bride by the bridegroom. Thus, it appeared to Revenue that the appellant has not properly explained licit possession of 151 gold coins and the explanation given is not tenable, and further, it appears a case of illegal import of gold coins. Further, it also appeared that as per Section 123 of the Act, the onus is on the appellant to prove the licit possession of the gold coins. Accordingly, show cause notice was issued on the appellant requiring to show cause why 151 gold coins totally weighing 1208 gms. valued at Rs.26,92,149/- seized from his personal possession under Panchnama dated 23/24.09.2015 should not be confiscated under Section 111(d) & (i) of the Customs Act, 1962.

8. The appellant contested the show cause notice by filing the reply denying the allegations, stating that the said gold coins in question are of Indian origin. As per the Appraisement Report, the coins belongs to British era of the period 1902 to 1910, pertaining to the King Edward VII, who reined during the period 1901 to 1910, and was

the emperor of India also. The gold coins in question were in circulation in India during the British Indian period and are commonly/readily available in India. The word "IND" appearing on the coins means India and IMP stands for Emperor i.e. Emperor of India. The inscription on the coins under seizure, which reads as:- "EDWARDS VII D:G:BRITT:OMN: REX: F: D: IND: IMP" carries the meaning "Edward the VII, by the Grace of God, of all the Britons, King, Defender of faith, Emperor of India".

9. It was further stated that the gold coins were of Indian origin of the British period and were lying with the families as their treasure and changing hands from generations to generations. The coins under seizure were given by the father-in-law and other relatives to the appellant and to his wife, are the family treasures for future generations. As the appellant had no intention to dispose off the gold coins in question, so he brought these back from London to keep them as family treasure. There is no restriction to take any items from India to any foreign country, except those goods/items which are prohibited in nature. The gold coins were neither prohibited nor restricted under the law. The gold coins in question pertains to India, as is evident from the word "IND" and "IMP", meaning "India" and "Emperor of India".

As the coins are of Indian origin, there is no presumption of smuggling and are not liable to seizure. The appellant also produced photos from his marriage album, wherein wife of the appellant is wearing gold coins, which supports the contention of the appellant, that he and his wife had received the gold coins as gift from his father-in-law and other relatives. Further, he contended that as the gold coins are of Indian origin, they are not liable to be seized and prayed to drop the proceedings.

10. It was further stated that the allegations of Revenue is based on assumption and presumptions. Admittedly, there is no foreign markings on the gold coins in question. Neither the authorised valuers' appraising report has certified that the coins are of foreign origin. The contention of the appellant are also supported by the material available on internet, as well as the historical evidences, during the British era period (gold coins each weighing 8 gms.) were 'Legal Tender' and in common circulation in India. King Edward VII was the emperor of India during the period 1902 to 1910 and his photo/bust depicted on the coins and inscription on the coins state him as the Emperor of India. Thus, the gold coins in question being in circulation under monetary system, which prevailed in India during the pre-independence

period are definitely of Indian origin. The gold coins were used in monetary/exchange system and thus, were part of the fiscal system prevailing in the country during the either period. Thus, the charge of smuggling (based on assumption) does not stand and is fit to be dropped. It was further urged that as required under Section 123 of the Customs Act, the appellant has discharged the onus *ipso facto,* as the gold coins in question are of Indian origin.

11. Further, it was contended that there was no duty leviable on gold coins, nor there was any declaration required at the time of arrival in UK. It was further urged that it is a case of 'town seizure' by CISF at the domestic terminal, and hence, rigours of the Customs Act are not attracted.

12. It is further contended that the provisions of Section 111 (d) and (i) applies only when the goods are imported and attempted to be imported and are prohibited goods or dutiable goods, which is not the case. Such facts are not obtaining in the facts of the present case. Further, it is contended that as per Entry No. 321 and 322 of Notification No.12/2012-Customs dated 17.03.2012, the same are not applicable as the coins in question are of purity of 916 (determined by the appraising officer in his

report), which is less than the prescribed limit of 99.5% purity. Since the coins are free items as per FT Policy, these cannot be termed as prohibited goods. The provisions of Section 2(33) defining prohibited goods' are not attracted as the gold coins are of Indian origin.

13. The Show Cause Notice was adjudicated vide Order-in-Original dated 30 March, 2017 holding that the appellant knowingly involved in illegal import and handling of gold coins and was in conscious possession and control of seized gold coins of foreign origin. He brought the seized gold coins from London into India illegally without declaring the same to Customs and failed to discharge the onus that the seized gold was not smuggled goods. Further observed that the appellant have committed acts of omission and commission. Accordingly, the seized gold coins were ordered to be confiscated under Section 111(d) and (i) of the Act read with Section 120 of the Act. Further penalty of Rs. 5 lakhs was imposed under Section 112 of the Act.

14. Being aggrieved, the appellant preferred appeal before Commissioner (Appeals). The learned Commissioner (Appeals) was pleased to observe that the legal possession of the seized gold coins is not proved and hence upheld the invocation of Section 111(d) and (i)

observing that the impugned goods have been imported by way of smuggling and are prohibited goods. Hence absolute confiscation is justified. It was further observed that the appellant failed to prove that the coins were of Indian origin. Accordingly, the appeal was dismissed. Being aggrieved, the appellant is in appeal before this Tribunal.

15. Heard the parties.

16. Learned Counsel for the appellant urging the grounds of appeal submits that as the coins pertained to British India period of 1902 to 1910, depicting the bust of King Edward VII, who was the Emperor of India during the said period, as India was under the British rule. The letters inscribed on the circumference "IND" and "IMP" stand for 'India' and 'Emperor of India' respectively. Such coins were part of the monetary system and were legal tender under the Negotiable Instruments Act. Such coins are of Indian origin and lying with the citizens or people of India as the treasure and changing hand generation to generation. It is further urged that the allegation of foreign origin is based on conjecture and surmises of the Custom authority. As the authorised valuer has not certified the seized coins being of foreign orgin. It is further urged that the Court below have erred in placing

selective reliance on the statement of the appellant. Admittedly, it is a case of town seizure. The appellant stated in his statement recorded under Section 108 at the time of seizure, that he had these coins in India with him and are of his family and he had taken these coins to U.K. in November, 2011 and he has brought back the same coins in September, 2015. Thus, the Court below have erred in relying on only half statement, and on that part of the statement which suits them, which is not permissible. The statement have to be read as the whole in evidence, and that part were in the appellant have stated that he had the coins available with him in India and he had taken to U.K. from India in November, 2011, cannot be ignored. If the whole statement is read together, there is admittedly no case of smuggling as the gold coins are of Indian origin which were legal tender during the British India period, had been taken to U.K. in 2011 and brought back in 2015. It is further urged that the presumption under Section 123 in favour of Revenue is not available in the facts of the present case. It is further urged that the appellant have led sufficient proof that he and his family are of good financial standing and were possessing gold coins and have also received gold coins at the time of his marriage in gifts. The whole case

of Revenue is based on the allegation, that the gold coins being of foreign origin, which is a mistake of fact and accordingly, the impugned order is fit to be set aside and the appeal allowed. It is further urged that the mother-in-law of the appellant have also stated on affidavit that their family had gifted gold coins to the appellant and her daughter at the time of marriage. It is further urged that the Court below have failed to appreciate that gold coins are classified in ITS(HS) at Sr. No. 7726 under Heading 71189000, and as per policy these are free items, there was no restriction for import or export. It is further urged that the provisions of Section 111(d) and (i) of the Act are not applicable in the facts and circumstances, there being no import of prohibited goods or dutiable goods. It is further urged that the provisions of Entry No. 321 and 322 of Notification No. 12/2012-Cus. are not applicable as the coins under seizure are of purity 916 (as determined by the jewellery appraiser) which is less than the prescribed limit of 99.5% purity. Thus, the coins are free items under Foreign Trade Policy and have been wrongly termed as prohibited goods by the Court below. Accordingly, learned Counsel prays for allowing the appeal with consequential benefits.

17. The learned Authorised Representative for Revenue relies on the impugned order.

18. Having considered the rival contentions, I find that admittedly the seized gold coins are of Indian origin even the approved valuer have not certified the seized gold coins as of foreign origin. Further, I find that the inscription on the coins evidently prove that the gold coins are of Indian origin, and were part of the monetary system and were in circulation during the British India period. Admittedly, Kind Edward VII, was the emperor of U.K. and India was under British Rule during the relevant period, and thus there is no anomaly as to the Indian origin of the gold coins. The allegation by Revenue that the gold coins are of foreign origin has got no basis, and is a wild guess work. The inscription on the gold coins ipso fact prove that the gold coins as are of Indian origin. The impugned order is vitiated for placing selective reliance on the statement of appellant under Section 108. I further find that the presumption in favour of Revenue under Section 123 is not attracted in the facts and circumstances. Accordingly, I find that the impugned order is not sustainable and I set aside the same. The appeal is allowed. The appellant is entitled to consequential benefits.

19. The Revenue authority is directed to return the gold coins forthwith to the appellant or his Authorised Representative within 45 days from the date of receipt/service of the copy of this order.

(Pronounced in Court on 21.01.2021)

(Anil Choudhary)
Member (Judicial)

RM

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH

Customs Appeal No. 50873 of 2020

(Arising out of Order-in-Original F No. VIII(CUS) 14/Adj-I/Rudra/2019-20 dated 27.4.2020 passed by the Commissioner Customs, Indore)

RUDRAS OVERSEAS
228, Vinay Nagar
Indore-452002.

APPELLANT

VS.

COMMISSIONER OF CUSTOMS,
B-Zone, 3rd Floor, 12/27 & 12/28,
Village Pipliakumar, Nipania
Indore-452010.

RESPONDENT

Present for the Appellant: Shri V S Negi, Advocate
Present for the Respondent **:** Shri Sunil Kumar, Authorized Representative.

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C L MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 24/09/2020
DATE OF DECISION : 24/09/2020

FINAL ORDER NO. 50849/2020

PER JUSTICE DILIP GUPTA:

This appeal has been filed to assail the order of the Commissioner Customs, Indore[1] for provisional release of the seized goods on execution of Bond and on furnishing of bank guarantee.

2. It transpires from the record that the appellant imported one shipment of nutrition supplements for which Bill of Entry dated

[1] The Commissioner

November 23, 2019 was filed at ICD, Indore and the appellant paid Customs duty of Rs.7,53,643/-. However, before the goods could be cleared, the goods were examined by the Directorate of Revenue Intelligence, Indore and the goods were detained.

3. The appellant claimed that as the goods were for human consumption and prone to deterioration/ damage, the appellant moved an application dated December 26, 2019 for provisional release of the goods under section 110A of the Customs Act, 1962[2]. The appellant has stated that during the course of investigation, the appellant was asked to deposit Rs.10 lakh which the appellant deposited.

4. A communication dated April 27, 2020 has been addressed to the appellant by Assistant Commissioner and same is reproduced below:

Dated 27.04.2020

To

M/s. Rudra Overseas
Vijay Nagar, Indore

Dear Sir,

Subject: Provisional release of goods imported under Bill of Entry No. 5795615 dated 23.11.2019-Reg.

Please refer to your application dated 24.02.2020 regarding provisional release of seized goods imported under Bill of Entry No. 5795615 dated 23.11.2019.

2. The Commissioner of Customs, Indore is pleased to provisionally release the seized goods imported under Bill of Entry No. 5795615 dated 23.11.2019 on execution of Bond for the value of Rs.86,22,915/- and furnishing of Bank Guarantee/Security of Rs.1,38,19,048/-.

Yours sincerely

Sd/-
Assistant Commissioner

[2] the Customs Act

5. Relying upon the provisions of Section 110 A of the Customs Act, learned Counsel appearing for the appellant has submitted that the Adjudicating Authority can release the goods on taking a bond from the owner in a proper form with such security and conditions as the Adjudicating Authority may require, but in the instant case, the Assistant Commissioner has merely stated that the Commissioner, who is the Adjudicating Authority, has provisionally released the goods on execution of a Bond of Rs. 86,22,915/- and furnishing of bank guarantee/security of Rs.1,38,19,048/-, without giving any reasons for arriving at such a conclusion. He, therefore, submits that the order is non-speaking order, more particularly when the order passed by the Commissioner has also not been made known or enclosed with the communication of the Assistant Commissioner.

6. It is for this reason that the learned Authorised Representative of the Department was required to place on record the order passed by the Commissioner. Today, a notesheet has been filed by the Authorized Representative. It shows that a note had been prepared which was placed for perusal and approval before the Assistant Commissioner and the Commissioner and these two officers have merely signed at the bottom of the notesheet. It is contended by the Authorized Representative of the Department that since the note has been approved/ signed by the Commissioner, it should be taken as an order of the Commissioner.

7. Section 110 A of the Customs Act, which deals with the provisional release of goods pending adjudication, is reproduced as under:

> **"SECTION 110A. Provisional release of goods, documents and things seized or bank account provisionally attached pending adjudication.** - Any goods, documents or things seized or bank account provisionally attached under section 110, may, pending the order of the adjudicating authority, be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require."

8. A perusal of the aforesaid section indicates that the Adjudicating Authority may, pending the final order, release the goods to the owner on taking a bond from him in the proper form with such security and conditions as the Adjudicating Authority may require. Thus, the Adjudicating Authority has to take a decision and the owner of the goods is required to be apprised of the reasons culminating in the provisional release order. In the present case, it transpires that the office put up a note indicating the value of bond and the value of bank guarantee/security and this note has merely been signed by the Commissioner. It also needs to be noted that even the note was not supplied with the order. Such a procedure does not satisfy the requirement of Section 110A of the Customs Act. The order passed by the Commissioner must indicate application of mind and contain reasons for passing an order for provisional release. Each case has to be considered on the basis of the facts brought to the notice of the Commissioner.

9. We, therefore, have no hesitation in observing that the communication dated April 27, 2020 for provisional release of goods should be set aside.

10. Such goods are stated to be for human consumption and liable to deterioration. The Commissioner shall, therefore, pass an order for provisional release of the goods in the light of the observations made above within a period of one week from the date a copy of this order is served upon by the Commissioner by either of the parties.

11. It has been stated by the learned Counsel for the appellant that a notice has been issued for disposal of the seized goods. In the circumstances mentioned above, when an order of provisional release has to be passed, the goods seized shall not be disposed for a period of eight weeks from today.

12. The appeal is, accordingly, allowed. The communication dated April 27, 2020 is set aside and the appeal is allowed to the extent indicated above and with the aforesaid directions.

Justice Dilip Gupta
(President)

C. L. Mahar
(Technical Member)

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.
COURT NO. II

Customs Miscellaneous Application No. 50731 of 2019
(on behalf of appellant)
In
Customs Appeal No. 492 of 2006
(Arising out of Order-in-Original No. 3/Commr/06 Dated 28.04.206 passed by Commissioner of Customs (Preventive), New Customs House, New Delhi)

Shri Dinesh Bansal **Appellant**
S/O Sh. Raj Kumar Bansal,
493/17 Sayed Wali Gali Railway Road,
Rohtak, (Haryana)

Versus

Commissioner of Customs (Prev.) **Respondent**
New Customs House, Near IGI Airport, New Delhi

with

Customs Appeal No. 499 of 2006
(Arising out of Order-in-Original No. 3/Comm/06 Dated 28.04.206 passed by Commissioner, Customs (Preventive), New Customs House, New Delhi)

M/s. Lawat Jewellers Pvt. Ltd., **Appellant**
285, Mehandi-Ka-Chowk, Bari Choupar,
Jaipur

Versus

Commissioner of Customs (Prev.) **Respondent**
New Customs House, Near IGI Airport, New Delhi

AND
Customs Appeal No. 500 of 2006
(Arising out of Order-in-Original No. 3/Commr/06 Dated 28.04.206 passed by Commissioner of Customs (Preventive), New Customs House, New Delhi)

Shri Suresh Kumar Soni, Managing Director, **Appellant**
M/s. Lawat Jewellers Pvt. Ltd.,
285, Mehandi-Ka-Chowk, Bari Choupar,
Jaipur

Versus

Commissioner of Customs (Prev.) **Respondent**
New Customs House, Near IGI Airport, New Delhi

APPEARANCE:

Ms. Nisha Bineesh, Advocate for the appellant
Shri Rakesh Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NOS. 50652-50654 / 2020

DATE OF HEARING: 07.02.2020
DATE OF DECISION: 20.03.2020

ANIL CHOUDHARY:

The issue in these appeals is whether the 59 (Ten Tola) gold bars recovered/seized from the appellant Shri Dinesh Bansal, have been properly explained in discharge of onus under Section 123 of the Customs Act, or the impugned order confiscating the 59 gold bars alongwith the vehicle, with further order imposing penalty on Shri Dinesh Bansal, Mr. Suresh Soni. The Managing Director of Lawat Jewellers Pvt. Ltd. (Seller), and penalty on Lawat Jewellers Pvt. Limited, under Section 112 (a) & (b), whether the same is justified.

2. The brief facts are that Officers of the Directorate of Revenue Intelligence intercepted a vehicle Tata Sumo (coming from Jaipur direction) bearing Registration No. HR 12D 7989, near Radisson Hotel, at National Highway No. 8 (Delhi-Haryana Border) on 10.09.2002 at 17:45 hrs. The vehicle alongwith its two occupants , Shri Jagdish Rai, the driver and Shri Dinesh Bansal was escorted to DRI Hqrs. Office at I.P. Estate, New Delhi.

3. As a result of rummaging of the vehicle, the DRI Officers recovered two bundles, one big and one small in size, from below the footmat of the front seat, adjacent to the driver. The big size bundle on opening was found to contain four small packets wrapped in transparent plastic covers. Each of these small packets contained 10 bars of yellow metal. The small bundle contained two smaller packets containing 10 and 9 bars of yellow metal. Each of the 59 bars thus recovered, besides the impression of an elephant in

a circle, bore the marking "HARMONY, SOUTH AFRICA, 10 TOLAS, 999, FINE GOLD".

4. Shri Dinesh Bansal, on being asked, informed that he had purchased the recovered gold bars from Jaipur. But as he failed to produce any documentary evidence, the gold bars were seized under Section 110 of the Customs Act, 1962 alongwith the Tata Sumo vehicle, which was used for carrying the goods. The proceedings relating to recovery and seizure were embodied in a panchnama. A certified goldsmith later confirmed that the gold bars were of 999 purity, and valued the same at Rs. 37.4 Lacs approx.

5. Shri Jagdish Kumar, the driver of the vehicle, in his statement recorded under Section 108 of the Customs Act, 1962, *inter alia* stated that for the past four months he had been working as driver of Shri Pradeep Bansal, a resident of Rohtak, who was the owner of the Tata Sumo vehicle, from which 59 bars of gold were recovered; that Shri Pradeep Bansal had been dealing in gold from Kucha Mahajani, Chandni Chowk; that he used to accompany Shri Pradeep Bansal and his brother Shıi Dinesh Bansal when they went to Jaipur to buy gold biscuits; that he used to park the vehicle in Johri Bazar in Jaipur; that he was not aware from where the gold was procured; that he was also not aware whether the gold was legally imported or smuggled; and that the gold used to be taken to their shop in Chandni Chowk.

6. Shri Dinesh Bansal, in his staternent recorded under Section 108 of the Customs Act, 1962, claimed the ownership of the Tata Sumo vehicle. As regards the gold, he informed that the same was purchased from **M/s, Lawat Jewellers Pvt. Ltd., Mehendi Ka Chowk, Jaipur for which he paid Rs. 36 Lacs**; that he did not have any receipt or any other document in support of the purchase; that he would have sold the gold in Kucha

Mahajani, Delhi, to different customers; and that he had purchased the gold from Jaipur, because sales tax on gold in Jaipur was only 0.46% whereas in Delhi it was 1% and thus he saved Rs. 150/- per gold biscuit. He also assured that he would produce the necessary documents regarding the purchase of the gold bars.

7. Shri Suresh Kumar Soni, Managing Director of M/s Lawat Jewellers, Jaipur deposed before SIO-DRI on 11.09.2002 under Section 108 of the Customs Act, 1962. He informed that they made following purchases from Corporation Bank, Jaipur on 10.09.2002.

Sl.No.	Delivery Order No.	Quantity of 10 Tola Gold Bar	Mark	Amount (Rs.)
1.	4641	150	CSFB	90 Lacs
2.	4642	50	CSFB	30 Lacs
3.	4646	180	CSFB	108 Lacs

He *inter alia* further stated that the delivery of the gold bars from the Corporation Bank was taken by their employee Shri Parmeshwar; that the delivery of the goods against Delivery Order No. 4641, was taken at about 1 - 1.30 PM and the remaining deliveries were taken around 4 - 4.30 PM; that generaly the gold received from the. Bank was brought to their office from where it was sold and delivered; that, however, out of 150 gold biscuits/bars received against Delivery Order No. 4641, 59 (fifty nine) were handed over to Shri Deepak Bansal (brother of Pradeep Kumar) in the Corporation Bank itself by Shri Parmeshwar (staff of law at) on his instructions; that no bill was taken by Shri Deepak alongwith him, as the same was later prepared by them; and that Shri Deepak left for Delhi from the bank. He further stated that they were dealing in gold biscuits from 1997; that they had been extended green channel facilities for the purpose of sales tax; that this facility was extended to two other jewellers; that they

also procured gold from Corporation Bank against Delivery Order No. 4647 on 11.09.2002; and the gold was of Harmony brand of South Africa.

8. The enquiries conducted from the Corporation Bank elicited the following response:-

(i) Corporation Bank vide their letter dated 11.09.2002 informed DRI, that they were selling gold to bullion traders: that the brand names of the gold usually sold by them were Union Bank of Switzerland (UBS) and Credit Suisse First Boston (CSFB): that they had issued 10 delivery orders on 09.09.2002 and 10.09.2002 from D.O.No.4637; and that they were selling gold in the form of Ten Tola Bars (TTB) and weight of One TTB was 116.42 grms.

(ii) In their letter dated 12.09.2002, the Corporation Bank informed that the gold brand sold by them were Union Bank of Switzerland (UBS) and Credit Suisse First Boston (CSFB); that UBS had their own mint and the gold bars bore the words 'UBS' and 'Switzerland'; and that in case of CSFB, CSFB procured gold either from 'Harmony'-South Africa or 'Rand Refinery' South Africa, and supplied gold to them from Switzerland.

9. The appellant Shri Dinesh Bansal submitted vide his letter dated 11.10.2002, the documentary evidence for purchase of gold in question, from M/s. Lawat Jewellers (P) Ltd., being sale Voucha Nos. 02-03 (G)1745 to 1747 all dated 10.09.2002, in support of limit purchase of 59 TT Gold Bars.

10. The statement of Shri Pradeep Kumar, brother of Shri Dinesh Bansal, was also recorded under Section 108 of the Customs Act, 1962, wherein he *inter alia* stated that though his brother was dealing in gold from the same premises, from where he was dealing, the business of Shri Dinesh Bansal was independent from his business.

11. Allegedly the enquiries from the Corporation Bank revealed that the gold bars sold to M/s. Lawat Jewellers against Delivery Order No. 4641 dated 10.09.2002, were a part of the consignment of 2000 gold TT Bars imported vide Bill of Entry No. AWB 361317 dated 29.08.2002.

12. The investigations were made with regard to the Bill of Entry No. 361317 dated 29.08.2002. It was found that against the bill of entry 2000 pieces of gold TT bars of Switzerland origin were imported by Corporation Bank, Jaipur, from Credit Suisse First Boston, Switzerland. The examination report of the Customs Officer on the reverse of the Bill of Entry mentioned "2000 gold bars of 10 tolas each, purity marking, net weight as per signed invoice, P/L, AWB". M/s J.M Baxi & Co. were the clearing agents who cleared the said cargo.

13. In his statement dated 14.12.2002 under Section 108 of the Customs Act, 1962, Shri Vikrant Gogia of M/s J.M Baxi & Co. *inter alia* stated that 100% examination of the consignment under Bill of Entry No. 361317 dated 29.08.2002 was conducted; that the gold biscuits bore the marking "Credit Suisse" Switzerland 10 Tolas, 999 and that the goods were examined by Inspector Shri Arun Kumar and supervised by Shri Harish Chander, Superintendent of Customs. He further stated that after clearance the goods were handed over to Shri Omender Sharma/Shri Manoj Kumar of 'Brink's Arya India (P) Ltd'. (Transporter) at Air Cargo Complex, IGI Airport, New Delhi.

14. Shri Arun Kamar, Customs Inspector, who examined the goods pertaining to the Bill of Entry No. 361317 dated 29.08.2002, in his statement dated 18.12.2002, recorded under Section 108 of the Customs Act, 1962, *inter alia* stated that the gold biscuits examined and cleared by him were of the marking "CREDIT SUISSE 999 10 TOLAS". To a specific query as to why he did not mention the marking, purity, net weight and

quantity in the examination report, when there were such specific directions given by the Group Appraiser, Shri Arun Kumar replied that he wrote the examination report as per the prevailing practice.

15. Shri Harish Chander, the concerned Customs Superintendent, in his statement recorded under Section 108 ibid, *inter alia* stated, he had seen the statement of Shri Arun Kumar and that he had nothing else to add.

16. Statement of Lt. Col. Narender Singh (Retd), Branch Manager, M/s Brink's Arya India (P) Ltd., was recorded under Section 108 ibid. He in his statement *inter alia* stated that the goods pertaining to Bill of Entry No. 361317 dated 29.08.2002 was delivered in sealed condition to Corporation Bank, Jaipur on 30.08.2002.

17. Shri N. Ramesh Kamath, Sr. Manager of Corporation Bank, Jaipur in his statement dated 04.12.2002 tendered under Section 108 ibid, *inter alia* stated that Jaipur branch was designated for gold banking by their International Banking Division (IBD), Mumbai; that the gold imported by various designated branches was sold to gold bullion dealers, who were their customers; that the gold was released to their customers against delivery order which contained the name of gold desk and name of the party to whom the gold was sold, giving details of gold TT bars and name of the supplier (brand), and an invoice was also issued for the same; that M/s Lawat Jewellers (P) Ltd., Jaipur was among the bullion dealers who had been taking gold TTBs from their branch; that they had been selling gold to M/s Lawat Jewellers on continuous basis since, June 2002; that they were supplied gold by (a) Union Bank of Swetzerland, Zurich (b) Commerz Bank, Zurich (c) Society Central, Paris and (d) Credit Suisse First Boston, Zurich; that in respect of overseas suppliers, UBS had their own mint for gold TTBs and they usually supplied their own gold, whereas the other suppliers were supplying gold of other mints, other origins; that regarding Credit Suisse

First Boston (CSFB), the gold consignment received were generally from Harmony or Rand Refinery of South Africa, having elephant or horse mark on gold TTBs; that the information contained in letters dated 11.09.2002 and 12.09.2002 was based on what had been passed on to him by his staff handling the delivery of the gold; that he could not vouch for the authenticity of the said information, as the same was not based on any personal knowledge or any document; that he had seen the Bill of Entry No. 361317 dated 29.08.2002 and the statement of Shri Vikrant Gogia (of CHA Co.), that he was unable to give any comment; and that he would be able to explain after checking up with IBD Mumbai.

18. Shri Suresh Soni, Managing Director of M/s Lawat Jewellers (P) Ltd., Jaipur in his further statement dated 16.12.2002 made under Section 108 ibid *inter alia* stated that Shri Dinesh Bansal and Shri Pradeep Bansal, residents of Rohtak were two real brothers and working as commission agents dealing in gold and silver in Kucha Mahajani, Delhi; that they had purchased 50-60 TT bars of gold 2-3 times; that the gold biscuits seized by DRI were delivered by his employee Shri Parmeshwar to Shri Dinesh Bansal in the premises of Corporation Bank on 10.09.2002; that the amount of Rs. 36 Lacs was paid by Shri Dinesh Bansal in cash; that Shri Parmeshwar made full payment to the Corporation Bank and took delivery of 150 Gold TT Bars; that he delivered 59 Gold TT Bars out of that consignment of 150 bars to Shri Dinesh Bansal and reached company's office with balance 91 gold biscuits and deposited the same; that for taking the delivery of gold they used to contact Shri Ramesh Kamath, Sr. Manager, Shri Deshpande, Manager and Shri Sunil Kumar, Probationary Officer; that so far as he knew, the delivery of 150 gold bars was given by Shri Ramesh Kamath and Shri Sunil Kalra, as per signature appearing in the delivery order; that gold biscuits supplied to Shri Dinesh Bansal were of 'Harmony'- South African

brand, whereas according to Delivery Order No. of Corporation Bank/Gold Desk-303/4641 dated 10.09.2002, 150 gold biscuits of (CFSB-supplier) were supplied; and that he had sought clarification in this context from the Corporation Bank. Shri Suresh Soni submitted a copy of the clarification letter No. OR/303/Jaipur/2002 dated 'nil' from the Corporation Bank, Jaipur.

19. Shri N. Ramesh Kanath, Sr. Manager, Corporation Bank, Jaipur in his statement dated 19.12.2002 under Section 108 ibid, deposed that after tendering earlier statement he contacted IBD, Mumbai for conforming as to what brand of gold TTBs were imported vide Bill of Entry No. 361317 dated 29.08.2002, supplied per Invoice No. 22359 dated 27.08.2002 from CSFB; that the CSFB had confirmed in writing (fax) on 10.12.2002 that they did not deliver Harmony brand TT bars to Corporation Bank during the year 2002; and that on the basis of documents, the gold TTBs sold to M/s Lawat Jewellers (P) Ltd., were of CSFB brand and not of Harmony South African origin.

20. DRI resumed the copy of massage dated 04.12.2002 from CSFB, Zurich to Corporation Bank. Which reads:-

(a) 'IN REDEE REFERENCE TO YOUR QUESTION REGARDING SHIPMENT OF 27.08.02 ACCORDING TO OUR B/O THIS WERE CS BARS WITH THE PACKING OF OUR REFINERY VALCAMBI THEY CAME DIRECTLY FROM VALCAMBI WITHOUT BEING UNPACKED IN ZURICH'. Message dated 04.12.02, 1458GMT from CSFB, Zurich *inter alia* mentioned "GOT RECONFIRMED THAT THE BARS SHIPPED WERE ORIGINAL BARS CS BRAND WITH PACKING OF OUR REFINERY VALCAMBI".

(b) Letter dated 10.12.2002 from 'Credit Suisse First Boston' to Mr. Raghav Kamath of Corporation Bank, *inter alia* informed that Credit Suisse, Switzerland had been supplying gold of Ten Tola Bars

to Corporation Bank at various locations in India, which included the Jaipur branch; that Credit Suisse used to delivery Harmony Ten Tola Bars, but they did not have such bars in their stock since July 2002 anymore and did not delivery any Harmony Ten Tola Bars to Corporation Bank, Jaipur during the course of the year 2002.

21. According to the investigations conducted by DRI, the stock register of Corporation Bank, Jaipur showed no stock of any South African gold including 'Harmony' brand in their vault on 21.08.2002. Further supply of TT Gold Bars was received on 30.08.2002 from CSFB.

22. Shri Sunil Kumar kalra, an Officer in the Corporation Bank, Jaipur, in his statement under Section 108 ibid, *inter alia* stated that there was no stock of South African gold in their vault on 10.09.2002 and 11.09.2002, hence, there was no question of supplying 'Harmony' brand to M/s Lawat Jewellers (P) Ltd. on these dates. On being asked about the Delivery Order No. 303/4658 dated 13.09.2002, wherein against the delivery of 40 CSFB brand TTB, the word 'Harmony' had been written, he stated that he had written word Harmony in good faith at the instance of Shri Suresh Soni of M/s Lawat Jewellers (P) Ltd.

23. Shri K.V. Deshpande, Manager of Corporation Bank, Jaipur, in his statement under Section 108 ibid, *inter alia* stated that the gold delivered to M/s Lawat Jewellers of Jaipur through their employee Shri Parmeshwar, was of Credit Suisse marking; that it was not of South African origin as they did not have any stock of South African gold in their vault; that while taking delivery from them, Shri Parmeshwar was not accompanied by anybody or any buyer of M/s Lawat Jewellers, and that he did not know Shri Pradeep Kumar or Shri Dinesh Bansal of Rohtak.

24. Shri N. Ramesh Kamath, Sr. Manager, Corporation Bank, Jaipur was again examined under Section 108 ibid. In his further statement dated

14.01.2003 he stated that he had made detailed investigations and on the basis of that he stated that there was no stock of South Africa 'Harmony' brand bars in their bank, during the year 2002.

25. Shri Parmeshwar, employee of M/s Lawat Jewellers (P) Ltd. did not appear in pursuance of summons issued to him.

26. Shri Dinesh Bansal in his statement further dated 03.03.2003 under Section 108 ibid stated that he was not aware as to why Shri Suresh Kumar Soni prepared the bills in the name of Shri Pradeep Kumar; that he had paid Rs. 36 lacs for 20+20+19=59 gold bars as per his order, but he had not told M/s Lawat Jewellers to prepare three bills.

27. Shri Suresh Kumar Soni being ill, did not, in response to summons, appear on 03.03.2003. In his place Shri Naval Kishore Soni, his brother and Director of the said company, appeared. In his statement he clarified that they knew 'Vicky' but did not know that his real name was Dinesh Bansal; that Vicky told them to prepare the bills in the name of Pradeep, which they did; and that three bills were prepared instead of one, because the deal was finalized as per three orders. Shri Naval Kishore Soni identified Shri Dinesh Bansal as Vicky in the office of DRI.

28. On the basis of the afore mentioned investigation, Show Cause Notice DRI F. No. 338/6/66/2002 dated 06.03.2003 was issued *inter alia* to Shri Dinesh Bansal, wherein 59 gold TT bars of Harmony brand valued at Rs. 37.4 Lacs were proposed to be confiscated alongwith Tata Sumo vehicle bearing Registration No. HR-12 D-7989. Besides, penal provisions under Section 112(a) and Section 112(b) of the Customs Act, 1962 were invoked against him, and others.

29. The matter was decided vide Order-in-original No. 3/Commr/06 dated 28.04.2006 whereby 59 bars of seized gold were confiscated absolutely, Tata Sumo vehicle was confiscated and allowed to be redeemed on payment

of redemption fine of Rs. 50,000/- and Shri Dinesh Bansal was imposed penalty of Rs. 35 Lacs.

30. That penalty was imposed Rs. 15 lakh each on M/s. Lawat Jewellers Pvt. Ltd. and its Managing Director Mr. Suresh Soni under 112 (a) & (b) of the Act. Penalty was also imposed under Section 117 on Mr. Sunil Kumar Kalra and Mr. K.V. Despande, employees of Corporation Bank Jaipur. Penalty proposed on Shri Raghav Kamat and Shri N. Ramesh Kamat Managers/Employee of the Corporation Bank was dropped. The Ld. Commissioner observed that interception of the appellant with gold bars was on the basis of intelligence. At the time of interception Shri Dinesh Bansal could not produce any document of legal-procurement of the said gold bars, but nevertheless claimed to have purchased the gold from M/s. Lawat Jewellers Pvt. Ltd., Jaipur. Further, Lawat Jewellers also admitted to the sale of gold bars to Mr. Dinesh Bansal, after procuring the same from corporation bank, Jaipur, vide delivery challan No. 4641 dated 10.09.2002. The said gold bars were part of a consignment of 2 thousand gold bars imported earlier by Corporation Bank on 29.08.2002, but on the basis of details and investigation, the transaction does not appear to be genuine.

31. It was further observed, although Lawat Jewellers are in business of trading in gold and had on the said date 10.09.2002, purchased 150 gold bars and more from Corporation Bank, delivered to them at about 1:15 PM of CSFB Brand. CSFB either procured gold from Harmony, South Africa or Rand Refinery and that the bars had the mark of 'Harmony' with 'Elephant Head' on them.

32. Being aggrieved the appellants are before this Tribunal. Mrs. Nisha Bineesh appeared for all the appellants and Mr. Rakesh Kumar appeared for the respondent Commissioner. Heard the parties, and perused the written

submissions, as well as the record.

33. Learned counsel for the appellants urges that Mr Dinesh Bansal at the time of interception on 10 September 2002, made a categorical statement that he had purchased the gold from Jaipur. Further the driver of the vehicle Mr. Jagadish Rai also stated that they had gone to Jaipur for purchase of gold, on the same day in the morning. Further statement was recorded on the same day under section 108 of Mr Dinesh Bansal, wherein he stated that he had purchased the 59 gold bars from Lawat jewellers private Ltd., Jaipur, for consideration of ₹ 36 lakhs. Further stated the purpose of purchase was resale at Delhi. He further assured to produce the documents in support of the transaction. He also stated that he raised the money from 7 persons.

34. Further urges that Mr. Suresh Soni Managing Director of Lawat Jewellers appeared before DRI officials on 11 September 2002, at Jaipur, and confirmed that they had purchased 150 gold bars from Corporation bank Jaipur, on the previous day, that is, 10 September 2002, vide delivery order No. 4641. Delivery was received at about 1:15 PM and their employee Mr. Parmeshwar, who took delivery, delivered 59 gold bars to Mr Dinesh Bansal in the premises of the bank itself. Mr. Dinesh Bansal had already made the payment of ₹ 36 lakhs to them. Mr. Suresh Soni also produced the copy of delivery order No. 4641 dated 10 September 2002, issued by the Corporation bank Jaipur. Mr. Soni also produced 3 sale vouchers No. 02 – 03 (4) 1745 to 1747, dated 10 September 2002, before the officials on 11 September, 2002.

35. That the senior manager of Corporation bank also confirmed the sale of gold bars to Shri Suresh Soni of Lawat Jewellers. Mr. Suresh Soni further deposed before the DRI authority on the same day, that they have purchased 23 TT gold bars – 'Harmonoy' brand, vide delivery order No. 4647 from Corporation bank Jaipur on 11 September 2002, and also produced the

photocopy of delivery order and facsimile of marking found on the gold bars they purchased on 11th September. Learned Counsel further urges that these evidences produced by the appellants before the DRI officers on 11th September 2000 have not been controverted by the respondent revenue. Further Lawat Jewellers through its managing director Mr. Soni produced evidence, that on 10 September 2002 they had purchased a total of 380 gold bars from Corporation Bank, Jaipur, as follows: –

(i) 150 gold bars vide delivery order No. 4641

(ii) 50 gold bars with the delivery order No. 4642

(iii) and 180 gold bars vide delivery order No. 4646. (Total 380 Gold Bars).

Mr. Soni further stated that gold bars vide delivery order No. 4641 were received at about 1:15 PM, and the remaining 2 delivery were taken between 4 and 4:30 PM on the same date. He further stated that at the time of delivery by them, no bill was taken by Mr. Deepak Bansal, as he was in a hurry and the bill was prepared by them later on in the day, as Mr. Bansal had left for Delhi state from the bank. The issued 3 bills in respect of the 59 gold bars which are purchased by Shri Bansal, that is, 2 bills of 20 gold bars each and 1 for 19 gold bars. Shri Nawal Kishore Soni brother of Suresh deposed on 3 March 2003 before the officials, that they knew Mr. Deepak Bansal by his nickname 'Viki' and hence wrote the name as Pradeep Bansal (brother), instead of Deepak Bansal.

35. Learned Counsel further urges that the officials of the Corporation Bank also confirmed that Lawat Jewellers private Ltd., were regular purchasers of gold bars from them for the last several years. He also confirmed the sale of 380 gold bars to Lawat Jewellers on 10 September 2002. The learned Counsel draws attention to letter dated 11 September 2002, issued by Corporation bank to SID – DRI Jaipur, wherein the Sr. Manager of the bank, in response to the letter of DRI dated 11 September

2002 and their personal visit, confirmed that the bank was dealing in gold and selling the same to bullion dealers & jewellers. Further confirmed that the bank sold gold bars received from Union Bank of Switzerland (UBS) and 'Credit Suisse First Boston' (CSFB). They also confirmed issuing of the delivery orders, among others, to lawat jewellers during the period 9th September and 10 September 2002. Copies of the D.O.S. were enclosed. The Corporation bank again by their letter dated 12 September 2002 to S 10-DRI, Jaipur, further affirmed that gold sold by the bank are from Union Bank of Switzerland – UBS and 'Credit Suisse First Boston' – CSFB. Further stated that UBS have their own mint and the gold Bars where of the brand 'UBS' Switzerland. In case of CSFB, they procure gold either from 'Harmony' South Africa or 'Rand' refinery, South Africa, and supply gold to bank, from Switzerland.

36. The learned counsel also draws our attention to letter No. OR/303/Jaipur/2002 dated nil, issued by the senior manager Corporation bank Shri N.R.Kamath to Ms. lawat jewelers, with regard to sale of gold bars, confirming that the gold bars sold to lawat jewellers are usually of 2 brands, namely (i) Union Bank of Switzerland – UBS and (ii) Credit Suisse First Boston – CSFB. UBS have their own mint and gold bars bear the words 'UBS' and 'Switzerland'. In case of CSFB, they procure gold either from 'Harmony' South Africa or 'Rand refinery' South Africa, and supply gold to us from Switzerland. Gold as received by us is later sold to various bullion dealers and jewellers like Lawat. Further mentioned that this letter is issued at specific request of Lawat Jewellers.

37. Leaned Counsel further urges that under the facts and circumstances, the appellants have discharged their onus, as required under section 123 (2) of the Customs Act. Mr. Dinesh Bansal from whose procession the goods gold was recovered by the DRI officials, have discharged his onus by giving

information and details of acquisition from Lawat Jewellers, and further Lawat Jewellers have also confirmed having sold the seized gold to Mr. Bansal. She further urges that by resorting to further investigation and by using pressure tactics against the officials of the bank, revenue tried to create confusion as regards the actual brand of gold bars delivered by Corporation bank to Ms. Lawat Jewellers. Even the letter dated 10th of December 2002, issued by 'Credit Suisse First Boston Switzerland, to Mr. Raghav Kamath, of Corporation bank, Mumbai, states that-CSFB have been supplying gold T.T. Bars to Corporation bank, at various location in India which includes the Jaipur branch. CSFB further confirmed that they used to deliver Harmony 10 Tola Bars, but they do not have stock of such bars since July 2002 anymore, and did not deliver any 'Harmony' brand of bars to Corporation bank, Jaipur, during the course of the year 2002. The learned Counsel states that the said letter of CSFB is vague, and further is not a piece of reliable evidence, as the person issuing the said document have not been examined by revenue in the adjudication proceedings. The said letter is also issued without any context.

38. Learned Counsel further points out from the letter issued by Corporation Bank, which shows that the bank does not record the 'brand' embossed on the gold bars. They only maintain the source of receipt of the gold Bars, which is evident from the copy of their 'Double Lock Register' of the bank, filed by the bank in the proceedings with the authorities. (Copy is annexed in Appeal paper book).

39. Learned Counsel further urges that revenue is selectively relying on the evidences on record. She points out that Shri NR Kamath, the senior manager of Corporation bank Jaipur had stated in his statement dated 19 December 2002 before the SIO-DRI, that the Bank is importing gold bars for the purpose of gold banking. Indent is placed to supplier abroad, and at no

point of time the bank specifies the brand or mark to be supplied. Normally the suppliers supply gold from their own mint (brand) or can be of other brands (mint). As Brand/mark was not material to their sales, they have not requested for any particular brand from supplier through their 'International Banking Division' (IBD). Further Mr. Deshpande, manager at Jaipur branch, after gathering information from their IBD – Mumbai, had stated on 11 September 2002, that CSFB are not having mint, and they procure gold either from 'Rand Refinery' South Africa or from 'Harmony' South Africa, and supply such gold bars. Further Mr. NR Kamath-Sr. Manager stated that he has not seen the gold bars imported vide bill of entry No. 361317, out of which 59 gold bars were a part. Evidently it is only subsequently, due to pressure exerted by the investigating officers, that the bank officials modified their statement to the effect that the bank did not deliver 'Harmony brand' gold bars to lawat jewellers on 10 September 2002.

40. Learned Counsel further states that even on 11 September 2002, Corporation Bank Jaipur, delivered 'Harmony' brand gold bars vide delivery order No. 4647 to lawat jewelers, which was brought to the notice of the investigating officers by making written submission along with the facsimile copy of gold bars. This fact was also stated in the statement recorded under section 108 of Mr. Suresh Kumar Soni, before the SIO – DRI on 11 September 2002. But the learned Commissioner have conveniently ignored this vital fact on record. Learned Commissioner have placed heavy reliance on delivery order No. 303/4658 dated 13 September 2002, by which lawat jewellers purchased 60 pieces of gold bars, from Corporation bank.

Even this subsequent purchase from Corporation bank by lawat jewellers of 60 gold bars, vide delivery order No. 303/4658, the bank mentioned 'Harmony' brand. Mr. Suresh Soni stated that this was written by the bank, on his request, to avoid any controversy, as already have arisen.

41. It is further urged that the Department have alleged, that the word 'Harmony' was subsequently added in the delivery order No. 303/4658 dated 13 September 2002. This allegation is only vague, on the basis of subsequent statement of Mr. SK Kalra, of Bank. Learned Counsel draws attention to the certificate given by the handwriting expert, who have certified that the word Harmony have also been written at the same time when other entries were made in the said invoice No. 303/4658. This evidence have not been controverted.

42. That the Department is ignoring the evidence which is not suiting them and at the same time placing reliance on the statement of Mr. SK Kalra, Bank employee, whose statement is evidently under 'undue influence' of the investigating officers.

43. The fact of purchase of gold bars by Mr. Dinesh Bansal from lawat jewelers, Jaipur, on 10 September 2002, is also supported ipso facto by his interception at Delhi Gurgaon border on NH-8. It is normal to cover a distance of 220 km in the Tata Sumo SUV, in about 4 hour 15 minutes. There is also nothing abnormal in keeping of the gold packet below the foot mat in the vehicle, for reason of safety.

44. It is further urged that revenue have erred in concluding that Corporation bank did not have 'Harmony' brand gold bars in their stock, during the period 1st September 2002 till 15 September 2002. Such conclusion is based on the vague statements of the bank officers given under 'undue influence' exerted by the investigating officers. It is evident that the bank does not maintain record of gold bars 'brand wise'. Bank is not at all concerned with what brand of gold Bars as received from their supplier. Bank at best, records the name of the supplier, and the quantum of gold bars. Evidently even from the import documents like bill of entry invoice

& packing list, the brand of the gold bars imported is not known. Further the veracity of the copy of packing list is questionable. The learned counsel further urges that even for argument sake, accepting the packing list, the handmade picture on the right side of the paper (packing list) does not match with the 'Credit Suisse' brand, which is available in the world market. Even from the photo copy of various, 'ten tola gold bars' produced by the Department, 'Credit Suisse' brand is different from that depicted in the packing list, annexed to invoice, relating to the bill of entry.

45. Learned counsel further urges that the learned Commissioner have erred in placing reliance on the letter dated 10 December 2002, written by some officer of 'Credit Suisse First Boston', Switzerland to Mr. Raghav Kamath of Corporation bank, (copy of it is annexed in of the appeal paper book). The said letter contains a very general statement and is also self-contradictory. On the one hand it confirms that CSFB have been delivering 'Harmony' brand and other brand gold bars to the Corporation bank. Further it states that CSFB do not have Harmony brand gold bars, since July 2002. And finally states that CSFB have not delivered any Harmony brand gold bars to Corporation Bank during the year 2002. The said statement/letter of CSFB is not reliable as the same is firstly vague, and also self-contradictory. Secondly it is only a photo copy of fax message, received purportedly by Mr. R Kamath of Corporation bank. The original was never produced. The said letter does not have any reference to the context it is issued. Further the said letter does not disclose the date of packing of the gold bars, nor any record of the particular brand of gold bars supplied, with reference to the invoice No. and bill of lading. This letter is also not reliable for the reason that the officer of the bank named therein -Mr. R. Kamath, who corresponded with the supplier – CS FB, have not been examined by revenue in the adjudication proceedings. Further the author of the said letter

dated 10th December 2002, have not been identified and in what capacity he wrote the said letter, nor the said person was examined in the adjudication proceedings. Further fax messages cannot be substantial evidence, to prove or disprove the existence of certain facts. The learned Commissioner-adjudicator was bound to verify the erroneous actions and wild allegations of the investigating officers. Apart from the aforementioned letter, there is no other substantial evidence to support/prove the contention or allegations of the Department. It is further urged that the Rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary powers. It is well settled law that the action of the investigation authority shall not travel beyond the scope of legislation. Attempt to find the source of source is unintended, under the scheme of the Customs Act. Law nowhere envisages or raises any presumption in favour of the Revenue department, once the person charged, has discharged the onus. In spite of disputing the veracity of the fax message dated 10 December 2002, from CS FB, no finding in this regard have been recorded by the Learned Commissioner. It is further stated that this fax letter dated 10 December 2002, appears to be a cooked and concocted piece of evidence, on the insistence of the Revenue officers.

46. Accordingly, the learned Counsel prays for allowing the appeals and setting aside the impugned orders.

47. The learned AR Mr. Rakesh Kumar, appearing for revenue contends that at the time of interception at 17:45 hours on 10 September 2002, Mr. Deepak Bansal who was in possession of the 59 gold bars, could not produce any documentary evidence and only stated that he had purchased the gold bars from M/s. Lawat jewelers, Jaipur. Shri Parmeshwar Lal who had taken delivery for Lawat of 150 gold bars vide delivery order No. 4641 on 10

September 2002, on behalf of lawat jewelers, was summoned 3 times, but he did not respond. Although on the face of it, the appellants and some of the officials of Corporation bank have tried to give it make-believe shape, but as a result of detailed investigation, it was revealed that the Corporation bank had no stock of Harmony brand gold bars on 10 September 2002.

48. The learned Authorized Representative, further stated that, from the following sequence of events/facts the concoction of the story of Mr. Suresh Soni can be made out. As per statement of bank official Mr. S.K. Kalra, no person was accompanying Shri Parmeshwar in the bank on 10 September 2002. Even if it is believed that Mr. Dinesh Bansal took delivery from Mr. Parameswaran of lawat jewellers in the bank itself at about 1:15 to 1:30 PM, it is not possible to arrive at Delhi Gurgaon border, at NH-8 from Jaipur within 4 hours.

49. That he further urges, carrying of a consignment of about 6 KG gold, without any supporting documents, in spite of the provisions of Section 123 of the Customs Act, is sufficient proof that the gold was smuggled. Further, delivery of aforementioned quantity in the bank premises itself, which is a public place, and denial of bank officer (Mr. Kalra) that he did not mark any other person accompanying Mr. Parmeshwar, also proves that the story of appellants is a concocted one. It has come out as a result of detailed investigation, that Corporation Bank, Jaipur, did not have any stock of 'Harmony' brand Gold Bars, on the date of delivery 10.09.2002, to Lawat Jewellers.

50. Further urges that the master AWB No. 72432592205, as show in BOE No. 361317, and packing list, clearly shows a 'Handmade Sketch' of the Gold bars as 'Credit Suisse Switzerland, 10 Tola 999'. The BOE mentions the country of origin as Switzerland. He further disputes the claim of Lawat Jewellers, including receipt of 'Harmony' brand gold bars after 10th

September 2002, also. Further, places reliance on copy of the letter dated 10.12.2002 from CSFB to IBD of Corporation Bank, Mumbai.

51. Learned authorized representative further places states that in August 2002, CS FB dispatched 'Credit Suisse' brand of Gold bars from its own refineries at Volcambi, Switzerland, and not 'Harmony' brand to Corporation Bank, Jaipur. He also relies on the statement of various bank officials including Mr Sunil K. Kalra in particular.

52. Learned Authorized Representative further states that in the facts and circumstances, appellant Dinesh Bansal have failed to discharge onus, as required under Section 123 (2) of Customs Act. Accordingly, he prays for dismissing of the appeals, including that of Lawat Jewellers and Mr. S. Soni.

53. Having considered the rival contentions, the written submissions and the appeal records, we find that the appellant, Mr. Dinesh Bansal, who was in possession of the 59 gold bars, from the very time of interception and seizure, in his statement recorded under Section 108, soon thereafter, he has stated that he has purchased the gold bars from M/s.Lawat Jewellers Pvt. Ltd., Jaipur on the same day. This fact has been corroborated by Shri Suresh Soni, Managing Director of M/s.Lawat Jewellers Pvt. Ltd., recorded on the very next day i.e. 11.09.2002 before S.I.O., DRI, wherein he affirmed having sold the 59 gold bars in question to the appellant, Shri Dinesh Bansal also produced the invoices. He also stated that the gold bars were delivered by their employee, Shri Parmeshwar in the premises of the bank itself (when M/s. Lawat Jewellers took delivery of 150 gold bars from the Corporation Bank, Jaipur at about 1.15 p.m.) on 10.09.2002. We also find that there is nothing abnormal in covering the distance of about 220 km. from Jaipur to Delhi Gurugram Boarder, where the appellant was intercepted by the DRI officials at about 5.45 p.m. Further, the officials of Corporation Bank , Jaipur have also affirmed of having delivered the gold bars being 380 nos. on

10.09.2002 to M/s.Lawat Jewellers Pvt. Ltd. Out of which vide Delivery Order No.4641, 150 gold bars were delivered at about 1.15 p.m. Further, the officers of the Corporation Bank have stated that the bank does not maintain the record of the particular brand of gold bars received for trading. They maintained their records with respect to the name and source of the supplier. Further, the bank officers stated that the bank receives gold bars mainly from United Bank of Switzerland, who have got their own mint and usually supply the gold bars having 'UBS' Trade Mark. It is also stated by the Bank that the other suppliers, CSFB, Switzerland did not have their own mint and have sourced their gold normally from Harmony, South Africa or 'Rand Refinery', South Africa and supplied the gold to the Corporation Bank from Zurich. Further in the course of investigation, it has come out that sometime in 2002, CSFB has set up their own mint in Switzerland and are also supplying gold bars under their brand name – 'CREDIT SUISSE'. Further, M/s.Lawat Jewellers has also confirmed that they received the sale consideration of Rs.36 lakhs for sale of 59 gold bars on 10.09.2002 itself, from Shri Deepak Bansal. Sofar, the issue of sale invoices in the name of Shri Pradeep Kumar (brother of Shri Deepak Bansal), cogent explanation was given by M/s. Lawat Jewelers, as they did not know the proper name of Shri Deepak Bansal and they only knew his nick name 'Vicky', they issued invoice in the name of his brother, who was also purchasing gold from them and the two brothers were operating their business from common premises at Kucha Mahajani, Chandani Chowk, Delhi. The driver of the Tata Sumo Vehicle has also corroborated the version of Deepak Bansal of purchase of gold bars from Jaipur.

54. So far further investigation done by the Department resulted into the receipt of purported letter dated 10.12.2002 by fax from CSFB, Zurich by Corporation Bank, Mumbai. We find that this letter on the one side states

that the CSFB has been supplying South African Origin gold from Rand Refinery and Harmony Refinery and thereafter, have vaguely stated that CSFB did not have stock of South African gold from July, 2002 and has supplied 'Credit SUISSE' brand gold from their own mint in Switzerland. This letter only creates a presumption, but is not conclusive. This letter supports the stand taken by the officials of Corporation Bank, Jaipur and M/s. Lawat Jewellers, Jaipur that they have been receiving gold bars of South African origin from CSFB, which they have been selling to traders/dealers including M/s. Lawat Jewellers. Further, the bank officers themselves in Invoice No.363/4648 for delivery of gold bars on 13.09.2002 to M/s. Lawat Jewellers, have mentioned 'Harmony' brand, at the request of Shri Suresh Soni at the time of delivery. Thus, it is evidently clear that the subsequent change of the statement of the bank officers is under undue influence exerted by the Revenue Officers. We further find that the said letter dated 10.12.2002 issued by CSFB through fax, is not a reliable piece of evidence, as it does disclose the context under which it is issued. Further, the person issuing the said letter on behalf of the CSFB has not been examined nor the authenticity of the fax message is established, under known process of law.

55. Accordingly, in the facts and circumstances, we hold that the appellant, Shri Deepak Bansal has proved the source of acquisition and also the source of the source of acquisition. However, the mandate of Section under Section 123 (2) of the Customs Act requires a person in the possession of gold bars, having foreign markings, to only prima facie establish the proof of licit acquisition, and is not require to prove source of source. We also hold that the Revenue has not been able to establish its allegation that the seized gold is different from the gold delivered by the Corporation Bank on 10.09.2002 to M/s. Lawat Jewelers. Accordingly, we allow these appeals and set aside the impugned orders. The appellants are

entitled to consequential benefit in accordance with law including return of seized gold and return of seized vehicle, if not already released by the Customs Department.

[order pronounced on 20.03.2020]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(C. L. MAHAR)
MEMBER (TECHNICAL)

JB

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. IV

Custom Appeal No. 51057 of 2020 (SM)

(Arising out of Order-in-Appeal No. CC(A)CUS/D-II/Prev/nch/1038-1039-1040/2019-2020 dated 24.01.2020 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s DI GOLD DESIGNER JEWELLERY .....Appellant
RAMBHAJ, 210, Deepali Enclave,
Pitampura, New Delhi,
110034

VERSUS

Commissioner of Customs (Preventive) Delhi .....Respondent
New Customs House,
Near I.G.I, AIRPORT, New Delhi
110037

WITH

Custom Appeal No. 51058 of 2020 (SM)

(Arising out of Order-in-Appeal No. CC(A)CUS/D-II/Prev/nch/1038-1039-1040/2019-2020 dated 24.01.2020 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s RIDHI SIDHI JEWELLERS .....Appellant
Main Market,, Gandhi Chowk Nohar,
Hanumangarh, Rajashthan
335523

VERSUS

Commissioner of Customs (Preventive) Delhi .....Respondent
New Customs House,
Near I.G.I, AIRPORT, New Delhi
110037

AND

Custom Appeal No. 51059 of 2020 (SM)

(Arising out of Order-in-Appeal No. CC(A)CUS/D-II/Prev/nch/1038-1039-1040/2019-2020 dated 24.01.2020 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s PRADEEP RATUSARIA .....Appellant
(HUF) M/S Ratusaria Jewellers,
Gali Bombay Wali,
Sirsa, Haryana-125055

VERSUS

Commissioner of Customs (Preventive) Delhi .....Respondent
New Customs House,
Near I.G.I, AIRPORT, New Delhi
110037

APPERANCE:

Shri B. Bhushan, Advocate for the Appellant
Shri Mahesh Bhardwaj, Authorised Representative for the Respondent

CORAM:

HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER NO. 52094-52096 / 2021

Date of Hearing: **02.12.2021**
Date of Decision: **22.12.2021**

RACHNA GUPTA:

Present Appeal has been filed to assail the Order-in-Appeal bearing no. 1038-1039-1040/2019-2020 dated 24th January 2020. The relevant factual matrix for adjudicating the impugned appeal, in brief, is as follows:

The Appellants herein are engaged in jewellery business. They used to send parcels of gold for job work of jewellery through the known trade practice called 'Angarias' and also usedto receive the gold/jewellery through the same mode. Department got an information about a consignment booked by Airway Bill No. 589-

56652551 of Jet Airways destined to Bombay to might have contained gold bullion of foreign origin which might have been smuggled into India. The said consignment was put on hold on 21/10/2014 and CELEBI, the custodian of warehouse, was instructed to not to clear the shipment without the permission of Custom Department. The said consignment was booked in the name of Shri Onkar Nath Singh. The Custom Officers, in the presence of Shri Onkar Nath Singh brought the consignment from CELEBI warehouse to new Custom House on 11/11/2014 and examined the same in presence of Shri Onkar Nath Singh and two more independent witnesses.

1.1 The consignment was found containing two tin boxes collectively weighing 11.8 kgs containing 22 & 18 small parcels respectively. All these parcels were detained for further investigation vide Panchanama dated 11.11.2014. To verify the yellow metal to be gold that the parcels were also got examined by jewellery appraisal on 27/11/2014 who vide the report of the even date verified that the yellow metal and yellow metal jewellery is gold. All 22 parcels since were having yellow metal jewellery or rough diamonds and 18 parcels since were found to contain yellow metal, yellow metal jewellery, and rough diamonds and the metal was verified to be gold, that the consignment was seized under Section 110 of Customs Act 1962, vide Panchnama dated 27/11/2014. It was also observed that 22 parcels were containing Indian made gold or jewellery out of Indian made gold and accordingly were released on 18/10/2014.

1.2 Based upon the statement of Shri Omakarnath Singh, statement of Shri Pradeep Ratusaria of M/s Ratusaria Jewellers summons also issued to M/s DI Gold Jewellery at M/s Ridhi Sidhi Jewellery who though not appeared but a letter dated 14/09/2015 was received from Shri Rajesh Agarwal proprietor of M/s DI Gold Jewellery based thereupon department formed an opinion that three of these jewellery merchants were in possession of foreign marked gold. Since they did not produce any document of acquiring the possession, they were alleged to have illegally imported the same and were alleged to have intentionally withheld the complete information and the identities of the person from whom they acquired the said gold knowing that the gold in their possession to be smuggled gold that show cause notice bearing no. 229/14 dated 5/11/2015 was served upon three of the appellants proposing the confiscation of the gold weighing 351.54 Gms. & 163.8 Gms. valued at Rs. 831747/- and Rs. 387597/- respectively seized from parcel no. 4 & 16 among 18 parcels of one of the tin box in Airway Bill No. 58956652551 under Panchnama dated 11/11/2014. Penalty upon the appellants under Section 112 (b) of Customs Act, 1962 was also proposed. The said proposal has initially been confirmed by the original adjudicating authority vide Order-in-Original No. 148/2017 dated 13/03/2017, the appeal thereof has been rejected vide the order under challenge.

2. Being aggrieved that appellant is before this Tribunal. I have heard Shri B Bhushan for the Appellant & Shri Mahesh Bhardwaj for the Respondent.

3. It is foremost submitted on behalf of the appellants that though 22 & 18 no. of parcels were recovered from two tin boxes in the consignment in question but only two parcels thereof bearing no. 4 & 6 containing gold bar weighing 351.54 Gms. and 163.8 Gms respectively were found engraved with foreign marked that is 'Valcambi Suisse' and 'Esayeur Founder' respectively. All total number of parcel were put on hold on 21/10/2014 and were seized on 27/11/2014. All other parcels except the above said 4 & 6 were released on 18/12/2014. Since, the seizure of the said two packets was under Section 110 of Customs Act dated 27/11/2014, the Show Cause Notice under Section 124 of the Customs Act, 1962 was required to be served upon the appellants within six months thereof, else the goods should have been returned to the person from whose possession they were seized. In the present case, the period of six months expired on 27/05/2015 but the show cause notice was issued on 05/11/2015 that is almost after one year of the seizure. Hence, Show Cause Notice itself is alleged to be barred by time.

3.1 On behalf of M/s DI Gold & M/s Ridhi Sidhi Jeweller, in addition, it is submitted that the show cause notice was not properly served upon them nor at the correct address. Also too short a time was given to them to mark their presence before the investigating officer which was not possible. The time and date chart as mentioned in para 12 of the appeal is impressed upon to explain the same & the absence. However, a letter dated 14/09/2015 was given by the

proprietor M/s DI Gold Designer Jeweller, Shri Rakesh Agarwal. The appellants further submitted that it is a settled practice that the gold is imported from foreign countries as duty paid gold and thus much of the gold available in the market is of foreign origin. Hence, with respect to the foreign origin gold found in parcel no. 4 & 6 it was the duty of the department to show that the said foreign origin gold is received by any of the appellants without payment of duty. But apparently department failed to conduct any investigation with respect to the origin of the gold and its mode of coming into India. Sufficient document have been submitted by the appellant to the department in the form of tax-invoice for the purchase of the above gold from Shreenath Corporation alongwith the document about sending gold weighing 351.54 gms. to M/s Ratusaria Jewellers for job work in the form of work order dated 15/10/2014. Delivery challan dated 16/10/2014 was submitted as the document to the fact that said M/s Ratursaria jewellers could not prepare the jewellery as per the job work assigned and thus it returned the same gold quantity to M/s DI Gold vide delivery note dated 30/10/2014. It is further submitted that since it is the quantity of gold as received is relevant while returning the same irrespective of marked thereof, M/s Ratusaria Jewellers was not required to return the same piece of gold which otherwise was already seized by the Customs by that time. It is submitted that the allegation against M/s Ratursaria Jewellers was absolutely false and are based on mere presumption basis.

3.2 Ld. Counsel also mentioned that defence as taken by the appellants about the Angariya as known trade practice among the jewellers for receiving gold or sending the same as jobwork and

receiving back stands fully corroborated not only from the statement of Shri Omkarnath but also from the contents of letter of Shri Rakesh Agarwal on behalf of the M/s DI Gold & M/s Ridhi Sidhi Jewellers, violation of principle of natural justice has also been alleged against the adjudicating authority vide confirming the allegations of presumptive smuggling against them and while imposing the penalty. It is submitted that serving notices on the wrong addresses and giving a short notice just 5 to 7 days not providing the opportunity of hearing any remand confirmed and penalty imposed in the giving circumstances is liable to be set aside on this score, it is based upon on behalf of all the appellants that the recovered gold was sent through Angariya which is a normal trade practice among the jewellers in the country. The quantity recovered is too small from a jeweller's perspective to be alleged as the case of smuggling. The evidence collected through the investigation is sufficient to prove that the gold was being transferred in the aforesaid normal course of trade. No evidence has been brought on record about the gold to have been smuggled one. The findings of the Adjudicating Authorities are alleged to be merely presumptive in nature, accordingly, are prayed to be set aside and the appeal is prayed to be allowed.

4. To rebut these submissions, learned DR has mentioned that the requisite documents were never produced by the appellants herein. In fact M/s. DI Gold and M/s. Ridhi Sidhi never co-operated the Department. Despite the issuance of several notices, they failed to make them appear before the investigating authority. Lack of documents is sufficient to hold that the goods were smuggled one,

otherwise also, the onus to prove that the seized gold was not received by elicit importation and was not smuggled one was upon the appellants in terms of Section 123 of Customs Act, 1962. The statement of Mr. Pradeep for M/s. Ratusaria Jewellers is highly insufficient to discharge the said onus. Remaining appellants failed to join the investigation. The gold in question is admittedly of foreign origin hence, no infirmity has been committed by Commissioner (Appeals) by ordering confiscation of the gold on the ground of it being smuggled one. The consequent penalty is also accordingly justified. The appeal accordingly, is prayed to be dismissed.

5. After hearing the rival contention, perusing the record of three of these appeals, my observance and findings are as follows:

5.1 The findings of the Adjudicating Authorities below are that seized gold was engraved with foreign markings i.e. Valcambi Suisse and Esayeur Founder recovered from the packet no. 4 and 6 of Airway Bill No. 58956652551 dated 20.10.2014 of Jet Airways being illegally and illicitly imported into the country in contravention of provisions/conditions of notification no. 12/2012 dated 17.03.2012 read with section 3 of Foreign Trade (Development & Regulation) Act, 1992. These findings are mainly based upon the fact that the documents submitted by Mr. Pradeep Ratusaria had no description of making and serial no. of gold bars and that the remaining appellants have failed to submit any document to falsify these findings.

5.2 I have perused the statements recorded during the investigation and the documents tendered. It is observed that Shri Onkar Nath Singh in whose name the seized gold was booked has

mentioned that he works for a company M/s BBS Parcels Services, Paharganj, New Delhi, who used to send parcels of jewellers from Chandani Chowk to Mumbai. The impugned two boxes of 22 & 18 parcels were booked by him on 20/10/2014 vide the impugned Airway Bill to be received by Suchit Kumar Yadav of Mumbai. One of the two parcels of 22 parcels belongs to his firm, another parcel of 18 parcels belongs to Mr. Shravan Kumar Chawat of M/s Jai Mata Di. He submitted the document with respect to 18 parcels including the name of the address of the senders and the receivers of the parcels. Shri Shravan Kumar also corroborated the transaction as deposed by Shri Onkar Nath Singh. Shri Pradeep Ratusaria of M/s Ratusaria Jewellers vide his statement accepted the same in addition informed vide his letter dated 01/04/2015 to have received said gold of M/s DI Gold & M/s Ridhi Sidhi Jeweller for manufacture of jewellery. The job work whereof was to be got done from M/s J.K. Jewells, M/s Classic Ornament & M/s Anil Jewells. All situated in Mumbai and accordingly, both the impugned gold pieces and alongwith the third one weighing 138.38 gms. were booked with Mr. Shravan Kumar of M/s Jai Mata Di to be delivered at Mumbai.

5.3 I further observe that though M/s DI Gold designer jewellery and M/s Ridhi Sidhi did not make them available before the investigating officer in furtherance of summon issued to them but from the time & date chart as mentioned in the appeal, it is abundantly clear that the notices were served for just five to seven days time for both these appellants to appear and in fact, most of them were received by these appellant after the date of hearing

mentioned therein use to expire. In such circumstances, the findings of the adjudicating authority below that both these appellants failed to co-operate the investigating agency are held to be false on the face of it. These findings are observed to be false also for the reason that M/s DI Gold Designee Jewellery respondent had replied to the impugned show cause notice vide their letter dated 16/03/20107 and M/s Ridhi Sidhi vide their letter dated 15/08/2016. Both of them have objected the issuance of show cause notice after the expiry of period of six months, in addition, have clarified about acquiring the licit/ legal possession of the impugned gold pieces. It is mentioned in the letter that the gold was purchased from Shreenath Corporation, Telipada, Jaipur. A copy of Tax/VAT invoice for the purchase of said gold was duly annexed alongwith said letter. The purchase was made on the basis of bills issued by Shreenath Corporation to M/s DI Gold Designer. Those bills were also got annexed with the letter. Further perusal shows that out of the gold weighing 1255.3 gms as purchased from said Shreenath Corporation, the gold weighing 351.54 gms was mentioned to have been sent to M/s Ratuaria Jewellers for making jewellery. Accordingly, the work order dated 15/10/2014 stands corroborated in view of this letter of M/s. DI Gold Designee Jewellery. It was also corroborated that Ratusaria since could not get the jewellery made, hence, returned the said gold quantity of 351.54 gms. vide delivery note of 30/10/2014. It has been found clarified that it was not necessary to return the gold of same marking.

5.4 Similarly, M/s Ridhi Sidhi Jewellers in their letter 15/08/2016 has stated about receiving 163.8 grms of gold from Smt. Krishna Devi, wife of Shri Anil Kumar, village Kumedpura, for making gold jewellery as per the design approved. It is deposed that the said piece of gold was sent to M/s Ratusari Jeweller. Both these appellants have clearly specified that the gold retained by the officers of Customs on 21/10/2014 and finally seized on 27/11/2014 was actually the licit purchase of the appellants and was on the way for getting a job work of jewellery out of the said gold send through the prevalent mode of 'Angariya' prevalent among jewellers.

6. As relied upon learned DR that it was not the department to prove the alleged smuggling but the onus was upon the appellants in terms of Section 123 of the Customs Act, I am of the opinion that above statement and the documents annexed therein are absolutely sufficient for discharging the burden as stands rest upon the appellants in view of Section 123 of the Customs Act. I also observe that the allegation of smuggling are based on the mere fact that the impugned parcels were containing gold of foreign origin but there is no denial to the fact that much of the gold in Indian market is of foreign origin. It was accordingly for the department to investigate that no requisite duty has been paid on the impugned gold. Apparently and admittedly, there is no such evidence on record, I am therefore of the opinion that since the appellant have already disclosed the source of acquisition of gold in question, the initial burden of showing the licit possession of the impugned gold stands discharged by the appellant. The burden stands shifted upon the

Revenue to show that the goods proposed to be confiscated were smuggled one.

6.1 I rely upon the decision of this Tribunal in the case of **Krishna Kumar Dhandia vs. Commission of Customs, Calcutta 2007 (2019) E.L.T (736),** I also draw support from the decision of Hon'ble High Court of Mumbai in the case of **Union of India vs Imtiyaz Iqwal Pothiawala reported in 2019 (365) E.L.T. (167)** wherein it has been held that burden of proof in case of notified goods is though upon the person from whose possession or the person who claims ownership of such goods to prove that the seize goods are not the smuggled goods. However, it has still for the Revenue to establish the reasonable belief that the goods seized under Section 110 of Customs Act were the smuggled goods. It has been held that when such reasonable belief is challenged, Section 123 come into picture only when such challenge to seizure is negatived. In the present case, from the above discussion, it is clear that the appellants since beginning have been challenging the said belief of the Revenue emphasizing that they are jewellers and getting gold from licit means and sending it for being converted into jewellery to and fro by the known trade of 'Angarias'. The onus was definitely upon the department to prove that the gold recovered was not possessed by the appellant through licit means and it was smuggled. The mere fact of the gold being of foreign origin is highly insufficient to prove alleged smuggling. Resultantly, ordering confiscation on the ground of seized gold to be smuggled one is held to be nothing but merely presumptive finding. Rather, I opine that

there is no basis for the belief to the reasonable while alleging smuggling. Hon'ble Apex Court in the case of **Tata Chemicals Ltd vs. Commissioner of Customs (Preventive), Jamnagar reported as 2015 (320) E.L.T. 45 (S.C)** as explained the meaning of 'reason to believe' by opining it to be not the subjective satisfaction of the officer concerned, for such power given to the officer concern is not arbitrary power and has to be exercised in accordance with the restraints imposed by law and that such belief must be that of an honest and reasonable person based upon reasonable grounds. It was held that confiscatory power based on imports 'reason to believe' has to be exercised only on the satisfaction based on certain objective material. Earlier decision of Apex Court in the case of **Hukma vs. State of Rajasthan 2008 (228) E.L.T. 8 (S.C.)** was relied upon wherein it was clearly opined that the burden of proof upon the private party is based on the existence of satisfaction of reason to believe. In the present case, there is nothing to explain as to why the VAT/Tax, the purchase orders, the job orders, the delivery challans etc. have not been considered by the Revenue. There is no apparent denial that the foreign origin gold can licitly also be available in the market. Hence the mere fact that gold was having foreign engravings is opined to be highly insufficient a reason to believe the gold to be smuggled one.

6.2 Hence, I opine that Section 123 of Customs Act cannot be resorted to otherwise also as already discussed above, there is ample evidence for discharging the said burden by the appellants in terms of said Section 123. The present, therefore becomes a clear case

where department has failed to established that the seized foreign marked gold was smuggled one. Merely because the foreign marked gold is involved, the same is wrongly held to be smuggled one. I draw my support from the decision of the Tribunal in the case of **Nitya Gopal Vishwas vs. Commissioner of Customs(Prev), Kolkata reported as 2016 (344) E.L.T. (209) Tri. Kolkata**. Otherwise also, in the light of liberalized policy of Central Government, it cannot be held that all foreign marked goods being bought and sold in India are of smuggled nature. I also rely upon the decision in case of **Giridhari Dubey vs. Commissioner of Customs (Preventive), Kolkata reported as 2002 (149) E.L.T. (427) Tri. Calcutta**.

7. In the present case, when apparently, the show cause notice proposing confiscation of goods seized under Section 110 of Customs Act was issued after one year from the date of seizure. The show cause notice itself gets hit by limitation as the show cause notice was mandatorily to be issued within the six months time of the seizure. The show cause notice has been objected since beginning to have been hit by time still the adjudicating authority failed to take cognisance thereof. Accordingly, the show cause notice itself is held to be barred by time and as such being void ab initio. I draw my support from the decision of the Hon'ble Apex Court in the case of **Rakesh Kumar Bhagat vs. Commissioner of Customs, New Delhi reported as 2008 (231) E.L.T. (204) (S.C).**

8. Above all, as far as DI Gold Designee Jewellery & M/s. Ridhi Sidhi are concerned, the order against them has been passed to

holding them to fail to appear and respond but from the date chart as relied upon by the appellants with respect to the date of issue of summons the date of receipt thereof and the date of hearing mentioned in summons it is abundantly clear that the absence of these appellant was not at all intentional but because of too short time as was given to them to make themselves available before the investigating officer. Absence of reasonable time for seeking presence amounts to absence of reasonable opportunity and is definite violation of Principles of Natural Justice. I draw my support from the decision of Hon'ble High Court of Delhi in the case of **Directorate General of Central Excise Intelligence vs State reported as 2015 (326) E.L.T. (282)**.

9. In view of entire above discussion I summarize as follows:

i) Show cause notice under Section 124 of Customs act confirming confiscation of seized gold being issued beyond six months of the date of seizure is held to be barred by limitation.

ii) Lack of appropriate and reasonable opportunity of hearing to the appellant amounts to violation of natural justice, the findings against them are liable to be set aside on this score as well.

iii) The appellants have sufficiently discharged their burden of proof in terms of Section 123 of Custom Act by proving the licit possession of the impugned gold which was delivered for job work through approved mode of the Trade for transfer of Gold and Jewellery. Lastly, the department has failed to show any cogent reason to believe that the goods were the smuggled one.

10. Resultantly, the Order-in-Appeal is nothing but the outcome of presumption on part of the authority. Accordingly, the impugned Order-in-Appeal is hereby set aside. Consequent thereto, three of the appeals herein, stand allowed.

[Order pronounced in the open court on 22.12.2021)

(Rachna Gupta)
Member (Judicial)

**SB*

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

CUSTOMS APPEAL NO.50643 of 2020

[Arising out of Order-in-Original No.08/2019 dated 03.12.2019 passed by the Commissioner of Customs (Import), Delhi].

M/s. Veera Fragrance Pvt. Ltd. **...Appellant**

VERSUS

The Commissioner of Customs (Import) **...Respondent**
New Customs House, New Delhi

WITH

CUSTOMS APPEAL NO.50644 of 2020

[Arising out of Order-in-Original No.08/2019 dated 03.12.2019 passed by the Commissioner of Customs (Import), Delhi].

Shri Vaibhav Jain **...Appellant**

VERSUS

The Commissioner of Customs (Import) **...Respondent**
New Customs House, New Delhi

APPEARANCE:

Shri S. Jaina, Advocate appeared for the appellant
Shri Rakesh Kumar, Authorised Representative for the Respondent -Revenue

CORAM: HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING : 19/04/2023
DATE OF DECISION: 05/07/2023

FINAL ORDER NO.50829-50830/2023

DR. RACHNA GUPTA

Present order disposes of 2 appeals as mentioned above, both being arising out of same set of proceedings and having challenged the same order of the original Adjudicating Authority.

2. The facts in brief relevant for the impugned adjudication are as follows:-

The appellant M/s.Veera Fragrances Pvt. Ltd. is the manufacturer of Aromatic Compounds and was importing aromatic chemical for perfumery preparation from Givaudan, Switzerland. Mr. Vaibhav Jain-another appellant is the Director of M/s. Veera Fragrances Pvt. Ltd. Pursuant to an information about some contravention by the appellants that the searches were conducted in the premises of the appellants and also in the premises of M/s. Ajit Traders on 10.08.2017. At all these premises drums / containers of different weight and size were found with "Aroma Chemical K-100". When those stickers of description were removed another sticker underneath was found, wherein the contents of the container were described as "safranal". *Prima Facie*, believing the said act as an act of misdeclaration that the chemical was seized:

- Nine Drums of 25 Kg. each containing 222.5 Kg. of 'Aroma Chemical K-100' alongwith 450 grams of "safranal" valued at INR. 81,05,586/- were seized from the factory of M/s. Veera Fragrances, Parpad Ganj, New Delhi.
- From both the premises of Ajit Traders were found 34 Tin Containers mentioning to contain "Aroma Chemical K-100" valuing at INR.3,09,65,500/- .
- From another premises of M/s. Veera Fragrances in Noida 50 tin containers of the impugned Aroma Chemical valuing at INR 4,55,37,000/- were seized alleging the seized chemical as liable for confiscation vide seizer memo dated 10.08.2017.

3. Though the appellants in their defense, mentioned that in the year 2016 itself, to maintain the trade secrecy, they in consultation with their foreign supplier that is M/s.Givaudan, Switzerland changed the name of "Safranal" to "Aroma Chemical, K-100". However, based on the investigations and the statements recorded during investigation the said defense was not considered and it was alleged that the appellants have declared the lower value of "safranal" from USD 428 per Kg. to USD 408 per kg. within a very small period of time without any reason. Hence the value of "safranal" need to be re-determined. It was also alleged that for subsequent imports of "safranal" the same was misdeclared as "Aroma Chemical K -100" by way of affixing / getting affixed secondary sticker showing description of goods "safranal". Thus, the value needs to be rejected and determined.

4. With these observations that the Show Cause Notice No. 4237 of 01.02.2018 was served upon the appellants for redetermination of the value of "safranal" and the recovery of the re-assessed value. The differential demand due to mis-declaration, amounting to Rs.19,61,808/-, was proposed to be recovered, in fact to be appropriated from the amount of INR 98,81,642/- already deposited by the appellant. The seized "Aroma Chemical K -100" was reassessed at I.N.Rs. 7,09,75,150/-. Recovery of proportionate interest and imposition of appropriate penalties was also proposed vide the aforesaid Show Cause Notice. The proposal has fully been

confirmed vide the order under challenge. Being aggrieved, the appellant is before this Tribunal.

5. We have heard Shri S. Jaina, ld. Counsel for the appellants and Shri Rakesh Kumar, Authorised Representative for the Revenue.

6. Ld. Counsel for the appellant has mentioned that the appellants have imported the "Aroma Chemical K -100" for being used in perfumery purposes vide 32 bills of entries. The "Aroma Chemical" was initially imported under the name of "safranal" and later under the name of "Aroma Chemical K-100". It is mentioned by the ld. Counsel that said change of description is wrongly alleged as misdeclaration and is wrongly alleged to be a case of undervaluation. Ld. Counsel submitted that "safranal" as well as "Aroma Chemical K-100" is one and the same Aroma chemical. The generic name for both these products is same which is 2, 6, 6 - trimethylcyclohexa-1, 3 diene - 1 - carbaldehyde. It is submitted that the price of the imported aroma chemical is the transaction value arrived at after negotiation between the exporter and the importer. The prices got negotiated based on the fact that the contracted quantity ordered was in bulk. It is impressed upon that since bulk orders were placed, the prices got revised by the seller / exporter and the negotiation stands duly confirmed by the exchanged emails between the exporter M/s. Givaudan, Switzerland and the appellant. It is impressed upon that the appellant is also distributor of Givaudan, hence, is a bulk buyer. Thus, the reduction in price was merely a commercial consideration which has wrongly been alleged as

an intentional mis-declaration with an intent to undervalue the import.

7. It is further impressed upon that price reduced from 428 USD per Kg. to 408 USD per Kg. even when the goods were imported as "safranal". This price of 408 USD per Kg. remained the same when the Aroma Chemical was imported as "Aroma Chemical K-100". Above all, the Director Mr. Vaibhav Jain has nowhere admitted the undervaluation of the goods. The genuine reason submitted was the maintenance of secrecy in the trade. There is no evidence for any *malafide* intent on the part of Mr. Vaibhav Jain. Finally, it is submitted that in the given circumstances, there was no reason with the Department to reject the transaction value. Reassessment has also not been done in the manner as prescribed. Resultantly, neither the seized goods are liable for confiscation nor penalty is imposable upon the appellants, the company as well as its Director. With these submissions, ld. Counsel for the appellant has prayed for setting aside of the order under challenge and for the appeal to be allowed.

8. While rebutting these submissions, ld. D.R. has submitted that the total assessable value of goods imported by the appellants from foreign suppliers was rejected for the reason that the goods were grossly undervalued by misrepresentation and misdeclaration with respect to the description of the imported goods. The actual invoice value was also suppressed by submitting less values with respect to the same goods by misdeclaring the description of goods as "Aroma Chemical K-100" instead of "safranal". No justification has been

provided by the appellants for differently describing the chemical carried out. No plausible reason is given as to why the same product has been imported at different lower values in a very short span of time. The findings in para No. 38.6 and 38.7 are impressed upon to be reasonable and justified. Impressing upon no infirmity in the order under challenge, appeal is prayed to be dismissed. Ld. D.R. has relied upon the following decisions:-

1. M/s. S.D. Overseas vs. Joint Commissioner of Customs New Delhi reported in 2022 (6) TMI 177 – CESTAT, New Delhi
2. Prasant Glass Works P. Ltd. vs. Collector of Customs, Calcutta reported in 1996 (87) ELT 518 (Tri.-Del.)
3. Harshita International vs. Commissioner of Cust. (Prev.), Mumbai reported in 2008 (229) ELT 386 (Tri.-Bom.)
4. Toplane vs. Commr. of Customs (Prev.) Kolkata reported in 2009 (238) ELT 95 (Tri.-Kolkata)
5. Chandni International vs. Commissioner of Cust. (Import), Mumbai reported in 2003 (153) ELT 312 (Tri.-Del.).
6. Anil Kumar Tiwari vs. Commissioner of Customs, Tuticorin reported in 2016 (344) ELT 1051 (Tri.-Chennai)
7. CCE & ST, Noida vs. Sanjivani Non-ferrous Trading Pvt. Ltd. reported in 2019 (365) ELT 3 (S.C.)

9. Having heard the rival contentions and perusing the record, we observe and hold as follows:-

The impugned demand was raised and confirmed by rejecting the transaction value of the import on 2 counts:-

(1) That when the Aroma Chemical is imported as "safranal" its value has reduced within a very short time alleging the same as an act of under-valuation.

(2) The same Aroma Chemical "safranal" has subsequently been imported as "Aroma Chemical K-100" and at still lower prices. Hence, alleging misdeclaration as a cause for under-valuation.

10. The Adjudicating Authority below while confirming both these allegations has rejected the transaction value reassessed it and has confirmed the differential amount to be recovered from the appellants and has also ordered the confiscation of the recovered Aroma Chemical from four of the premises of the appellants. In addition, has imposed penalty on both the appellants. To adjudicate the reasonableness of these findings, we foremost need to look into the definition of transaction value and the procedure for arriving at transaction value. We observe that Duties of customs are levied on goods imported into and exported from India at the rates specified in the Schedules to the Customs Tariff Act, 1975. On some goods, the levy is based on quantity (specific duty), and other goods it is based on value (ad valorem). If the duty is to be levied based on value, valuation for the purpose has to be done as per Section 14 which reads as follows:

> **Section 14. Valuation of goods. -**
>
> (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **the value of the imported goods and export goods shall be the transaction**

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

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

Provided further that the **rules** made in this behalf **may provide for,-**

(i) the circumstances in which the **buyer and the seller shall be deemed to be related**;

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

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

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

(2) XXXXXXX

11. From the above definition, we observe that the value to be considered for calculating the Customs duty shall be the transaction value subject to five conditions:

a) The buyer and seller are not related.

b) Price is for delivery at the time and place of importation, i.e., all costs up to the point of import are to be included. For instance, if the sale is on Free on

Board (FOB) basis, the costs of transportation to the place of import, transit insurance, etc. will have to be added.

c) Price is the sole consideration for sale.

d) Some amounts indicated in the first proviso to sub-section 1 of section 14 must be included.

e) Valuation will be as per any other conditions as may bespecified in the Rules.

12. Thus, the default position is that the valuation has to be done on the basis of the transaction value and not based on any fixed value. The second proviso to sub-section (1) of Section 14 provides for Rules to be made in this behalf to provide for:

a) the circumstances in which **the buyer and the seller shall be deemed to be related**;

b) the manner of determination of value in respect of goods

when there is no sale,

c) the manner of determination of value in respect of goods if **the buyer and the seller are related**,

d) the manner of determination of value in respect of goods where **price is not the sole consideration for the sale**;

e) the manner of determination of value in respect of goods in

any other case; and

f) 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.

13. The Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter called as Valuation Rules) were framed as per the second proviso to sub-section 1 of section 14. It has 13 Rules in all of which Rules 1 and 2 are Preliminary Rules. Rule 3 states that subject to Rule 12, the value shall be the transaction value adjusted according to Rule 10. Rule 10 provides for certain costs to be included in the transaction value. Rule 12 provides for the proper officer to reject the transaction value if he has reason to doubt its truth and accuracy. **Thus, unless the proper officer rejects the transaction value under Rule 12, the valuation has to be** based on transaction value as per Rule 3 with some additions, if necessary, as per Rule 10.

14. In case the valuation cannot be done under Rule 3 /Rule 10. It must be done sequentially under rules 4 -9 sequentially.

15. In the present case the appellants are observed to have imported Aroma Chemical for perfumery preparation vide 32 different bills of entries as shown below:-

No.of Bill of Entry	Period in which B.o.E. filed	Description of Goods	Qty in (Kg.)	Unit price (USD/Kg.)
1	11.02.2016	Safranal (Aromatic Chemical for perfumery preparation)	500	428
4	08.03.2016 to 2104.2016	Sarfanal (Aromatic Chemical for perfumery preparation	2000	408

5	04.05.2016 to 29.07.2016	Aroma Chemicazl K100 (Aromatic Chemical for Perumery Preparation)	2500	408
7	08.09.2016 to 17.12.2016	Aroma Chemical K100 (Aromatic Chemical for Perfumery Preparation)	3500	400
15	09.01.2017 To 04.07.2017	Aroma Chemical K100 (Aromatic Chemical for Perfumery Preparation	7550	380

16. We further observe from the documents on record that these bills of entries are based on the invoices issued by Givaudan with reference to the purchase orders against which they supplied the same to the appellants. There are 3 purchase orders:-

(1) Purchase order dated 09.12.2015 has two transaction values for the Aroma Chemical imported i.e. @ 428 and 408 USD per Kg.

(2) The purchase order dated 27.06.2016 the value mentioned is at the rate of 400 USD per Kg.

(3) The purchase order dated 13.12.2016 is at the rate of 380 USD per Kg.

17. We also observe from the extract of Emails placed on record that after receiving the first consignment in February, 2016 there is a common order confirmation for purchase of 5000 Kg. “safranal”. However, prior to the said order was completely dispatched there have been exchange of emails for modifying the agreed price at the rate of 428 USD per Kg. to 408 USD per Kg. and based on said communication that the order confirmation got modified with respect to undispatched quantity of “safranal”. These observations to our

understanding are sufficient to hold that though the time period has been short but there is a reasonable genesis for reduction in price while importing Aroma chemical as "safranal". We also observe a certificate being issued by M/s.Givaudan, the importer, acknowledging the quantity imported by the appellant and the prices for the same. The said certification is in complete conformity of the description and the price in the impugned bill of entries.

18. These observations are also sufficient for us to hold that the findings of adjudicating authority below in para 38.2 of the order that there was no written proof regarding the offer of discount and even the declaration of overseas supplier i.e. M/s. Givaudan is silent about the price are wrong being contrary to the documents on record. Thus, we hold that value of Aroma Chemical while being imported as "Safranol" though was at reduced price for subsequent transaction but the same cannot be rejected for it being the transaction value. The transactions are held to be the ordinary sales. For this conclusion, we rely upon the decision of Hon'ble Apex Court in the case of **Eicher Tractors Ltd. Haryana vs. Commissioner of Customs Mumbai-1 reported as (2001) 1 SCC 315 = 2000 (122) E.L.T. 321 (S.C.)** wherein the Hon'ble Court held as follows:-

> "6. Under the Act Customs duty is chargeable on goods. According to Section 14(1) of the Act, the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed, the value has to be determined under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are *ordinarily sold,* or offered for sale, for delivery at the *time* and *place of importation* - in the course of international

trade. The word "ordinarily" necessarily implies the exclusion of "extraordinary" or "special" circumstances. This is clarified by the last phrase in Section 14 which describes an "ordinary" sale as one "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 ...". Subject to these three conditions laid down in Section 14(1) of time, place and absence of special circumstances, the price of imported goods is to be determined under Section 14(1A) in accordance with the Rules framed in this behalf.

xxx xxx xxx

9. These exceptions are in expansion and explicatory of the special circumstances in Section 14(1) quoted earlier. It follows that unless the price actually paid for the particular transaction falls within the exceptions, the Customs Authorities are bound to assess the duty on the transaction value.

xxx xxx xxx

12. Rule 4(1) speaks of the transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose of assessment to Customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). "Payable" in the context of the language of Rule 4(1) must, therefore, be read as referring to "the particular transaction" and payability in respect of the transaction envisages a situation where payment of price may be deferred.

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13. That Rule 4 is limited to the transaction in question is also supported by the provisions of the other rules each of which provide for alternate modes of valuation and allow evidence of value of goods other than those under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 "using reasonable means consistent with the principles and general provisions of these Rules and sub-section (1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India". If the phrase "the transaction value" used in Rule 4 were not limited to

the particular transaction then the other rules which refer to other transactions and data would become redundant.

xxx xxx xxx

22. In the case before us, it is not alleged that the appellant has misdeclared the price actually paid. Nor was there a misdescription of the goods imported as was the case in *Padia Sales Corpn.* [1993 Supp. (4) SCC 57] 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 a 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)."

19. In another decision in the case of **Commissioner of Customs, Visakhapatnam vs. Aggarwal Industries Ltd. reported as (2012) 1 SCC 186** = **2011 (272) E.L.T. 641 (S.C.)** Hon'ble Supreme Court has held as follows:-

"10. The law, thus, is clear. As per Sections 14(1) and 14(1A), the value of any goods chargeable to *ad valorem* duty is deemed to be the price as referred to in that provision. Section 14(1) is a deeming provision as it talks of 'deemed value' of such goods. Therefore, normally, the Assessing Officer is supposed to act on the basis of price which is actually paid and treat the same as assessable value/transaction value of the goods. This, ordinarily, is the course of action which needs to be followed by the Assessing Officer. This principle of arriving at transaction value to be the assessable value applies. That is also the effect of Rule 3(1) and Rule 4(1) of the Customs Valuation Rules, namely, the adjudicating authority is bound to accept price actually paid or payable for goods as the transaction value. Exceptions are, however, carved

> out and enumerated in Rule 4(2). As per that provision, the transaction value mentioned in the Bills of Entry can be discarded in case it is found that there are any imports of identical goods or similar goods at a higher price at around the same time or if the buyers and sellers are related to each other. In order to invoke such a provision it is incumbent upon the Assessing Officer to give reasons as to why the transaction value declared in the Bills of Entry was being rejected; to establish that the price is not the sole consideration; and to give the reasons supported by material on the basis of which the Assessing Officer arrives at his own assessable value."

20. In the present case, we observe that appellant has not misdeclared the price actually paid. Thus, in the light of the above discussed settled proposition of law and the discussion about documents on record in the form of purchase orders, order confirmations, invoice and certification of the importer we hold that transaction value of Aroma Chemical when imported as "Aroma Chemical K-100" also cannot be rejected. For subsequent imports also there are corresponding invoices and Emails negotiating the price on record of these appeals. These documents have miserably been ignored by the adjudicating authority. The decision rejecting the transaction value and reassessing the same without following the sequence of Rules 4-9 of Valuation Rules as discussed above is not sustainable.

21. Coming to the allegations of misdeclaring "safranal" as "Aroma Chemical K-100", we take the judicial notice of the fact that "safranal" is an organic compound, derived from a component of Spices called Safran which is stigmas and styles of crocus flower. This chemical organic compound is responsible for the Aroma. The chemical composition of this organic compound is $C_{10}H_{14}O$ and IUPAC name for

"Safranal" is 2, 6, 6 - trimethylcyclohexa-1, 3 diene - 1 - carbaldehyde. We also judicially notice that the IUPSC name and the chemical composition for Aroma Chemical K-100 is also same. Not only this, we observe that HSN Code for "Safranal" as well as Aroma Chemical K-100 for perfumery preparation is 29122990. This is apparent from the bills of entries placed on record. It is also apparent from those documents that the rate of customs duty for "Safranal" as well as K-100 is also same. Thus, even if the imported Aroma Chmical is named as K-100, which initially used to be imported as "Safranal", no benefit has accrued to the appellant. Resultantly, we hold that there is no question of any *mens rea* with the appellants with an intent to evade customs duty while declaring "safranal" as "Aroma Chemical K-100."

22. The another important observation of ours is the another important aspect as observed is that the value was reduced while importing Aroma Chemical as "safranal" itself. As already mentioned above, there is no unreasonability in the said reduction of value, hence, no question arises for the rejection of transaction value when it reduced from USD 428 per Kg. to 408 USD per Kg. Appellant has given explanation in defence that the reduction in price was purely out of negotiations prior receiving the subsequent consignment. No evidence is produced on record to falsify the said defence nor the emails and the certificate of importer as produced on record by the appellant. Department also failed to produce any evidence to prove that 'safranal' and "Aroma Chemical K-100" are two different compounds. Both are observed to the one and the same chemical.

23. We also observe that when Aroma Chemical was imported as "Aroma Chemical K-100", several consignments were imported at the same value of USD 408 per Kg. as was initially got negotiated for "safranal". The above discussion is sufficient for us to hold that the change of name from "safranal" to K-100 does not amount to be an act of misdeclaration as there is no evidence of evasion of customs duty while mentioning "safranal" as D-100 on the consignments as well as on the storage tins/containers. The entire case made out against the appellant is therefore, held to be an act of misunderstanding and the findings are nothing but the result of presumptions and assumptions. Once there was no intent to evade the customs duty and the required duty has already been paid by the appellant. Once, there is no evidence of alleged misdeclaration and undervaluation for the reasons as discussed above, there arises no question of imposition of penalty either on the importing firm or on its director. Hence, the orders under challenge cannot be sustained.

24. In the light of entire above discussion, the order under challenge is hereby set aside. Consequent thereto both the appeals stands allowed.

[Pronounced in the open Court on 05.07.2023]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Anita

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

CUSTOMS APPEAL No. 51266 of 2023

(Arising out of Order in Appeal No. CC(A)/Cus/D-1/Export/NCH/03/2022-23 dated 06.04.2022 passed by Commissioner (Appeals), New Customs House, Near IGI Airport, New Delhi-110037)

M/s. The Craft Harvest **...Appellant**
H. No.2/6B, Fourth Floor,
Jangpura-A, New Delhi-110014.

Versus

Commissioner of Customs, **....Respondent**
New Customs House,
New Delhi.

APPEARANCE:
Mr. Avijit Dikshit, Advocate for the appellant
Ms.Tamanna Alam, Authorized Representative for the Respondent

CORAM : HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: **02/05/2023**

Date of Decision: **13/07/2023**

FINAL ORDER No. 50902/2023

DR.RACHNA GUPTA

The appellant in the present case is an exporter and is also registered with goods and service tax Department. Through the Custom Broker, namely, M/s.A & A International Freight Forwarders (CHA), the appellant filed the shipping bill No.4692472/- dated 06.06.2019 for export of 59 woollen shawls of Pashmina wool having FOB value of Rs.1097700/-. However, Wild Life Inspector, Wild Life Crime Control Bureau, when examined the aforesaid goods on 07.06.2019 he reported that out of 59 pieces of the shipment 6 pieces of shawls were suspected to contain guard

hair of Tibetan antelope (Chiru). Since Chiru is listed in Schedule I of Wild Life Protection Act, 1972 and Appendix I of Convention on International Trade in Endangered Species (CITES), being endangered species, the Inspector recommended the Shawls to forensic lab of Wile Life Institute of India, Dehradun for final confirmation based on that recommendation that the samples were drawn under Panchnama dated 12.06.2019.

2. Six pieces of shawls were stuffed in a box and sealed in the presence of Authorised Representative of appellant/exporter, CHA Wild Life Inspector and two witnesses. The test report from the lab was received vide letter No.3874/2019 dated 13.07.2019 confirming that the sample contains hair of Tibetan Antelope. However, the appellant objected the said report vide letter dated 25.07.2019 requesting for retesting thereof. The samples were got re-examined by Zoological Survey of India, Kolkata Lab. The said Lab also confirmed vide their letter No.653/1284 dated 22.01.2020 that the samples i.e. six Shawls contain guard hair of Tibetan Antelope. Based on the said two reports, that those six Shawls were seized under section 110 of Customs Act vide order dated 06.02.2021 on the reasonable belief that the said goods are liable for confiscation under section 113 of the Customs Act, 1962. Accordingly, the appellant was alleged to have deliberately engaged in dealing, keeping, concealing, selling or purchasing the shawls containing guard hair of Tibetan Antelope (prohibited goods) by mis-declaring and concealing them alongwith 53 Pashmina Shawls.

3. However, while considering the request of the appellant-exporter for waiver of Show Cause Notice and considering the reply in his letter dated 22.02.2021 and 24.02.2021, while granting the exemption from personal hearing that the original adjudicating authority vide Order-in-Original No.09/2021-22 dated 12.04.2021 ordered absolute confiscation of 6 Shawls which were found containing guard hair of Tibetan Antelope. Confiscation of remaining 53 Pashmina Wools Shawls was also ordered, however, with an option to the exporter-appellant to get redeem the said export goods on payment of redemption fine of Rs.1,00,000/- in terms of section 125 of Customs Act, 1962. Penalties were also imposed on the appellant of Rs.1,20,000/- each under section 114 (i) and 114 (AA) of Customs Act 1962. The appeal against the said order has been rejected vide Order - in - Appeal No.3/2022-23 dated 06.04.2022. Being aggrieved, the appellant is before this Tribunal.

4. I have heard Shri Avijit Dikshit, ld. Counsel for the appellant and Ms. Tamanna Alam, ld. Authorised Representative for the Revenue.

5. Ld. Counsel for the appellant has mentioned that Provisions of Section 113, 114 (i) and 114 A of Customs Act, 1962 are not applicable in the given facts as the Shawls exported by the appellant are not the prohibited goods. It is submitted that 6 Shawls out of 59 Shawls in the consignment were separated on the basis of suspicion. Due to suspicion, the report was obtained from

Wild Life Institute of India, Dehradun (WLI). The report concluded that said six Shawls contain guard hair of Tibetan Antelope is not acceptable, for the reason that the report is completely silent about the procedure followed, observations made, noted statistics and reasons for the conclusion. Even the report of retesting by the lab of Zoological Survey of India, Kolkata is alleged to have the same lacuna. Both the reports are alleged to be nothing more than a bare statement, thus, are alleged as arbitrary. The order based upon such vague and cryptic report is, therefore, prayed to be set aside. It has also been challenged for being passed even without issuing the Show Cause Notice. It is mentioned that even the retraction letter of the appellant dated 24.02.2021 has not be relied upon by the adjudicating authorities.

6. Ld. Counsel has also placed on record of testing methodology and reports conducted by reputed Labs in India and abroad certifying the absence of Shahtoosh fibres. It is impressed upon that the bare perusal of said test reports would reveal several details and various parameters that have to be observed while concluding such tests. Both the test reports in question are miserably silent about these details and parameters hence are liable to be rejected and the findings based upon said reports are also liable to be set aside. It is further submitted that as per Centre for Cellular and Molecular Biology (CCMP) also the identification using morphological keys are often not reliable and do not lead to successful prosecution of the offender. The circular rather emphasises on using modern technology which would lead

to greater utility. A paper titled as "the advantageous of scanning electron microscope in the forensic studies of hair" in domesticated and wild animals published in international journal of scientific research has also been relied upon to impress that techniques as that of Scanning Electron Microscope (SCM) and of Lighter Transmission Electron Microscopy (TEM) are much more advantageous. The paper acknowledges that there can be confusion with respect to the hair of animals if out-dated techniques are used. Ld. Counsel further impressed upon that section 119 and 125 of Customs Act are not applicable with respect to the remaining 53 shawls. Ld. Counsel hence, the order of giving option of redemption fine is also not sustainable. Ld. Counsel has relied upon two decisions as follows:-

1. Mazda Chemicals v. Commissioner of Customs (Preventive) Ahmedabad [1996 (88) ELT 769 (Tribunal).
2. Commissioner v. Finesse Creation Inc.[2009 (248) ELT 122 (Bom.)

7. The order imposing penalty is also prayed to be set aside, for want of any culpability of mind of the appellant, ld. Counsel relied upon the decision of **Commr. of Customs (Import) vs. M/s. Trinetra Impex Pvt. Ltd. Reported as 2019 (11) TMI 72**. With these submissions order under challenge is prayed to be set aside and appeal is prayed to be allowed.

8. Ld. D.R., on the other hand, has submitted that two test reports of well established government institutes have established that six suspected shawls contain guard hair of Tibetan Antelope.

It is impressed upon that presence of any part of scheduled animals in any percentage makes such article a prohibited item, hence, the adjudicating authorities below have rightly held those six shawls to be the shawls of Shahtoosh (made from the guard hair of Tibetan Antelope/ Chiru) There is no infirmity in ordering absolute confiscation of the said shawls. There is also no infirmity in the finding that remaining 53 Pashmina shawls were used to conceal the said six Shahtoosh shawls. Hence, the order of confiscation but with an option to redeem 53 shawls is quite reasonable and justified. These findings are impressed upon to be sufficient ground for imposition of penalty. Finally, ld D.R. has submitted that the request of the appellant for retesting has rightly been rejected for the second time on the ground that the testing had been done by the renowned governmental forensic laboratories. With these submissions, ld. DR has prayed to the dismissal of the appeal.

9. Having heard the rival contentions and perusing the entire record, I observe and hold as follows:-

I observe that the issue herein depends upon the distinction between two kinds of shawls one made by Pashmina Wool and another by Shahtoosh wool. For the purpose I need to understand the morphological differences between the two kinds of shawls and different scientific methods to distinguish the two. I judicially notice that Shahtoosh is the name given to the wool of Tibetan Chiru-Antelope. These species are trapped killed and skinned for their short fine fleece called Shahtoosh which is the warmest and

the softest wool of the world. Pashmina on the other hand comes from Tibetan mountain goats without killing the animal but the fleece is obtained. Hence I can conveniently say that Shahtoosh is a wool obtained by killing the animal, resulting into the animal getting endangered whereas Pashmina is a craft. For the same reason the possession and sale of Shahtoosh are illegal in most of the countries including India, due to being prohibited under CITES and Wild Life Act, 1972. The table below gives few more differences.

Sl. No.	Characteristic	Shahtoosh (s)	Pashmina (P)	
(a) Guard Hair				
1	EXTERNAL FEATIRES			
a	Colour	Fawn	White	
b	Average Thickness (pm)	145+11.8 (120-180)	85.16+13.01 (67.5 – 100)	
c	Curvature	Wavy	Straight	
d	Weight/unit length (pg/mm)	0.85-1.13	2.32-2.97	
2	MICROSCOPIC FEATURES			
a	Cuticular characteristic	Margin	Smooth	Rippled crenate
		Distance between scales	Large	Large
		Pattern	Regular mosaic	Irregular mosaic
b	Medullary characteristic	Thickness (pm)	131+14.12	69.5+20.45
		Medullary index (%)	90.34	81.6
		Pattern	Lattice type (bigger cavities)	Lattice type (smaller cavities)
c	Cross section		Circular /oval	Circular/ dumb bell
d	Root bulb structure		Club-like and width gradually increasing towards tip	Carrot-like andbecoming narrow towards tip
(b) Underfur				
1	EXTERNAL FEATIRES			
a	Average thickness (pm)	14.2+1.42 (12-16)	18+4.23 (12-28)	
2	MICROSCOPIC FEATURES			
a	Cuticular characteristic	Margin	Smooth	Smooth
		Distance between scales	Large	Large (less than in shahtoosh)
		Pattern	Simple coronal with furrow and shoulder	Simple coronal without furrow and shoulder
b	Medullary characteristic	Thickness (pm)	10.14+1.85	14.5+2.38

		Medullary index (%)	71.45	80.76
		Pattern	Not distinct but has scatter	Not distinct and has faint pattern

10. It has been judicially noticed that because of many consignments carrying Pashmina wool are being identified as Shahtoosh, possession and sale of which is banned under the Wild Life Protection Act and CITES that the shawl traders have filed a public interest litigation in February, 2022 before High Court of Delhi complaining of being subjected to Customs and Criminal Prosecutions on the ground that their export consignment carry articles suspected to be Shahtoosh.

11. Responding to a plea seeking improved infrastructure in the forensic science laboratories (FSLs) that are engaged in wildlife forensics, a division bench of Chief Justice Satish Chandra Sharma and Justice Subramonium Prasad of Delhi High Court has issued notice and sought response from several Ministries of the Central Government; the Central Board of Indirect Taxes and Customs, Wildlife Institute of India, Zoological Survey of India and Wildlife Crime Control Bureau.

12. The plea moved by three unions of exporters, manufacturers, traders, and artisans of Pashmina shawls demands modern 'Scanning Electron Microscopic' technology and DNA testing procedures in the labs.

Their grievance as per the plea is that customs and criminal prosecutions are initiated against stakeholders of the Pashmina trade on the premise that their consignment for export carry

articles 'suspected to be shahtoosh guard hair'. Such actions are adversely impacting the industry at large, the plea adds.

14. I further judicially notice that the said PIL Urges that the techniques used for identifying and distinguishing shahtoosh and pashmina are "obsolete". The plea reads that "the sole basis of these prosecutions emanates from forensic reports that are issued by the forensic science laboratories using technologically obsolete methods [referred to as 'Light Microscopy'], that erroneously conclude various exporters' consignments to be 'positive for Shahtoosh' guard hair',"

Consequent to such forensic reports, the accused stakeholders are subjected to "onerous customs proceedings", leading to huge monetary losses and delays in release of seized shipments, the petition argues. Many exporters facing prosecutions, including the Petitioners, have countless experiences of conflicting results of the government's own forensic reports, it adds. Plea further states that at present there are two forensic science laboratories in Dehradun and Kolkata and both of which use Light Microscopy for examining consignments suspected to be 'shahtoosh'.

16. "Despite making all efforts to ensure quality control, many times it is noticed that the shawl which is otherwise 100% pure pashmina and manufactured/weaved from pashmina wool contains a few stray 'guard hairs' superficially or somehow contamination found belonging to different species or for that matter of Tibetan

Antelope (Chiru) / Shahtoosh. However, it is to be noted that accidentally falling hair are a case of contamination and by no stretch of the imagination can be said to constitute trading an illegal item or 'Animal Article' as defined under Wildlife Protection Act," the PIL contends.

17. Reverting to the facts of the present case, I observe that the reports from both the Government Laboratories while confirming that the sample contains hair of Tibetan Antelope, reads as follows:-

> *"Samples (06 Shawls) were examined scientifically and confirmed that the shawls containing guard hair of Tibetan Antelopes Pantholops hodgsonii (Abel, 1862) [Mammilia Artiodactyla: Bovidae]"*

18. The report is absolutely silent about what scientific method was being used by both those Labs. I observe from the arguments and notes provided by the appellant that either of the following methods can be used for identifying the guard hairs of Chiru (Sahtoosh) from that of Circus (Pashmina) goats.

1. Scanning Electron Microscopy (SEM)
2. Light Microscope
3. OFDA Technique &
4. DNA Technique

19. In addition, the difference can be observed from fibers surface morphology in such parameters as already tabulated above. The report is absolutely silent about any of these methodologies and even about the noticed characteristics. I observe that both the times the reports have been objected.

Appellant even requested for cross-examination of the examiner. However, the same has been denied. I am of the opinion that denial to cross-examine amounts to violation of principle of natural justice. The confiscation has been confirmed based on un-detailed insufficient report, the examiner whereof was denied to stand the test of veracity. As already observed above, the issue has already been raised by the shawl traders before Delhi High Court, the PIL has been accepted. Notice has already been issued. Finally, keeping in view that shawls of both kind of stuff are soft and warm and it is difficult for a layman or a non-technical person to distinguish between the two merely on the basis of appearance.

20. I convinced with the submissions put forth on behalf of the appellant that though the forensic labs where the shawls in question were got tested, are the Government Laboratories but there is no denial that these labs are insufficiently laced with the proper and modern techniques. Hence, I hold that reports from both these labs cannot be the sole basis of confirmation that 6 seized shawls are Shahtoosh shawls. I rely upon the decision of CESTAT, Kolkata in the case of **Unsun Systems Consulting Pvt. Ltd. reported as 2015 (2) TMI** wherein it is held that where the examining authorities neither consider the technical aspect nor disclose the details of examination report in respect of the impugned goods vis-à-vis their physical and scientific characteristics. Such examination reports are in conclusive as they lead to nowhere. Hon'ble Apex Court also in the case of **Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia in SLP Civil No.**

9855/2022 dated 20.02.2023 has held where the truth of fact is not known there is no need or room for any presumption. Thus, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the World Community to be correct, the later must prevail over the former.

21. As already discussed above that there has been several scientific advancement in the techniques identifying Shahtoosh as well as differentiating it from other animal craft wool, the conclusion can be drawn only on the basis of modern scientific advancements. I observe that the test reports based on such scientifically advanced techniques have been placed on record by the appellants about the impugned shawls. The perusal reveals the elaborations as far as the morphological as well as scientific characteristics of Chiru hair and Circus hair are concerned. Since those features are missing in this report such report is held to have been wrongly relied upon to prosecute the appellant. Otherwise also the admitted fact is that the consignment of 59 shawls was found to have 53 Pashmina Shawls and six Shawls were detained on the basis of mere suspicion. As already discussed above, no cogent verification has been arrived at to confirm the said suspicion. The prosecution is nothing but an outcome of presumption and surmises. Above all, both kind of shawls are being crafted by the Artisans in Kashmir the procedure as detailed in the appeal itself shows that the possibility of few strands of the

hairs of a different species getting mixed with the hair of Circus goat (Pashmina) cannot be ruled out. Unintentional and unavoidable mixing cannot be the basis of criminal prosecution and imposition of penalty. I hold that the reports are insufficient to prove that the 6 shawls were prohibited goods. Question of those six shawls to be concealed on the ground of it being a prohibited product doesn't arise. Remaining 53 shawls also cannot be subjected to confiscation as question of them to be used for concealing the prohibited goods stands redundant in the light of above discussion.

12. With all the above observations, I hereby set aside the order under challenge. Consequent thereto, the appeal stands allowed.

[Pronounced in the open Court on 13/07/2023]

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 51095 of 2020-SM

(Arising out of order-in-appeal No. 13 to 15 (SM) CUS/ JPR/2020 dated 24/26.02.2020 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur).

Dharmesh B. Bhavsar **Appellant**
1469, Manivasan Sheri, Saraspur
Ahmedabad.

VERSUS

Principal Commissioner, Customs **Respondent**
C. R. Building, Statue Circle,
C-Scheme, Jaipur.

APPEARANCE:

Sh. N. K. Tiwari, Consultant for the appellant
Sh. Ishwar Charan, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50045/2023

DATE OF HEARING: 31.08.2022
DATE OF DECISION: 17.01.2023

ANIL CHOUDHARY:

The appellant, Dharmesh B. Bhavsar is a trader engaged in trading of electronic goods including mobile phones. He purchases the goods from local market in India for trading.

2. In the month of July, goods loaded on truck No. RJ14 GE 3145 comprising goods under various consignment notes (of various parties) were loaded from Delhi for being transported to Ahmedabad, was intercepted by Sales Tax Department at Jaipur in the month of July, 2014 (night of 1st and 2nd July). It appeared to the officers of

Commercial Tax Department that several goods inter alia electronic goods, namely LCD, LED TV and Chinese made mobile phones, alongwith other parchooni goods were being transported without proper invoice/ challan or documents. The Sales Tax Officer detained the vehicle and the goods and after taking the custody got the truck parked at High Court circle, at Jaipur. The sales Tax Officers assessed the goods to Sales Tax pursuant to enquiry and recording of statement(s) holding that the goods have been purchased and sold within India (in the State of Rajasthan) and accordingly assessed sales tax liability and penalty, which was deposited by the transporter. In the meantime, the Sales Tax Department had informed the Customs Department, that as the goods appears to be imported, they may also make enquiry. That immediately when the goods was released by the Customs Department after payment of tax and penalty on 01.08.2014, the Customs Officers at the gate of Sales Tax Department, intercepted the truck and detained the goods and the truck and brought to their office. Thereafter, after making enquiries the Customs Department issued show cause notice dt. 28.01.2015. In the show cause notice, it is mentioned that the Customs Department have intercepted the truck and the goods on 01.08.2014 itself on release by the Sales Tax Department and detained the goods under Section 110(1) of the Customs Act, 1962 under detention memo dt . 01.08.2014. The Customs Department recorded the statement of (i) Sh. Suresh Chand Gurjar, Truck Driver, and (ii) Sh. Kamlesh G. Chandwani, Partner of M/s Sri Vishal Gujrat Freight Cargo (Sri VGFC in short). The Customs Department also received letter dt. 17.09.2014 from Sh. Bhavesh Parnami, Ahmedabad wherein he submitted that the

goods – 20 LED TV was booked via Sri VGFC for transportation to Ahmedabad. He has purchased the LED TV under Tax Invoice No. 230 dt. 01.07.2014 from M/s Gomti Impex, Civil Lines, Delhi and one LED from M/s S. K. Trading Company, Delhi. He also annexed the copy of invoice for purchase of 19 LED TVs. Statement of Sh. Bhavesh Parnami was recorded on 03.11.2014.

3. Another letter was received from Sh. Jagdish Bhai alias Nilesh Bhai dt. 17.09.2014 by the Customs that he has booked 16 LED TVs for transport from Delhi to Ahmedabad with Sri VGFC, this he has purchased under Tax Invoice dt. 01.07.2014 from M/s S. K. Trading Company, Delhi.

4. Further statement of Sh. Kamlesh G. Chandwani, Partner of Sri VGFC was recorded on 03.11.2014, wherein he inter alia stated that the owner of mobile phones seized by the Department is Sh. Dharmesh Kumar B. Bhavsar, Ahmedabad (appellant).

5. On summons, Sh. Niraj Agarwal S/o Sh. Pawan Agarwal, Manager of Sri VGFC appeared before the Customs officer on 02.01.2015 and his statement was recorded. He inter alia stated that he is looking after the day-to-day work on behalf of his father, who is the Proprietor. It was further stated that till that day, no one has turned up to enquire about the mobile phones, but now the consignee Sh. Dharmesh B. Bhavsar having private marka 'Kumar DL' and 'DL Enterprises' (as mentioned in bilty No. 10256 for 11 packages, bilty No. 10245 – 5 packages and bilty No. 246 – 6 packages all dated 01.07.2014, have contacted at their Ahmedabad office with respect to

these bilty numbers. Accordingly, they informed the consignee that the goods have been seized by the Customs Department and the matter is pending. Further, he has asked the consignee to approach the Customs Department. They also issued certificate to the consignee certifying the goods mentioned belongs to Sh. Dharmesh B. Bhavsar, and they have no objection in handing over the goods of the above LR Nos. to Sri Dharmesh. Copy of such certificate was also submitted by Sh. Niraj Agarwal.

6. The Customs Department had seized mobile handsets of Chinese origin total quantity 2287 and valuation was done on MRP basis as per the stickers found affixed on the packages of the handsets, totally valued at Rs.22,76,743/-. After allowing abatement on the MRP of 35% the duty was calculated, including cess – Rs.2,17,720/-.

7. It appeared to Revenue that mobile handsets of foreign origin seized under panchnama dt. 02.08.2014 and 15.08.2014 are unclaimed and no claimant has turned up to claim the ownership. Further, the invoices etc. submitted by the truck Driver and transport company in respect of the mobile handsets, appeared to be bogus or fake. Further, observed that inspite of information given to the consignee Sh. Dharmesh B. Bhavsar in December, 2014 he has not turned up to claim the goods. As the appellant did not turn up to claim the goods, under the aforementioned facts, the mobile phones appears to be of smuggled nature and liable to confiscation under Section 111 of the Act. It further appeared to the Customs Department that the owner of the mobile handsets was the appellant in view of the no objection

certificate issued by the transporter in his favour. Show cause notice dt. 28.01.2015 was issued requiring the transporter (i) SVGFC (ii)Sh. Bhavesh Parnami and (iii) Sh. Jagdish Bhai are hereby jointly and severally proposing to confiscate 36 LED TV sets valued at Rs.20,20,400/- and further penalty was proposed on SVGFC to show cause as to why 2287 pcs. of Chinese origin phones having MRP Rs.22,76,743/- be not confiscated under Section 111(b) and (d) of the Act alongwith penalty. Penalty was also proposed on Sh. Kamlesh G. Chandwani and Sh. Niraj Agarwal both employee of Sri VGFC.

8. Addendum to show cause notice dated 05.07.2016 was issued to the show cause notice dt. 28.01.2015, observing that after issuance of the show cause notice, this appellant Sh. Dharmesh B. Bhavsar appeared before the Department and requested for provisional release of 2287 pcs. of Chinese origin mobile phones. Sh. Dharmesh B. Bhavsar also produced copy of order dt. 12.05.2016 of Rajasthan High Court in Civil Writ Petition, directing the appellant to appear before the Customs Department to prove the ownership of the seized goods. The appellant appeared on 02.06.2016 and in his statement categorically admitted the fact that he has no proof of legality of import of 2287 pcs. of mobile phones. Nor he has any documents in support of customs duty on the said phones. He has stated that he has purchased the mobile phones from Delhi market on cash payment; that the appellant, it appeared, failed to prove the legality of the impugned goods as well as the claim of the ownership of such goods. His request for provisional release was rejected. However, the show cause notice was amended to the effect that the appellant is free to furnish evidence in order to

support legal import of the said mobile phones. Further, this appellant was required to show cause as to why 2287 pcs. of Chinese origin mobile handsets be not confiscated under Section 111(b) & (d) and penalty under Section 112(b) and under Section 114AA of the Customs Act, 1962.

9. This appellant contested the show cause notice by claiming ownership of the mobile handsets of Chinese origin stating that the same was purchased in cash from the open market in Delhi. Further the claim is duly supported by 'No Objection Certificate' issued by Sri VGFC (transporter).

10. The Joint Commissioner observed in the order-in-original that inspite of issue of 'NOC' dt. 12.10.2014 by the transporter in favour of the appellant, he did not approach the Department till the issue of show cause notice till January, 2015. The appellant has claimed the ownership of the mobile phones (received through post on 10.03.2015), almost nine months since the seizure initially by the Sales Tax Department and then by the Customs Department. Thereafter, he approached for provisional release of the seized goods after filing Writ Petition No. 7146/2015 before the Hon'ble High Court of Rajasthan praying for provisional release of the goods. Further, Sh. Bhavsar admitted that he does not have proper sales invoice in support of purchase of goods from open market in Delhi and have also not given the name and details of the seller. It was held that the appellant has failed to prove the legitimate ownership of the mobile phones. The appellant had also raised the contention that admittedly it is a case of

town seizure and the appellant has purchased the goods from the open market in Delhi, after the import of the goods. Further, there is no legal obligation as per Section 123 of the Act and it was onus on the Department to prove the smuggled nature of the goods. The mobile phones 2287 pcs. of Chinese origin having MRP of Rs. 22,76,743/- were held liable for confiscation under Section 111(b) and (d) of the Act. The mobile phones were absolutely confiscated. Further, penalty of Rs. 1 lakh was imposed on this appellant under Section 112(b)(ii) and Rs.20,000/- under Section 114AA. Penalty was also imposed on the transporter among others.

11. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals) who vide the order-in-appeal was pleased to reject the appeal. Being aggrieved, the appellant is before this Tribunal.

12. Learned Counsel for the appellant Sh. N. K. Tiwari assailing the impugned order inter alia urges that the appellant had led sufficient evidence showing the purchase of mobile handsets from open market in Delhi. Admittedly, it is a case of town seizure as the goods were admittedly being carried by the transporter from Delhi to Ahmedabad. Further, urges that the Customs Department had not brought any evidence on record in support of their allegation of smuggled nature of goods. The whole order of confiscation and penalty is bad as the same is based on presumption and assumption, without any corroborative evidence. It is further urged that the goods have been admitted to have been traded within India and the Sales Tax Department had assessed and collected the sales tax alongwith penalty on the goods/ mobile

phones in question. It is further urged that the Court below have passed order of confiscation and penalty in a mechanical manner showing non-application of mind. The contention of the appellant is also supported by the documentary and oral evidence led by the transporter –Sri VGFC who have also stated that they received the goods at Delhi for transportation to Ahmedabad, and the goods were inspected at Jaipur by the Sales Tax Department. After being assessed to Sales Tax and on payment of sales tax, the goods were released by the Sales Tax Department and thereafter immediately detained and seized by the Customs Department. Thus, the fact of trading of the goods in India in the domestic market, is also supported by the levy of sales tax by the Sales Tax Department of Rajasthan. Accordingly, he prays for allowing of the appeal with consequential benefits.

13. Learned Authorised Representative appearing for the Revenue relies on the impugned order.

14. Having considered the rival contentions, I find that admittedly the goods under dispute – Chinese mobile phones have been purchased by the appellant from open market in Delhi. Such contention is also supported by the statement and evidence led by the transporter. Appellant have also produced documents of transport before the Tribunal as well as the bilties that the goods were being transported from Delhi to Ahmedabad. Further, appellant had appeared before the Customs Department and had claimed the goods. Admittedly, no other person has claimed the goods in question. I further find that in view of admitted town seizure, it was the onus on the Customs Department to

lead evidence in support of allegation as to the smuggled nature of goods. I also find from the record that no evidence has been brought on record in support of its allegation. Further, sale-purchase of goods in India is supported by the levy of Sales Tax by the Sales Tax Department of Rajasthan. Accordingly, I find that the order of Court below is vitiated in law and on facts.

15. In view of my findings and observations, I set aside the impugned order and allow the appeal. The respondent –Revenue is directed to release the goods forthwith to the appellant within a period of 15 days from the date of receipt of copy of this order. Further, ordered that the appellant shall not be liable for payment of godown rent or detention charges or demurrage.

16. In the result, the appeal is allowed.

(Order pronounced on 17.01.2023).

(Anil Choudhary)
Member (Judicial)

Pant

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCPAL BENCH - COURT NO. IV

Customs Appeal No. 54958 of 2023

(Arising out of Order-in-Appeal No. 12-RLM-CUS-JPR-2023 dated 19.04.2023 passed by the Commissioner (Appeals), Jaipur)

M/s Mahakaal Jewels Private Limited **Appellant**
T-3, S S Tower, Dhamani Street,
Choura Rasta, Jaipur-302003.
(Rajasthan)

VERSUS

The Commissioner of Customs (Prev.) Jaipur **Respondent**
Customs Commissionerate,
NCR Building, Statue Circle, C-Scheme,
Jaipur – 302005 (Rajasthan)

APPEARANCE:

Shri Arun Goyal, Advocate for the Appellant

Shri Girijesh Kumar, Authorized Representative for the Respondent

CORAM :
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 09.08.2023
Date of Decision: 09.10.2023

FINAL ORDER NO. 51405/2023

HEMAMBIKA R. PRIYA

The present appeal has been filed against the Order in Appeal No. 12-RLM-Cus-Jpr-2023 dated 19.04.2023, by M/s Mahakaal Jewels Pvt. Ltd. Jaipur (hereinafter referred to as the appellant) wherein the customs duty of Rs.64,866/-, fine of Rs. 54 lakhs and Rs. 2 lakhs along with penalty was imposed on the appellant. The brief facts of the case are the appellant filed a Bill of Entry No. 686

9180 dated 28.12.2021, for clearance of 14474.45 carat 'Emerald Rough Stone' falling under CTH71031031. The consignment was examined by the customs officer, in the presence of the authorized customs broker. During the course of examination, nine packets of Emerald Rough Stone, as declared in Bill of Entry was found and three small packets of undeclared goods which appeared to be white/blue colour rough stone weighing 271.75 carats were also found. Thereafter, the Gems and Jewellery Export Promotion Council, Jaipur vide their test reports dated 31.12.2021, confirmed that the three packets of undeclared goods were Natural Rough Diamonds, the import of which (rough diamonds) was restricted in terms of Policy Condition No. 3 of chapter 71 of ITC (HS) 2017, Schedule-I (Import Policy). The Natural Rough Diamonds is permitted for import only, if it was accompanied with Kimberley Process Certificate, as specified by Gems and Jewellery Export Promotion Council. In order to ascertain the exact value and quantity of the goods, Sri Kamal Kant Parekh, Government approved valuer was appointed. The valuer in the presence of two independent witnesses, the importer and the CHA examined the impugned goods. Shri Parekh prepared two separate valuation reports, one for Natural Rough Emerald and one for Natural Rough Diamonds. On completion of investigation, show cause notice dated 20.05.2022 was issued to the Appellant, which was adjudicated vide the impugned order.

2. The learned counsel submitted that the appellant had filed Bill of Entry No. 6869180 dated 29.12.2021 for import of 14474.45 carat/2897.89 grams of Natural Rough Emerald falling under CTH

71031031, declaring the transaction/assessable value of Rs. 4,52,26,504/- and the duty of Rs. 3,62,434/- was discharged. The consignment was opened and examined on 30.12.2021 in presence of Customs Broker as per the existing examination guidelines. There was no intelligence of any smuggling. The consignment contained 9 packets of Natural Rough Emerald as declared, weighing 14474.45 carat/ 2897.89 grams and 3 packets of undeclared Blue/White Stone rough weighing 271.75 Carrat / 54.35 grams. Five samples were drawn from the 3 undeclared packets which were sent to GJEPC testing lab. The GJEPC confirmed the samples to be Rough Diamonds. As the import of Rough Diamond was restricted in terms of DGFT Circular No. 34/2015-2020 dated 28.09.2020 and was undeclared, and found with Natural Rough Emerald, the entire consignment was placed under seizure. The learned counsel submitted that the restrictions with regard to import of Natural Rough Diamonds were only with regard to production of KP certificate at the time of import. He stated that the appellant requested the Revenue to return the consignment of Natural Rough Diamond to the shipper/overseas suppliers, which was otherwise permitted vide Circular No. 53/2003-Cus. dated 23.06.2003.

3. The learned counsel further stated that the entire consignment was got valued by Shri Kamal Kant Parekh, said to be a Government approved valuer, in the presence of the Director of the appellant. However, the appellant was not permitted to confront or cross examine the said valuer. No cogent reasons were given for rejecting the declared value, and for getting

valuation done of Natural Rough Emerald wherein the value was correctly declared. He relied on the following decisions in support of his contentions:

(i) Bikash Saha Vs. CC, Kolkata – 2020 (371) ELT 763 (Tri.-Kol.)

(ii) Rubal International Vs. CC, New Delhi – 2022 (381) ELT 93 (Tri.-Del.)

(iii) PCC, ACC Import Vs. Wall Street Impex – CESTAT Final Order dated 15.12.2022.

(iv) Motor Industries Co. Ltd. Vs. CC – 2009 (244) ELT 4 (SC).

The learned counsel contended that no legally permissible reason was given for rejection of the declared value of Natural Rough Emerald, and merely states that the same was done as they were found with the undeclared goods does not find support in law. He relied on the following case laws:

(i) CC Calcutta Vs. South India Television P Ltd. – 2007- TIOL-126-SC.

(ii) BBM Impex Pvt. Ltd. Vs. CC (Prev). Delhi – 2020- TIOL-958-CESTAT-Del.

4. The learned counsel also submitted that there is not a single allegation that any amount over and above the invoice value as declared in respect of transaction of Emerald Stone was paid or payable. He relied the decision in the case of **– CCE & ST Noida Vs. Sanjivani NF Trading P. Ltd. – 2019-365-ELT 3-SC** to support his arguments.

5. The learned counsel further submitted that the Customs Valuation Rules, 2007 were not followed correctly. No reason was given by the adjudicating authority to skip Rule 7 and resort to Valuation under Rule 9 of Customs Valuation Rules. He submitted

that the Rules do not allow acceptance of higher of the two alternative values, which were arbitrary and fictitious.

6. The learned counsel further contended that the valuer was not in the list of Valuers so appointed by the Commissioner of Customs (Preventive), Jaipur. He stated that the valuation being subjective, the same is bound to vary and +/-20%, which is an accepted variation in the trade. The valuation cannot be enhanced merely on the basis of pure subjective opinion of one valuer or Chartered Engineer. To support his contention, he relied on the decision in the case of **CC Port Kolkatta Vs. N/s Best Mega International – 2023-TIOL-531-CESTAT-Kol.**

7. The learned counsel submitted that the statement under Section 108 of the Customs Act, 1962 is admissible as evidence and the Director of the appellant had, in his statement, stated that the declared value was the correct and negotiated transaction value of Natural Rough Emerald. The Director had also submitted that Natural Rough Diamonds were never ordered. He submitted that the entire show cause notice did not allege any concealment, but relevant sections had been invoked. In case of Natural Rough Emerald, the difference in valuation is Rs. 80 lacs approx. involving duty difference of Rs. 64,866/-. The learned counsel submitted that an exorbitant penalty of Rs. 54 lacs had been imposed, which was unrealistic and irrational. He submitted that it is a settled position of law that Redemption Fine has to be commensurate with the Margin of Profit. In support, he relied on the following decisions:

(i) DJP International Vs. CC, Delhi – 2017 (350) ELT 294-(Tri-Del).
Maintained by Apex Court in 2017-350-ELT-A65-SC.

(ii) Bikash Saha Vs. PCC, Kolkatta – 2020 (372) ELT 884-(Tri.-Kol).

(iii) Chahat Trading Corp. Vs. CC, New Delhi – 2017 (357) ELT 937 (Tri.-Del.).

8. The learned counsel further submitted that no case had been made out of any mens rea or mis-declaration with intent to evade any duty, as the total duty liability was only Rs.2,747/-. In this regard, the learned counsel relied on the decision in the case of **M/s Devgan Mechanical Works Vs. CC, Ludhiana – 2021-TIOL-330-CESTAT-CHD.**

9. Learned Departmental Representative submitted that it is clear from the facts of the case that an attempt was made to clear of undeclared good (i.e. Natural Rough Diamond), which are restricted in nature, by the importer. The Policy condition No. 3 of Chapter 71 of ITC (HS) 2017, Schedule-I (Import Policy) clearly says that "import of rough diamond shall be permitted only if accompanied by Kimberley Process (KP) Certificate, as specified by Gem and Jewellery EPC". The importer could not produce the said mandatory certificate. Therefore, in absence of KPC, improper import of "Natural Rough Diamond" by way of mis-declaration amounts to smuggling. Apart from the undeclared goods, the declared goods i.e., "Natural Rough Emerald" was also found mis-declared in terms of its value. Therefore, the adjudicating authority had rightly found the impugned goods liable for confiscation under Section 111 of Customs Act, 1962 read with Section 118 and 119 of

the Act, and for omission and commission of the offence, the importer rendered himself liable for penalty under Section 112(a)(i) and 114AA of the Customs Act, 1962.

10. The learned Authorised Representative submitted that it is the regular practice for every **import consignment** that the goods imported are to be valued by the Government approved valuer/appraiser in compliance of Section 14 of the Customs Act, 1962. Moreover, the appellant has taken a baseless ground as the declared goods viz. "Natural Rough Emerald" possesses a self declared value itself by the importer and the same has not been rejected on the prima facie of presence of undeclared goods viz. "Natural Rough Diamonds". He contended that both declared and the undeclared goods were treated as separate entities and the Govt. Approved Valuer had ascertained the value of declared goods 'Natural Rough Emerald' to be Rs. 5,33,20,750/- (Rs. Five Crores thirty-three lacs twenty thousand seven hundred and fifty only) against the declared value of Rs. 4,52,26,504/- (Four Crores fifty two laces twenty six thousand and five hundred and four only). The learned Authorised Representative submitted that the declared value pertaining to import made by the importer did not appear to be the true transaction value as envisaged under Rule 3 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962 and was, therefore, liable to be rejected under Rule 12 of the Customs Valuation (Determination of Price of Impugned Goods) Rules, 2007. Further, the assessable value had to be re-determined by sequentially applying Rule 4 to 9 of the CVR, 2007.

11. The learned Authorised Representative stated that as per Notification No. 34/2015-2020 dated 28.09.2020, issued by DGFT, Ministry of Commerce, the undeclared goods i.e. 'Rough Diamonds' is restricted in terms of Policy condition No. 3 of Chapter 71 of ITC (HS) 2017 Import Policy 2015-2020, as import of rough Diamonds is permitted only if accompanied by Kimberley Process Certificate (KP Certificate) as specified by Gems and Jewellery EPC. The undeclared good i.e. rough diamonds weighing 271.40 Ct. was estimated at Rs. 10,98,670/- separately by the Govt. Approved Valuer. He strongly contended that the assessable value of the declared goods was provided in the form of Valuation report and the same was accepted and signed by the importer.

12. The learned Authorised Representative further submitted that it was during the course of examination, the undeclared goods viz. "Rough Diamond" were found in 3 packets and the same had not been declared in any of the import documents like B/E, Invoice etc. Further, the goods were restricted in nature, which signifies and establishes the involvement of the importer in the attempt to clear the undeclared and prohibited (without KP certificate) goods. The same was also averred from the para 5(i) & 5(j) of the statement of the importer recorded under Section 108 of the Customs Act, 1962 of the OIO NO. 53/2022-ADC dated 27.12.2022, whereby it appears the falsification of the signature and fabrication of the invoices and letter provided by the importer.

13. The learned Authorised Representative submitted that mis-declaration was detected by the department as 03 small packets of undeclared goods were found along with the declared Emerald

Rough stone. Therefore, the valuation of the entire consignment was done by the Govt. Approved Valuer as per procedure. Since, the imported goods were found mis-declared in respect of description, value, quantity and import policy tends them to be seized under Section 110 of the Customs Act, 1962.

14. We have heard the learned counsel for the appellant and the learned authorised representative for revenue. The issues under consideration are as follows:

(i) Whether the valuation by the Government approved valuer of Natural Rough Emerald and the consequent imposition of redemption fine is correct?

(ii) whether the imposition of redemption fine on Natural Rough Diamond is correct?

15. We proceed to deal with each of these issues independently. We find that the only reason given in the impugned order for rejecting the declared value was that undeclared Natural Rough Diamond were found during the examination of the import consignment. We note that no cogent reason has been given by the revenue for rejection of the transaction value. The learned counsel for the appellant has argued before us that the valuation has been done by so called Government approved valuer Shri Kamal Kant Parekh, who did not figure in the list of the Government approved valuers as intimated vide Public Notice no.03/2022 dated 08.03.2022. We have perused the contents of the aforesaid Public Notice and we find that it lists names of 29 members of the Gems and Jewellery Export Promotion Council, Jaipur/Regional Jewellers

Association empanelled for the purpose of identification, classification, purity, weight and valuation of precious/semiprecious stones, pearls as well as gold/silver and jewellery for customs purposes. The said Public Notice also supersedes the earlier Public Notice No. 02/2021 dated 21.01.2021. Perusal of the said Public Notice reveals that the name of the Shri Kamal Kant Parekh does not figure in this list of the Government approved valuers. This aspect has also not been clarified by the adjudicating authority in the impugned order. It has also been argued before us that valuation of precious stones is subjective. No valuer can give exact valuation of rough precious stones at any stage of time, however an expert the valuer may be. Generally, the prices are given with a margin of fluctuation of +/- 20% and the value declared by the appellant was well within this range. It has further been contended that the valuation report of the said Government approved valuer does not specify whether the rate is wholesale or retail sale value or the CIF value. Further, during the course of investigation itself, it has been observed that the valuation cannot be determined under Rules 4 to 7 of Customs Valuation Rules, 2007 as the nature of each stone and its value is distinct and varied, and even the market value cannot be ascertained. Consequently, other than the valuation report submitted by the valuer who does not appear in the panel of Government approved valuers, and there being no other corroborative evidence to establish any undervaluation by the appellant, the transaction value is liable to be accepted. We take note of the fact that the differential value is Rs 80 lakhs approximately, involving a mere duty difference of Rs. 64,866/-

only. We find that the Revenue has been unable to lead any evidence before us for the rejection of the transaction value. In this regard, it is seen that the Tribunal in the case of **Bikash Saha Vs commissioner of Customs (Prev), Kolkata [2020 (371) ELT 763 (Tri. Kol)]** has held as follows:

> "6. However, we find that the valuation adopted in the impugned order is arbitrary. The learner Commissioner has not recorded any reason for rejecting the declared value in respect of 148 bales. He proceeded to redetermine the valuer for the goods when the misdeclaration was only in respect of 81 bales. Commissioner proceeded to redetermine the entire quantity of goods with citing any reasons for rejecting the value of the goods. The impugned order does not refer any valuation rules and it does not make it clear if the CVR, 2007 have been followed sequentially. Under the circumstances, we find it difficult to sustain such unreason order to the extent of the value of 148 bales declared by the appellant. We find that the valuation declared by the appellant is to be accepted……."

16. Similarly, we find that the Supreme Court in the case of **Commissioner of Customs, Calcutta Vs South India Television (P) Ltd., [2007-TIOL-126-SC-CUS]** has held as follows;

> "6. We do not find any merit in this civil appeal for the following reasons. Value is derived from the price. Value is the function of the price. This is the conceptual meaning of value. Under Section 2(41), "value" is defined to mean value determined in accordance with Section 14(1) of the Act. Section 14 of the Customs Act, 1962 is the sole repository of law governing valuation of goods. The Customs Valuation Rules, 1988 have been framed only in respect of imported goods. There are no rules governing the valuation of export goods. That must be done based on Section 14 itself. In the present case, the Department has charged the respondent-importer alleging mis-declaration regarding the price. There is no allegation of mis-declaration in the context of the description of the goods. In the present case, the allegation is of under-invoicing. The charge of under-invoicing has to be supported by evidence of prices of contemporaneous imports of like goods. It is for the Department to prove that the apparent is not the real. Under Section 2(41) of the Customs Act, the word "value" is defined in relation to any goods to mean the value determined in accordance with the provisions of Section 14(1). The value to be declared in the Bill of Entry is the value referred to above and not merely the invoice price. On a plain reading of Section 14(1) and Section 14(1A), it envisages that the value of any goods chargeable to *ad valorem* duty has to be deemed price as referred to in Section 14(1). Therefore, determination of such price has to be in accordance with the relevant rules and subject to the provisions of Section 14(1). It is made clear that Section 14(1) and Section 14(1A) are not mutually exclusive. 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. When under-valuation is alleged, the Department has to prove it by evidence or information about comparable imports. For proving under-valuation, if the Department relies on declaration made in the exporting country, it has to show how such declaration was procured. We may clarify that strict rules of evidence do not apply to adjudication proceedings. They apply strictly to the courts' proceedings. However, even in adjudication proceedings, the AO has to examine the probative value of the documents on which reliance is placed by the Department in support of its allegation of under-valuation. Once the Department discharges the burden of proof to the above extent by producing evidence of contemporaneous imports at higher price, the onus shifts to the importer to establish that the invoice relied on by him is valid. Therefore, the charge of under-invoicing has to be supported by evidence of prices of contemporaneous imports of like goods. Section 14(1) speaks of "deemed value". Therefore, invoice price can be disputed. However, it is for the Department to prove that the invoice price is incorrect.** When there is no evidence of contemporaneous imports at a higher price, the invoice price is liable to be accepted. The value in the export declaration may be relied upon for ascertainment of the assessable value under the Customs Valuation Rules and not for determining the price at which goods are ordinarily sold at the time and place of importation. This is where the conceptual difference between value and price comes into discussion."

16.1 In view of the above discussions, we hold that the Department has failed to prove that the transaction value/invoice price was incorrect. Consequently, the valuation done by the valuer

cannot accepted and is set aside. We now take up the matter relating to the imposition of Rs 50 lakh as RF on the said goods under Section 111 read with Section 118(a) and 119 of the Customs Act, 1962. The relevant provisions of Section 111 are reproduced hereinafter to appreciate the Revenue's contentions:-

> **"Section 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;
>
> ……
> …
>
> (i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;
>
> ……
> …
>
> (l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;
>
> (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 3 [in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment 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;"

16.2 The imported goods viz., Natural Rough Emerald was declared in the Bill of Entry by the appellant. There is no discrepancy found either in its weight or carats. There is no

prohibition in the import of such Natural Rough Emerald. Therefore, the provisions of Section 111(d) is not attracted. It is an admitted fact that 3 packets of Natural Rough Diamonds were found along with the Natural Rough Emerald, which had not been declared by the appellant. As the said diamonds was not accompanied by the KP Certificate, the said goods took on the nature of prohibited goods. However, it is a fact on record that the said 3 packets were not concealed in any manner in the import consignment. Further, this came to light during the routine examination of the imported goods, and not on any intelligence or information. No Panchnama was drawn either. Therefore, the provisions of Section 111(i) is also not attracted. Section 111(m) is also not attracted as there is no case of undervaluation that has been established by Revenue. In view of the above, we hold that there is no case for imposition of Rs. 50 lakh as redemption fine on the Natural Rough Emerald.

17. We now come to the second issue on imposition of redemption fine on the undeclared Natural Rough Diamonds. It has been argued before us that the Department did not possess any intelligence or information about smuggling of such rough diamond. The import consignment was opened and examined in a routine manner by the customs officer wherein nine packets of Natural Rough Emerald and three packets of Natural Rough Diamond were found. It is on record that the packets were not concealed or hidden in any manner, to allege smuggling. We note that the original adjudicating authority has held that the Natural Rough Diamond was restricted in nature, and the appellant importer could not produce a valid Kimberley Process certificate, hence the goods

took on the nature of prohibited goods. Therefore, the original adjudicating authority has gone on to confiscate the Natural Rough Diamonds valued at Rs. 10,98,670/- under Section 111 of the Customs Act, 1962, with an option given to the importer to redeem the goods for re-export on payment of redemption fine of Rs. 2 lakh. It is a fact on record that 3 packets of natural rough diamond were found in the consignment which had not been declared by the appellant. It is also on record that such import of rough diamond was restricted in terms of DGFT circular number 34/2015 – 2020 dated 28.09.2020. The condition for import was that it had to be accompanied by a Kimberley process certificate. However, we note that the Director in his statement has accepted that he had not ordered the rough diamonds, and hence he could not produce the Kimberly Process Certificate. It has been also pleaded before us that the provisions of Circular No. 53/2003 Cus dtd 23.6.2003 vide para 6 allow the goods to be sent back to the exporting country in the same is not accompanied by the valid KP certificate. The relevant portion of the aforesaid notification is reproduced hereunder:

> "6. In case a rough diamond consignment is not accompanied by a KP Certificate, but otherwise in order, the importer in India may be given seven working days to arrange for the original KP Certificate for clearance of the said import consignment. If the importer is not able to submit the Original KP Certificate within the said period of seven working days, the goods would be sent back to the Exporting Authority (i.e. the certifying authority) of the country of origin. All formalities in this regard would be completed by the GJEPC and cost of such shipment would also be borne by the GJEPC."

17.1 The learned counsel has placed before us a copy of the letter from the exporter stating that the appellant importer had only ordered 14474.45 carats of Natural Rough Emerald, whereas

due to mistake of their staff three packets of Natural Rough Diamond were kept in this parcel. The subsequent letter by the Director of the exporter company has also corroborated that they had sold only Natural Rough Emerald to the appellant and the consignment of 3 packets of Natural Rough Diamond was incorrectly packed in the consignment of the appellant. We note that the said three packets of Natural Rough Diamonds were not concealed or mixed with the consignment of Natural Rough Emerald and were in fact packed different packets and was quite visible to the naked eye when the consignment was opened for examination. The Department has not been able to establish that the appellant had deliberately mis-declared the consignment and had attempted to smuggle Natural Rough Diamond in the garb of Rough Emerald stone, in order to avoid submitting the KP certificate. We note that the appellant from the very first instance has categorically stated that the said goods were never ordered by him and that he is aware that the import is restricted subject to the availability of the KP certificate. We also note that the Department has not drawn any Panchnama to establish that the rough diamonds were concealed in the import consignment in any manner. The appellant had submitted necessary documentation to evidence that he had not placed the order for import of Natural Rough Diamond to the exporter. The appellant has also clarified the different signatures in the invoice and the email belong to the owner and the authorised signatory. Consequently, it is established that there was no attempt by the appellant import these undeclared goods and the same has happened due to the mistake

on the supplier side. Therefore, we hold that the goods viz., Natural Rough Diamond are permitted to be re-exported, without payment of redemption fine.

18. In view of the above discussions, we hold that no penalty or fine is leviable on the appellant. Accordingly, we set aside the impugned order and allow the appeal.

(Pronounced in open Court on 09.10.2023)

(Dr. Rachna Gupta*)*
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)

RM

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 55296 OF 2023 (SM)

[Arising out of the Order-in-Appeal No. CC (A) CUS/D-II/ICD/TKD/Export/ 01/2022-23 dated 03/04/2023 passed by The Commissioner of Customs (Appeals), New Delhi – 110 037.]

M/s Raajhans Spices Private Limited **Appellant**
SD 392, Tower Apartment, Pitampura,
North West, Delhi – 110 034.

VERSUS

Commissioner of Customs (Export), **Respondent**
ICD, Tughlakabad,
New Delhi – 110 020.

APPEARANCE

Shri Abhas Mishra, Advocate, Ms. Neha Singhal, Advocate – for the appellant.
Shri Rajesh Jain, Authorized Representative (DR) – for the Department

CORAM : **HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)**

FINAL ORDER NO. 50012/2024

DATE OF HEARING : 01.01.2024

ASHOK JINDAL

The appellant is in appeal against the impugned order praying for setting aside of imposition of redemption fine and penalty on them.

2. The facts of the case are that the appellant is an exporter of readymade garments. They filed export documents with the department on 1st August, 2022. The goods were examined and it was alleged that goods have been heavily overvalued, thereafter

investigations started. During the course of investigation, it was found that the GST registration of the supplier of the goods has been suspended in August, 2022 and a market survey was also conducted by the officials of the department without accompanying any representative of the appellant and found that the goods are heavily overvalued, therefore, it was proposed that goods are to be liable for confiscation. Accordingly, redemption fine and penalty were also proposed. As appellant has not filed Shipping Bill, they took back the goods to the town after payment of redemption fine and penalty under protest and filed appeal before the Commissioner (Appeals). The learned Commissioner (Appeals) upholds the order of the adjudicating authority upholding the redemption fine and penalty. Against the said order, appellant is before me.

3. Learned counsel for the appellant submits that in this case, it is not alleged that invoices issued by the supplier of the goods are bogus, only allegation is that after procuring the goods from the supplier of the goods, the GST registration of the supplier is suspended which does not mean that supplier is non-existent and no enquiry was conducted at the end of the supplier. It is further submitted that market survey was done in absence of any representative of the appellant, therefore, it is not known how the market survey was done and for which type of goods, the market survey was conducted. In fact, readymade garments are of very huge verities and nowhere it is coming out that in the market survey which quality and how much quantity the market

survey was conducted to arrive at the value determined. In that circumstances the goods are not held liable for confiscation. Accordingly, no redemption fine and penalty is imposable.

4. On the other hand, learned authorized representative supported the impugned order and submitted that in this case the market survey conducted by the officials of the department which was accepted by the appellant and found it satisfactorily. Further, the GST registration of supplier of the goods was suspended and moreover what is admitted by the appellant, need not to be proved. Therefore, the order of confiscation of the impugned goods and imposing redemption fine and penalty is to be upheld.

5. Heard both sides and considered the submissions.

6. On consideration of the submissions by both the sides, I find that in this case the appellant is alleging two things :

(a) The GST registration of the supplier of goods is suspended, it does not found non-existent as there is no report filed by the revenue that the supplier of goods is non-existent. Further, no investigation was conducted at the end of the supplier and it is not coming out from the investigation, whether the supplier has paid GST on the subject goods.

(b) Further, the market survey was done in the absence of the representative of the appellant, it is in gross violation of principle of natural justice.

7. In that circumstances, I am of the view that as the supplier of the goods is issued invoices to the appellant paying GST and market survey was not done in proper manner, in that circumstances the impugned order is not sustainable and is accordingly set aside.

8. In that circumstances, the goods are not liable for confiscation, accordingly, no redemption fine and penalty can be imposed upon the appellant.

9. In view of this, the appeal is allowed with consequential relief.

(Dictated and pronounced in open court.)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. I

CUSTOMS APPEAL NO. 50782 of 2020

[Arising out of the Order-in-Appeal No. CCA/CUS/D-II/PREV./NCH/1409/19-20 dated 28.02.2020 passed by Commissioner of Customs (Appeal) New Delhi]

Principal Commissioner of Customs (Preventive), Commissionerate **...Appellant**
New Customs House, Near I.G.I. Airport,
New Delhi – 110 037

Versus

Shri Amit Goel **...Respondent**
R/o S-33, Panchsheel Park,
New Delhi-110017

With
CUSTOMS MISCELLAENOUS APPLICATION NO. 50723 OF 2022
(on behalf of the Revenue)

APPEARANCE:
Shri Rakesh Kumar, Authorised Representative for the Department

Shri Tarun Gulati, Senior Advocate and Shri Kishore Kunal with Ms. Ankita Prakash, Adocate for the Respondent

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Final Order No. 55113 /2024

Date of Hearing : 17/01/2024
Date of Decision: 07/03/2024

P V SUBBA RAO:

1. The order dated 28.2.2020 [1] passed by the Commissioner (Appeal) setting aside the penalty imposed on Shri Amit Goel is assailed by the Revenue in this appeal. Miscellaneous Application No. 50723 of 2022 has been filed by the Revenue seeking bring on record certain evidence. The factual matrix which culminated in the issue of the impugned order is as follows.

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1 Impugned order

2. Receiving specific intelligence, officers of the Customs (Preventive), New Delhi visited the shop of Shri Rajesh Kumar at Chandni Chowk and seized 20 Kg of foreign marked gold from him under section 110 of the Customs Act, 1962 [2] believing it to be smuggled gold liable to confiscation under section 111 of the Act and also seized Rs. 6.44 crores believing this amount to be sale proceeds of smuggled gold liable to confiscation under section 121 of the Act.

3. When any goods to which section 123 of the Act applies are seized under the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods rests on the person from whom they are seized and also on any other person who claims to be the owner of the goods. This section reads as follows:

> **"123. Burden of proof in certain cases**.—(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, **the burden of proving that**
> **they are not smuggled goods shall be**—
> (a) in a case where such seizure is made from the possession of any person,—
> (i) **on the person from whose possession the goods were seized**; and
> (ii) **if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person**;
> (b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.
> (2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify."

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2 Act

4. In this case, when questioned, Shri Rajesh Kumar explained that he was a broker and that he deals in foreign marked gold and gets a commission on such sales and that the seized gold, which was in a bag in his shop at the time of seizure, was brought to him by Shri Pankaj Kumar- an employee of Shri Amit Goel- who was sitting across him in the shop at the time of seizure. He further said that in all, 27 kg of gold was brought by Shri Pankaj kumar of which 7 kg was sold and the sale proceeds of this sale and of some other foreign marked gold brought by Pankaj Kumar during the previous week was the amount of Rs. 6.44 crores (which was seized by the officers). He also said that the gold belonged to Shri Amit Goel whose employee, Shri Pankaj Kumar, brought it to him and which he sells in the market for a commission.

5. Shri Pankaj Kumar also affirmed that he was an employee of Shri Amit Goel and that he had brought the gold sent by Shri Amit Goel to Shri Rajesh Kumar.

6. Following up, the residence and office premises of Shri Amit Goel were searched and nothing incriminating was found or recovered as a result of these searches. Summons were issued to Shri Amit Goel but he had not joined the investigation nor had he given his statement. Instead, he filed a Writ Petition before the Delhi High Court which was dismissed. Thereafter, he joined the investigation and gave his statement on 18.11.2016. Shri Goel denied having anything to do with the gold but accepted that Shri Pankaj Kumar was

an employee of M/s Shine Star Build Cor Pvt Ltd. owned by his family and hence had been known to him for 10 years. He also said that he had known Shri Rajesh Kumar for 10 months after he was introduced to him at a social function. He also agreed that he was in touch with Shri Rajesh Kumar on a regular basis because he was in the business of advising his clients on investments in stocks and commodities and for this purpose, he needs to keep track of the price trends of gold in the market on a regular basis which information he gets from Shri Rajesh Kumar.

7. When asked, Shri Pankaj Kumar said that he had brought the gold to Shri Rajesh Kumar along with his colleague Shri Santosh Kumar- another employee of Shri Amit Goel in *Chevrolet Beat* car which belongs to the company owned by Shri Amit Goel and that Shri Santosh Kumar had left after dropping him at the place of Shri Rajesh Kumar. Shri Santosh Kumar could not be traced and his statement was not recorded.

8. Statements of two of the employees of Shri Rajesh Kumar viz., Shri Ajay Mahto and Shri Manoj Kumar were also recorded who also confirmed that Shri Amit Goel would regularly send foreign marked gold to Shri Rajesh Kumar for sale.

9. During further investigations, call data records of the mobile phones were obtained. These also confirmed that Shri

Amit Goel was in touch with Shri Rajesh Kumar and Shri Pankaj Kumar on that day and had made several calls to them before the seizure. When questioned, Shri Amit Goel said that he made several calls because Shri Pankaj Kumar had not reported for work on that date and that his calls to Shri Rajesh Kumar were related to enquiries about the prices of gold about which he contacts him on a regular basis.

10. After completing investigations, a Show Cause Notice dated 12.04.2017[3] was issued to Shri Rajesh Kumar, Shri Pankaj Kumar, Shri Santosh Kumar and Shri Amit Goel calling upon them to show cause why:

> "(i) The foreign marked Gold Bars totally weighing 20.643 kilograms having market value of Rs. 6,46,57,189/- (Rupees Six Crore Forty Six Lakhs Fifty Seven Thousand One Hundred Eighty Nine only) seized from the premises located at 1164/7 & 8, Basement, Kucha Mahajani, Chandni Chowk, Delhi-110006, should not be confiscated under the provisions of sections 111(d), 111 (o) and 111 (p) of the Customs. Act, 1962;
>
> (ii) The Indian currency notes amounting to, Rs. 6,43,74,000/- (Rupees Six Crore Forty Three Lakhs Seventy Four Thousand Only), as has been ascertained and reported by the Bank of India while depositing Rs. 6,44,00,000/- recovered from the premises located at 1164/7 & 8, Basement, Kucha Mahajani, Chandni Chowk, Delhi-110006, admitted to be the sale proceeds of smuggled gold, should not be confiscated under Section 121 of the Customs Act, 1962; and
>
> (iii) Penalty should not be imposed on each of them, individually, under section 112 of the Customs Act,

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3 SCN

1962 for the acts of omission and commission, as brought out in the foregoing paras.

11. These proposals were confirmed in the Order-in-Original dated 15.02.2019 passed by the Additional Commissioner. On appeal by Shri Amit Goel, the Commissioner (Appeal) passed the impugned order setting aside the penalty of Rs. 80,00,000/- imposed on him. In a separate order dated 30.06.2021 passed an appeal by Shri Rajesh Kumar, the Commissioner (Appeals) upheld the confiscation of the gold and cash and imposition of penalty on him. Revenue filed this appeal to assail the setting aside of the penalty on Shri Amit Goel by Order in Appeal dated 15.02.2019.

12. Shri Rajesh Kumar filed Customs Appeal No. 51709 of 2021 assailing the penalty imposed on him and upholding the penalty by the Commissioner (Appeals) by Order in Appeal dated 30.06.2021. This was listed before the learned Single Member as the penalty in dispute in that case was less than Rs. 50,00,000/-. It needs to be pointed out that nobody claimed the ownership of the gold or cash or had assailed their confiscation. According to Shri Rajesh Kumar and Shri Pankaj Kumar, they belong to Shri Amit Goel and they did not contest their confiscation. According to Shri Amit Goel, he had nothing to do with the gold or the cash and he also did not contest their confiscation.

13. Learned authorised representative for the Revenue submits that when the appeal of Shri Rajesh Kumar was listed before the learned member, he was apprised that that appeal which arose from the same investigation in which this appeal is pending before the division bench and hence that appeal may also be transferred to this division bench so that both appeals could be heard together. However, the learned member had not accepted this submission during the hearing and decided that appeal by Final Order No. 51030 of 2022 dated 31.10.2022. Both sides rely on this order of the learned member in this appeal. Although the confiscation of the goods was never in dispute and although Shri Amit Goel was not a party in the appeal before the learned member, he held that Shri Rajesh Kumar was not a man of sufficient means (based on his income tax returns) and hence concluded that Shri Amit Goel was the real owner of the gold that was confiscated and further went on to set aside the confiscation. As he had set aside the confiscation, he had also set aside the penalty imposed on Shri Rajesh Kumar.

14. Learned authorised representative for the Revenue relies on this final order to assert that since Shri Amit Goel was already held to be the owner of the gold by the learned member and this supports Revenue’s case that penalty imposed on him must be upheld. Learned senior counsel for Shri Amit Goel, on the other hand, relies on it to assert that since the learned member had already set aside the

confiscation of the gold, itself, the penalty on Shri Amit Goel which is a consequence of the confiscation cannot be imposed.

15. Before examining the other submissions on both sides and deciding on the prayer of the Revenue in this appeal to restore the penalty imposed on Shri Goel by the adjudicating authority by setting aside the order of the Commissioner (Appeals) to that extent, we proceed to decide if the Final Order of the learned single member in the appeal of Shri Rajesh Kumar will have a bearing on the decision in this appeal.

16. Undisputedly, nobody assailed the confiscation of the gold and cash in either of the cases because nobody was claiming their ownership- either Shri Rajesh Kumar or Shri Amit Goel. Therefore, the question of confiscation, not having been assailed by either party, was not a question before the learned member for a decision.

17. Secondly, even the question of ownership of the gold was also not before the learned member and if at all it was to be determined if Shri Amit Goel was the owner of the gold and cash, it could not have been done in an appeal in which he was not a party and further without even issuing him a notice or hearing him.

18. Thirdly, even if the gold belonged to Shri Amit Goel, it was still gold covered under section 123 and had foreign markings and hence was seized by the Customs officers on the

reasonable belief that it was smuggled gold. The burden of proving that it was not smuggled rests on the person from whom it was seized viz., Shri Rajesh Kumar or any other person who claims to be the owner of the gold. Neither Shri Rajesh Kumar nor Shri Amit Goel had produced any evidence to show that it was not smuggled gold nor claimed before the original authority or the Commissioner (Appeals) or the learned member that it was not smuggled gold. Therefore, there was no reason whatsoever to set aside the confiscation even if the owner of the gold was Shri Amit Goel.

19. For all these reasons, we find that the order of the learned member cannot be relied upon to decide this appeal. We, therefore, reject the reliance on this order by both sides.

20. We now proceed to examine the submissions made by both sides and decide this appeal.

Submissions on behalf of the appellant Revenue

21. Shri Rakesh Kumar, learned authorised representative made the following submissions.

i. In this case, 20.643 kg gold of foreign origin was seized without any documents to show their licit import from Shop No 7 where Shri Rajesh Kumar (Shop Owner) and Shri Pankaj Kumar Singh (an employee of the Appellant Shri Amit Goel) were present. On further search at Shop No 8 (Owner Rajesh Kumar) adjacent to shop No 7, currency of total value of Rs 6.44 Cr was also recovered.

ii. Shri Rajesh Kumar stated that 27 kg gold was sent to him by Shri Amit Goel, through his employee, Shri Pankaj Kumar, of which he had sold 7 kg immediately and sale proceeds are part of the currency the currency found in Shop No. 8 which was seized. He also said that in the past also he had adopted the same modus operandi to sell gold sent by Shri Amit Goel.

iii. Shri Pankaj Kumar who had brought the gold also confirmed in his statement that it belonged to Shri Amit Goel. He also explained that the gold was brought by him along with another employee of Shri Goel, viz., Shri Santosh in a Chevrolet Beat car of Shri Amit Goel and that Shri Santosh had left immediately on some other work. Shri Santosh never appeared before the DRI till date.

iv. Shri Pankaj Kumar retracted his statement belatedly after more than a month. He had not even retracted it when he was arrested and produced before the magistrate. Both employees of Shri Rajesh Kumar, (Shri Manoj Kumar and Shri Ajay Mahto) also said that the gold belonged to Shri Amit Goel and they have not retracted their statements till date.

v. Circumstantial evidence in the form of Call Data Records[4] shows that there were calls between Shri Rajesh Kumar and Shri Amit Goel. Shri Goel had not appeared in

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4 CDR

response to summons and had not cooperated with the investigation.

vi. These propositions were accepted by the Commissioner (Appeals) in the order while confirming the penalty imposed on Shri Rajesh Kumar but he set aside the penalty on Shri Amit Goel.

vii. Thus, on the one hand, the Commissioner (Appeals) relied on the self- confessional statement of Shri Rajesh Kumar recorded under Section 108 of the Customs Act, 1962 dated 15.10.2016 even though it was retracted afterwards insofar as the confiscation of the gold and sale proceeds of the smuggled gold and imposition of penalty on Shri Rajesh Kumar was concerned, but did not rely on it when it came to affirmation of penalty imposed on Shri Amit Goel.

viii. The Commissioner (Appeals) had also ignored the fact that Shri Rajesh Kumar admitted that during 6-7 months prior to this seizure there were 4-5 deliveries by the employees of Shri Amit Goel which matched with the statement of Shri Pankaj Kumar Singh dated 15.10.2016.

ix. Shri Rajesh Kumar said that Shri Amit Goel had informed him about the consignment on 14.10.2016 by calling him on his mobile Number six times. The CDR call records also substantiate the same.

x. Also, the Panchnama dated 14.10.2016 states that the gold was recovered from Shop No 7 found in a bag. It was always stated in all his statements by Shri Rajesh Kumar that the gold was kept in a bag brought by Shri Pankaj Kumar Singh kept at the Counter. The statement of Pankaj Kumar Singh should not have been admitted in parts by the Commissioner (Appeals). The above facts are corroborated from the cross examination of Officers of DRI and that of Shri Rajesh Kumar by Shri Pankaj Kumar Singh.

xi. The statement of Shri Rajesh Kumar on 27.01.2017 also revealed that the employee of Shri Amit Goel had visited the shop 6-7 times from June 2016 up to 14th October 2016. The same has been corroborated from the statements of other Noticee and the employee of Shri Rajesh Kumar.

xii. Hon'ble Apex Court in the case of Collector of Customs Vs D. Bhhoormull 1983 (13) ELT 1546 held that the Department cannot prove the case with mathematical precision and in all preponderance of probabilities it is categorical and clear that Shri Amit Goel is the mastermind who is a smuggler in the guise of a research Analyst and Chief Investment strategist.

xiii. Retraction statement of Shri Pankaj Kumar Singh is an afterthought tutored by Shri Amit Goel and non-cooperation and non- appearance of the other employee

Shri Santosh in the investigation is also an important piece of evidence which to be tutored by Shri Amit Goel only.

xiv. As per the statement of Shri Pankaj Kumar Singh dated 13.02.2017 the Mobile No 8826957178 issued in the name of his brother Shri Neeraj Kumar Singh was being used by Shri Amit Goel. The same has been corroborated from the Statement of Shri Puneet Gupta, a relative of Shri Amit Goel, in his statement dated 28.04.2017. CDR details of Mob no 8826957178 clearly indicates that Shri Amit Goel was in constant touch with Shri Rajesh Kumar (011-23928648) and Shri Puneet Gupta (011-23901866) conversing several times with both on 13.04.2016 and 14.04.2016.

xv. The Commissioner (Appeals) erred in not upholding Penalty on Shri Amit Goel. The submissions of the respondent are without any merit and has been made just to mislead the Hon'ble Bench. In the light of above submissions and Case laws, the Order of the Commissioner (Appeals) may be set aside insofar as the setting aside of penalty on Shri Amit Goel is concerned.

Submissions on behalf of the Respondent

22. Shri Tarun Gulati, learned Senior Counsel made the following submissions on behalf of the respondent.

i) The impugned order is correct and well reasoned. Despite detailed investigations including searches of

both the residence and the office of the respondent on 15.10.2016, no evidence was found to even suggest that the respondent had ever dealt with the smuggled gold.

ii) The entire case in the SCN against the respondent is based on the oral evidence of Shri Rajesh Kumar and Shri Pankaj Kumar- both co-noticees. Both retracted their statements within a reasonable time. Further, as they are co-noticees, their statements cannot be relied upon against the respondent.

iii) Shri Rajesh Kumar retracted his statements dated 1.10.2016 and 26.10.2016 before the learned Chief Metropolitan Magistrate and also gave contradictory statements during the cross examination. These contradictions are not disputed in this appeal.

iv) The statements of Shri Ajay Mahto and Shri Manoj Kumar cannot be relied upon as they were not put through the process required under section 138B to make them relevant to prove the case against the respondent.

v) Statements of Shri Ajay Mahto and Shri Manoj Kumar are verbatim identical and both are employees of Shri Rajesh Kumar who is a co-noticee from whom the gold was seized.

vi) The CDRs do not provide any details of the conversations but only that there were conversations.

The respondent had clarified in his statement as to why the calls were made. He called Shri Pankaj Kumar- his employee- because he had not turned up for work. He had called Shri Rajesh Kumar to enquire about the gold prices which he needed to keep track of in his line of business to advise his clients on investments in commodities.

vii) Shri Pankaj Kumar's retraction was not belated. In fact, he had given his retraction to the jail authorities much earlier but it had not reached the CMM.

Findings

23. We have considered the submissions. The case of the Revenue is that Shri Amit Goel was, indeed, the main player and the owner of the smuggled gold and the sale proceeds of the smuggled gold that were seized. This assertion is based on the following facts and evidences.

24. Shri Goel had not cooperated with the investigation, had not responded to summons, and had not joined it and instead hand, filed a Writ Petition before the High Court and only after it was dismissed did he appear to give his statement.

25. Four of the persons who were directly concerned with the seizure categorically said that Shri Amit Goel was the owner of the gold. Shri Rajesh Kumar from whom the gold was seized said that the gold was sent by Amit Goel and Shri Pankaj Kumar, who was his employee and who had brought it

also said that the gold belonged to his employer Shri Amit Goel on whose behest, he had brought the gold to give to Shri Rajesh Kumar. Shri Rajesh Kumar also said that Shri Amit Goel would send gold to him regularly which he would sell as a broker for a commission and give the amount back to Shri Pankaj Kumar. Shri Manoj Kumar and Shri Ajay Mahto- both employees of Shri Rajesh Kumar also gave statements that Shri Pankaj Kumar would get foreign marked gold to Shri Rajesh Kumar and that gold belonged to Pankaj's employer Shri Amit Goel.

26. Call data records show that Shri Amit Goel had made several calls to Shri Pankaj Kumar and Shri Rajesh Kumar including several calls in the morning prior to the seizure.

27. Learned senior counsel for the respondent submits that Shri Goel was afraid that he might be arrested in the matter although he had nothing to do with the gold and hence he was pursuing his legal options as a part of which he had filed the writ petition. According to him, merely pursuing a legal remedy does not establish either his ownership of the gold and cash or his guilt.

28. According to the learned senior counsel, of the four persons whose statements are sought to be relied upon by the Revenue to impose penalty on the appellant, only two were examined as required under section 138B of the Act and were also cross-examined. The other two, Shri Manoj Kumar and Shri Ajay Mahto were not examined as required under section

138B and therefore, their statements are not relevant to proving the case.

29. As far as the CDRs are concerned, Shri Amit Goel indeed, had made calls to Shri Pankaj Kumar because he had not reported for work. He had made calls to Shri Rajesh Kumar to enquire about the gold prices.

30. We find that merely because a person had filed a Writ Petition in the High Court and had not responded to the summons by the officers till the dismissal of the Writ Petition by the High Court, no inference can be drawn that he was guilty or complicit in dealing with the smuggled gold.

31. As far as the statements are concerned, Section 138B deals with their relevance and it reads as follows:

> **Section 138B. Relevancy of statements under certain circumstances.** -
> (1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act **shall be relevant, for the purpose of proving**, in any prosecution for an offence under this Act, the truth of the facts which it contains, -
> (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
> **(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.**
> (2) The provisions of sub-section (1) **shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court**."

32. The statements of the two persons who had not been put through the procedure prescribed under section 138B cannot be relied upon. Learned authorised representative submits that section 138B (1) applies to prosecutions in courts and 138B(2) states these proceedings apply 'so far as may be' to other proceedings and therefore, the procedure need not be followed and it is up to the adjudicating authority to follow it or not. Even if it is not followed, according to the learned authorised representative, statements made to the Customs officers under section 108 can be used as evidence to prove a case.

33. Learned authorised representative has mis-understood the expression 'so far as may be' to mean that the adjudicating authority may or may not follow the procedure under section 138B. All that it means is that they apply to other proceedings as they apply to prosecutions. However, some words in sub-section (1) such as 'court' do not apply to the other adjudication proceedings and in such case, the 'court' must be replaced by 'adjudicating authority' and the provisions may be read accordingly. 'So far as may be' only means with appropriate substitution of words as they apply to adjudication proceedings and do not mean that it is upto the adjudicating authority to follow the procedure under section 138B or not. For these reasons, the two statements cannot be relied upon.

34. As far as the telephonic calls are concerned, learned Senior Counsel does not dispute that Shri Amit Goel not only knew both Shri Rajesh Kumar (as an operator in the gold market) and Shri Pankaj Kumar (as his employee) but also that he would frequently call them. He also does not deny that Shri Goel had called them in the morning of the day of seizure. His explanation is that he called Shri Pankaj Kumar because he had not reported for work and called Shri Rajesh Kumar to enquire about the gold prices. These were part of the statement of Shri Amit Goel. We find that these are plausible explanations for the calls made. It does not emerge from the investigation as to what was discussed during the calls because the CDRS do not give recording of what was discussed but only who called whom and for how long. It also does not appear that during investigation, Shri Pankaj Kumar and Shri Rajesh Kumar were either questioned about what was discussed in that morning on phone with Shri Amit Goel nor were they confronted with the statement of Shri Amit Goel on this issue.

35. Of the two persons whose statements were put through the examination under section 138B and who were further re-examined, Shri Pankaj Kumar had retracted his statement and stood by his retraction during the cross-examination. Revenue could have re-examined him calling him a hostile witness and could have attempted to prove that his original statement implicating Shri Amit Goel was correct but did not do so.

36. This leaves the statement of Shri Rajesh Kumar who was examined and cross examined and there were sufficient contradictions in his statements during cross examination.

37. Searches were conducted at both the residence and office premises of the respondent quite early during the investigation but nothing incriminating was found.

38. Thus, insofar as this appeal is concerned, Revenue's prayer to restore the penalty imposed on Shri Amit Goel by setting aside the impugned order is based on the fact that Shri Goel had called Shri Rajesh Kumar and Shri Pankaj Kumar on that day and based on four statements. In the absence of any evidence to the contrary, the plausible explanation regarding the reasons for the calls must be accepted. Of the four statements, two are not relevant as the procedure followed under section 138B was not followed. Of the remaining two statements, Shri Pankaj Kumar retracted his statement and stood by the retraction during the cross-examination. There was no re-examination by the department to disprove this hostile evidence. This leaves with the statement of Shri Rajesh Kumar who had, during cross-examination, contradicted himself.

39. In our considered view, this evidence is not sufficient to hold that Shri Amit Goel was the owner of the confiscated gold and that had sent it to Shri Rajesh Kumar through Shri Pankaj

Kumar and therefore, restore the penalty imposed on him under section 112.

40. In view of the above, we uphold the impugned order and dismiss Revenue's appeal. The miscellaneous application also stands disposed of.

[Order pronounced on **07.03.2024**]

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86762 OF 2019

[Arising out of Order-in-Appeal No: 51 (CAC)/2019(JNCH)/Appeal-I dated 28th March 2019 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Apex International
Plot No.2, Nand Nagar, Industrial Estate, Phase I
Mahau Khera Ganj, Kashipur - 244713 … ***Appellant***

versus

Commissioner of Customs (NS-IV)
Jawaharlal Nehru Customs House, Nhava Sheva,
Tal: Uran, Dist: Raigad 407 707 ***…Respondent***

APPEARANCE:

Ms Shamita Patel, Advocate for the appellant

Shri S B Hatangadi, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85888 /2022

DATE OF HEARING: 21/09/2022
DATE OF DECISION: 21/09/2022

This appeal lies against order-in-appeal no. 51 (CAC)/2019(JNCH)/Appeal-I dated 28th March 2019 of Commissioner of Customs (Appeals), Mumbai – II challenging the

redemption fine under section 125 of Customs Act, 1962 and penalty imposed under section 112 of Customs Act, 1962 upon them, albeit after reduction in appellate proceedings attendant upon confirmation of confiscation ordered under section 111(o) of Customs Act, 1962.

2. Learned Counsel for the appellant submits that the dispute revolves around duty of ₹ 10,38,685/- having been foregone on imports effected against advance authorization no. 6110001060/27.8.2013, covered by bond executed on 5th September 2013 for making good the said amount with interest for breach of notification no. 96/2009-Cus dated 11th September 2009, commencing on 12th September 2013. It was further pointed out that the period of eighteen months for fulfillment of obligation originally stood extended to 24 months in accordance with amendment sheet dated 11th March 2015, which, admittedly, the appellant was unable to comply with leading to show cause notice dated 24th November 2016 requiring deposit of duty foregone, along with interest thereon, under the authority of the applicable notification besides proposing confiscation of the imported goods under section 111(o) of Customs Act, 1962 as laid down in bond prescribed in section 143 of Customs Act, 1962.

3. According to Learned Counsel for the appellant, the duty along with interest thereon, totaling ₹ 15,86,879/-, had been deposited on

11th September 2017 and closure accorded by the licensing authority on 21st November 2017. It was submitted by her that these facts, though brought to the notice of the first appellate authority, was not appreciated sufficiently as the redemption fine and penalty were merely reduced in the impugned order instead of being set aside.

4. Learned Counsel relies upon the decisions of the Larger Bench of the Tribunal in *Bhagyanagar Metals Ltd v. Commissioner of Central Excise, Hyderabad – II [2016 (333) ELT 395 (Tri.-LB)]* which refers to *re Weston Components Ltd.* It was further pointed out that the decision of the Tribunal in *Global Boards Ltd v. Commissioner of Customs (Export), Mumbai [2019 (368) ELT 1113 (Tri.-Mumbai)]* and in *Maruti Udyog Ltd v. Commissioner of Customs, Kandla [2001 (132) ELT 340 (Tri.-Mumbai)]* disfavor resort to section 111 of Customs Act, 1962 when breach of conditions of licence had been regularized, and certified to be so, by the competent authority.

5. Learned Authorised Representative drew attention to the restitution only after the show cause notice had been issued under Customs Act, 1962. He also contends that it was an admitted fact that the export obligation had not been fulfilled and that, in accordance with the decision of the Tribunal in *Prakash Roadlines Corporation Pvt Ltd v. Commissioner of Customs (Export Promotion), Mumbai*

[2019 (369) ELT 663 (Tri.-Mumbai)] and in *KDL Biotech Ltd v. Commissioner of Customs (Export Promotion), Mumbai [2015 (327) ELT 305 (Tri.-Mumbai)]*, of the Hon'ble High Court of Bombay in *Unimark Remedies Ltd v. Commissioner of Customs (Export Promotion), Mumbai [2017 (355) ELT 193 (Bom.)]* and of the Hon'ble Supreme Court in *Sheshank Sea Foods Pvt Ltd v. Union of India [1996 (88) ELT 626 (SC)]*, the consequences should follow.

6. Having considered the rival submissions, it would appear that the sole issue for determination is the scope for invoking the detriment of confiscation under section 111(o) of Customs Act, 1962 with attendant penalty under section 112 of Customs Act, 1962. The appellant had conceded inability to execute export orders within the prescribed period and had, thus, not been in compliance with the conditions in the 'advance authorization scheme' elaborated in the Foreign Trade Policy issued under the authority of Foreign Trade (Development and Regulation) Act, 1992 mirrored in notification no. 96/2009-Cus dated 11th September 2009. It is also on record that the first appellate authority had held the said breach as not attributable to *malafide* and, therefore, reduced the redemption fine and penalty thereon. The various schemes incorporated in the Foreign Trade Policy are administered, insofar as imports and exports are concerned, though notifications issued under section 25 of Customs Act, 1962 emplacing the same conditions including execution of bond for

compliance and, failing which, duty foregone along with interest, is obliged to be deposited besides being liable to appropriate action under Customs Act, 1962. Such stipulation is necessitated as, generally, the period granted for fulfillment of export obligation lies well beyond the normal period of limitation prescribed in section 28 of Customs Act, 1962. The authority to confiscate under section 111(o) of Customs Act, 1962 follows from the breach of the specific conditions incorporated therein and which, in the circumstances impugned herein, may arise only for non-fulfillment of conditions prescribed at the time of import that continues to be so.

7. The decision of the Tribunal in *re Global Boards Ltd* has made it abundantly clear, thus,

> *'8. Insofar as the confiscation of the goods are concerned, it has been held in re Sanghi Industries Ltd. that -*
>
> > *'6.8 ……. The act of importation and the conditions of importation are two different things and for violation of each of them, separate consequences would follow. In the instant case the duty liability has been imposed for the import of the goods and the goods have been confiscated for violating the terms and conditions of importation. Since the goods are liable to confiscation, the liability to penalty arises under Section 112 of the Customs Act. Penalty is an action (in personam) on the importer while the duty and fine are (action in rem) on the goods. As per Section 112 of the Customs Act, liability to penalty arises when a person who in relation to any goods acts or omits any act which act or omission would render the goods liable to confiscation under Section 111. Any person who abets or aids the commission of an act or omits to such an act (which renders the goods liable for confiscation) is also liable to penalty. Similarly when a person acquires possession or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other way dealing in goods which he knows or has reason to*

believe are liable to confiscation under Section 111 is also liable to penalty under Section 112. In the instant case the appellant imported the goods subject to a condition that he would fulfil the export obligation which obligation he failed to fulfil. Therefore, the goods became liable to confiscation under Section 111(o). Since the goods are liable to confiscation under Section 111(o), penalty under Section 112(a) is attracted. In this case, penalty has been imposed under Section 112(a) and there is no illegality or infirmity in imposing penalty apart from demanding differential duty and we hold accordingly. When the goods are liable to confiscation, the adjudicating authority has the power to allow the redemption of the goods on payment of fine in lieu of confiscation under Section 125 of the Customs Act. The goods were released to the appellants at the time of importation under a bond executed by the appellant. The release of the goods was thus provisional. Therefore, when the assessment is finalized subsequently, even if the goods are not available for confiscation, redemption fine in lieu of confiscation can be imposed as has been held in a number of judicial pronouncements on the subject. Therefore the imposition of redemption fine in the instant case is fully justified and is quite legal and we hold accordingly.'

xxxxx

11. Section 111(o) of Customs Act, 1962 empowers confiscation for non-fulfilment of 'post-importation conditions' which have not been regularised by the appropriate authority. In re Philips (India) Ltd., it has been clearly held that failure to fulfil export obligation is remedied by recovery of duty. With the recovery of duty, the requirement to comply with the 'post-importation condition' does not exist. Consequently, the imports stand regularised and Section 111(o) of Customs Act, 1962 becomes inapplicable. With negation of section 111(o) of Customs Act, 1962, the imposition of penalty is not sustainable. Accordingly, we set aside the confiscation and penalty in the impugned order.'

8. Well before that decision, the Tribunal, in *re Maruti Udyog Ltd,* had also settled the issue thus

> *'9. One of the conditions of the exemption itself was that the duty was to be paid within the period specified. It cannot therefore said that there is breach of the condition of the exemption. We have to distinguish this kind of exemption from an unconditional exemption, or an exemption to which no conditions are attached requiring payment of any duty within a specified period. In such cases, the duty to be recovered either by recourse to Section 28 or by enforcing any bond or undertaking that the importer has executed. In the case before us, such a step might have been necessary, if Maruti Udyog Ltd. had not paid the amount within 30 days from the close of the financial year. It could then be said that one of the conditions of the exemption have not been complied with. That is not the case. It is not in dispute that Maruti Udyog Ltd. paid the amount within this period. Therefore, there in fact has been no breach in the condition of the exemption. The goods were therefore not liable to confiscation under clause (o) of Section 111 and the importer not liable to penalty.'*

9. The question that arises, therefore, is whether the regularization had occurred, as argued by Learned Authorised Representative, to extricate the appellant from the consequence of the show cause notice. A decision on the contractual breach of obligation entered into in relation to schemes under the Foreign Trade Policy vests with the licencing authority and it is only upon such occurrence that it may be conclusively held that breach of condition is demonstrated. It is relevant here that the show cause notice has invoked section 143 of Customs Act, 1962 which provides for the execution of bonds for ensuring fulfillment of conditions. It is, therefore, not a demand under

section 28 of Customs Act, 1962 following allegation of short payment, non-payment or evasion of duties but for enforcing the obligation under 'advance authorization scheme' of the Foreign Trade Policy. It is seen from the records that the competent licensing authority had accorded closure in terms of the scheme upon discharge of appropriate duty, and interest thereon, as prescribed in the condition. In such circumstances, the regularization is complete in all respects and it is only in the absence of such regularization that proceedings under section 111(o) of Customs Act, 1962 could have been brought to conclusion.

10. The decisions of the Tribunal cited by the Learned Authorised Representative relate to ineligibility at the threshold by non-fulfilment of the conditions of import and, therefore, remaining out of the ken of regularization by the licensing authority. In *re Unimark Remedies Ltd,* the issue for consideration before the Hon'ble High Court of Bombay was the role of the appellants in diversion of goods manufactured from the imported raw material which could not have been undertaken until after completion of export obligation and the decision of the Hon'ble Supreme Court in *re Sheshank Sea Foods Pvt Ltd* pertains to the jurisdictional authority of customs officers to initiate proceedings when conditions of import under the schemes in Foreign Trade Policy (or the EXIM policy as it then was) had not been fulfilled. These are not the issues canvassed in the present appeal. Thus, in effect, the

decisions of the Tribunal in *re Global Boards Ltd* and *re Maruti Udyog Ltd*, cited by the Learned Counsel, pertaining to law on invoking of section 111(o) of Customs Act, 1962 in circumstances of the imports having been regularised, must be followed.

11. In view of the above, the impugned order is set aside and the appeal allowed.

(Dictated and Pronounced in Open Court)

(C J MATHEW)
Member (Technical)

**/as*

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

CUSTOMS APPEAL No.85509 OF 2022
CUSTOMS APPEAL No.85515 OF 2022

[Arising out of Order-in-Appeal No.MUM-CUSTM-AMP-822 & 823-2021-22 dated 27th October 2021 passed by the Commissioner of Customs(Appeals), Mumbai-III]

PACIFIC CYBER TECHNOLOGY PVT LTD
22 Piramal Industrial Estate No.4,S.V.Road,
Goregoan West, Mumbai
Maharashtra-400062 **Appellant**

Vs.

COMMISSIONER OF CUSTOMS (IMPORT)
Air Cargp Complex, Navpada, Sahar Village, Andheri
East Mumbai-400099 **Respondent**

Appearance:
Present for the Appellant: Shri Prashant Patankar, Consultant
Present for the Respondent:Shri A.K.Srivastava (AR)

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO.85527-85528/2025

Date of Hearing: 10.12.2024

Date of Decision:08.04.2025

PER:AJAY SHARMA

These appeals have been filed challenging the impugned Orders-in-Appeal dated 27.10.2021 passed by the Commissioner(Appeals), Mumbai, Zone III by which the learned Commissioner allowed both the appeals filed by revenue by setting aside the Order of re-assessment dated 5.2.2020 and the Order-in-Original dated 5.3.2020 passed by the respective lower authorities.

2. The issue to be decided herein is whether the re-assessment of the Bill of Entry in question has been rightly done by the concerned lower authority in accordance with Section 149 of the Customs Act, 1962 or was the said Bill of Entry required to be challenged by the importer before the appellate authority u/s. 128 ibid which would have been the appropriate proceedings?

3. The facts leading to the filing of the instant appeal are stated in brief as follows. M/s. Pacific Cyber Technology Pvt. Ltd.- Appellant (Importer) herein filed *Bill of Entry No.* 5936140 dated 4.12.2019 at JNCH concerning Invoice No. SKW20191119-1 dated 19.11.2019. Another *Bill of Entry No.* 5793005 dated 22.11.2019 at Air Cargo Complex has also been filed by them inadvertantly for the same invoice No.SKW20191119-1 dated 19.11.2019 in place of correct Invoice No. SKW20191121-3 dated 22.11.2019 and customs duty of Rs. 14,72,009/- has been paid vide challan dated 22.11.2019 whereas the correct customs duty for the said B/E would have been Rs.4,41,603/-.Resultantly they paid excess customs duty of Rs. 10,30,406/-.

4. Upon realising the mistake, the appellant approached the concerned officer for re-assessment of B/E No. 5793005 dated 22.11.2019 in order to correct the invoice particulars alongwith relevant Invoice No. SKW 20191121-3 dated 22.11.2019. Upon which the amendment of the B/E was allowed and the B/E dated 22.11.2019 was re-assessed and the order of re-assessment dated 5.2.2020 was passed by the Assistant Commissioner of Customs and customs duty was re-assessed as Rs.4,41,603/-. Thereafter the appellant applied for refund of Rs.10,30,406/- excessively paid by them and the same was sanctioned by the Asstt. Commr. of

Customs, Refund Section, ACC, Mumbai vide Order-in-Original dated 5.3.2020. Both the orders i.e. Order of re-assessment dated 5.2.2020 and Order dated 5.3.2020 sanctioning refund were challenged by Revenue before the 1st appellate authority i.e. Commissioner of Customs (Appeals), Mumbai, Zone-III, who vide impugned order dated 27.10.2021 allowed both the appeals filed by revenue by setting aside the Order of re-assessment dated 5.2.2020 as well as the Order-in-Original dated 5.3.2020 granting refund.

5. According to Revenue, the order of re-assessment dated 5.2.2020 is not correct because the same cannot be done u/s. 149 of Customs Act, 1962 and therefore re-assessment done by the lower authority cannot survive. It is the submission of revenue, which finds favour with the first appellate authority, that as per proviso to Section 149 of the Customs Act, 1962 *no amendment of a bill of entry is authorised to be amended after clearance of the imported goods* and since in the instant matter the request for re-assessment has been made after the clearance of the imported goods and the goods were not present at the time of re-assessment, therefore the said section has no application. It is also the case of revenue that the appellant herein has not filed any appeal against self-assessment of the Bill of Entry and the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified u/s. 128 ibid or under the other relevant provisions of the Customs Act. Learned Commissioner (Appeals) i.e. the first appellate authority while allowing the appeal of revenue observed that since the bill of entry has been re-assessed without getting the order modified u/s. 128 ibid

therefore the same is void and resultantly no refund can be claimed by the appellant. Learned Authorised Representative appearing on behalf of Revenue, while reiterating the findings of the learned Commissioner, has submitted that in the instant case the re-assessment has to be done subject to outcome of an appellate order after following the procedure prescribed by law. According to learned authorised representative the appellant herein ought to have challenged the assessment order in appellate forum and has to get the self-assessment modified u/s. 128 ibid and only thereafter the re-assessment can be done in accordance with the order of the Appellate Authority. In support of his submissions, learned Authorised Representative relied upon the law laid down by the Hon'ble Supreme Court in the matter of *M/s. ITC Ltd. vs. CCE, Kolkata-IV; 2019 (368) ELT 216 (SC) = (2019) 17 SCC 46.*

6. I have heard learned Consultant for the appellant and learned Authorised Representative on behalf of Revenue and perused the case records including the synopsis/written submissions and case laws placed on record. Learned consultant for the appellant mainly relied upon section 149 ibid while submitting that the re-assessment in their case is squarely covered under the proviso to Section 149 ibid. Per contra learned Authorised Representative pressed upon Section 128 ibid. For ready reference Sections 128 and 149 ibid are extracted hereunder:-

> ***"128.Appeals to Commissioner (Appeals).*** *- (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner of Customs or Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order :*

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

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*"**149. Amendment of documents.** Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended in such form and manner, within such time, subject to such restrictions and conditions, as may be prescribed :*

Provided that no amendment of a bill of entry or a shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be."

[Emphasis supplied]

7. In order to appreciate the facts of the matter, correct Air-way Bill and the Bill of Lading numbers for the two consignments with their respective invoices/packing list are as extracted as under:-

AWB No.910-14270664(20/11/2019) HAWB No.0013849		**HBL No.DMCQBKKH021368** (18/11/2019)	
Pallets	10	Pallets	20
Gross weight	2,143 kg	Gross weight	6,960.400 kg
Invoice No.SKW20191121-3 (22/11/2019)		**Invoice No.SKW20191119-1 (19/11/2019)**	
Pallets	10	Pallets	20
Gross weight	2,148.20 kg	Gross weight	6,960.400 kg
Quantity	36,000	Quantity	1,20,000 nos.
Net Weight	1,998 kg	Net Weight	6,660 kg

As per Packing List		As per Packing List	

8. From the above table it is clear that same goods i.e. pallets were imported in both the invoices. In one invoice i.e. Invoice dated 22.11.2019 it was 10 pallets (quantity 36,000) with the gross weight of 2143/2148.20 kg whereas in the Invoice dated 19.11.2019, 20 pallets (quantity 1,20,000 nos.) were imported having gross weight of 6960.400 kg. But due to oversight for the import of 10 pallets of invoice dated 22.11.2019 customs duty applicable for 20 pallets has been paid.

9. While deciding against the applicability of S.149 ibid, learned Commissioner (Appeal) has recorded a finding that the *proviso therein has given emphasis that no amendment of a bill of entry is authorised to be amended after clearance of the imported* goods, which in my view is completely unfounded and without any basis. Learned Commissioner also relied upon the decision of the Hon'ble High Court of Delhi at New Delhi in the matter of *Terra Films Pvt. Ltd. vs. Commissioner; 2011(268) ELT 442 (Del.)* and recorded a finding that the said decision highlighted that for amendment to be allowed u/s. 149, it should be based on documentary evidence in existence and physical verification of the documents and examination vis-à-vis the goods, otherwise it is impossible.

10. Section 17(4) or (5) ibid, as the case may be, comes into effect only if the proper officer, while examining the goods self assessed by the importer, came to the conclusion that it was not done properly and then re-assesses the duty leviable on such goods. It is only in such cases where re-assessment arrived at by

the proper officer u/s.17(4) ibid is contrary to the self assessment done by the exporter/importer, the need to pass a speaking order on re-assessment arises but not in the cases like the present one where the importer himself has requested for re-assessment. In the instant case the issue is only of clerical error/mistake in the B/E as the appellant has mistakenly mentioned particulars of invoice dated 19.11.2019 instead of invoice dated 22.11.2019 in the Bill of Entry No. 5793005 dated 22.11.2019 and paid the Customs duty accordingly.

11. The relevant paragraphs of the decision of Hon'ble Delhi High Court in the matter of *Terra Films Ltd. (supra)*, which was relied upon by the learned Commissioner while rejecting the amendment, are extracted hereunder:-

> *" 6. As per proviso of this Section 149, no amendment of a shipping bill was to be allowed after the export goods have been exported except on the basis of the documentary evidence, which was in existence at the time the goods were exported. The submission of the learned counsel for the appellant/exporter in this regard was that the exporter was in possession of all the documents at the time of export to show that it was entitled to claim under the DEPB/DECC cum drawback scheme. From the plain reading of Section 149, it may be seen that exporter could not claim amendment in routine and as a matter of right. The discretion vested in the Proper Officer to permit amendment in any document after the same has been presented in the Customs house. Though this discretion was to be exercised judiciously, but it was qualified with the proviso that the amendment could be allowed only if it was based on the documentary evidence in existence at the time the goods were exported. The Commissioner in the remand case has rightly observed that the present case in fact relates to the request for conversion of shipping bills from one export promotion scheme into another and was not merely of an amendment in the shipping bill. The request was made for conversion from one scheme to another after the lapse of long period of more than one year. It was a case of request for "conversion" and not of "amendment" inasmuch by converting from one scheme to another, it was not only addition of word 'cum' duty drawback, but change of entire status and character of the documents. Even if it was to be taken as a case of amendment, the proper officer may not be in possession of*

the documents sought to be amended after lapse of such a long period, particularly when the goods already stood exported. For enabling an exporter to draw the benefits of any scheme, not only physical verification of documents would be required, but as is noted by both the authorities below, the verification of the goods of export as also their examination by the Customs was necessarily required to be done. In the given factual circumstances, that was rightly held to be impossible. The Commissioner in the remand case rightly distinguished the cases cited on behalf of the exporter from the facts of the present. The finding of fact as arrived at by the Commissioner has been rightly upheld by the CESTAT."

[Emphasis supplied]

According to me the reliance placed on the aforesaid decision for rejecting the amendment is totally misplaced as the Hon'ble High Court therein has specifically observed that *it was a case of conversion from one scheme to another and not merely of an amendment in the shipping bill*. Whereas the instant matter is simply for amendment that too of clerical error, supported by documentary evidence available at the time the goods were imported and cleared for home consumption.

12. The law on this issue has already been settled by the Hon'ble High Court of Judicature at Bombay in the matter of *Dimension Data India Pvt. Ltd. vs. Commissioner of Customs;2021(376) ELT 192 (Bom.)* in which the Hon'ble High Court, while referring the law laid down by the Hon'ble Supreme Court in the matter of *ITC Ltd. (supra),* has held that in the *ITC decision* the Hon'ble Supreme Court has clarified that in case any person is aggrieved by an order which would include an order of re-assessment, he has to get the order modified u/s. 128 or under other relevant provisions of the Customs Act before he makes a claim for refund. This is because as long as the order is not modified the order remains on record holding the field and on that basis no refund can be claimed. The

Hon'ble High Court has also held that in *ITC decision (supra)* the Hon'ble Supreme Court has not confined modification of the order through the mechanism of Section 128 only and it has been clarified therein that such modification can be done under other relevant provisions of the Customs Act also which would include Section 149 and Section 154 of the Customs Act. The relevant paragraphs of the judgment of Hon'ble Bombay High Court in the matter of *Dimension Data India Pvt. Ltd. (supra)* are extracted as under:-

> "14. Short point for consideration is whether request of the petitioner for correction of inadvertent mistake or error in the self-assessed Bills of Entry and consequential passing of orders for re-assessment is legal and valid ? Corollary to the above is the question as to whether even in a case of this nature, petitioner is required to be relegated to the remedy of appeal?
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> xxx xxx xxx
>
> 17. Section 149 deals with amendment of documents. It says that save as otherwise provided in sections 30 and 41 which deals with delivery of arrival manifest or import report and delivery of departure manifest or export manifest or export report, the proper ofcer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended in such form and manner and within such time, subject to such restrictions and conditions, as may be prescribed. As per the provisio, no amendment of a Bill of Entry or a shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported as the case may be.
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> xxx xxx xxx
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> 18. From a careful analysis of section 149, we fnd that under the said provision a discretion is vested on the proper ofcer to authorise amendment of any document after being presented in the customs house. However, as per the proviso, no such amendment shall be authorised after the imported goods have been cleared for home consumption or warehoused, etc. except on the basis of documentary

evidence which was in existence at the time the goods were cleared, deposited or exported, etc. Thus, amendment of the Bill of Entry is clearly permissible even in a situation where the goods are cleared for home consumption. The only condition is that in such a case, the amendment shall be allowed only on the basis of the documentary evidence which was in existence at the time of clearance of the goods.

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22. Having noticed and analysed the relevant legal provisions, we may now turn to the decision of the Supreme Court in ITC Ltd. Vs. Commissioner of Central Excise, Kolkata IV (supra). The question which arose before the Supreme Court was whether in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty could be entertained

22.1 . From the question itself, it is clear that the issue before the Supreme Court was not invocation of the power of re-assessment under section 17(4) or amendment of documents under section 149 or correction of clerical mistakes or errors in the order of self-assessment made under section 17(4) by exercising power under section 154 vis-a-vis challenging an order of assessment in appeal. The issue considered by the Supreme Court was whether in the absence of any challenge to an order of assessment in appeal, any refund application against the assessed duty could be entertained. In that context Supreme Court observed in paragraph 43 as extracted above that an order of self- assessment is nonetheless an assessment order which is appealable by "any person" aggrieved thereby. It was held that the expression "any person" is an expression of wider amplitude. Not only the revenue but also an assessee could prefer an appeal under section 128. Having so held, Supreme Court opined in response to the question framed that the claim for refund cannot be entertained unless order of assessment or self-assessment is modified in accordance with law by taking recourse to appropriate proceedings. It was in that context that Supreme Court held that in case any person is aggrieved by any order which would include an order of self-assessment, he has to get the order modified under section 128 or under other relevant provisions of the Customs Act (emphasis ours).

22.2. Therefore, in the judgment itself Supreme Court has clarified that in case any person is aggrieved by an order which would include an order of self-assessment, he has to get the order modified under section 128 or under other relevant provisions of the Customs Act before he makes a claim for refund. This is because as long as the order is not

modified the order remains on record holding the field and on that basis no refund can be claimed but the moot point is Supreme Court has not confined modification of the order through the mechanism of section 128 only. Supreme Court has clarified that such modification can be done under other relevant provisions of the Customs Act also which would include section 149 and section 154 of the Customs Act.

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24. In the instant case, petitioner has not sought for any refund on the basis of the self-assessment. It has sought re-assessment upon amendment of the Bills of Entry by correcting the customs tarif head of the goods which would then facilitate the petitioner to seek a claim for refund. This distinction though subtle is crucial to distinguish the case of the petitioner from the one which was adjudicated by the Supreme Court and by this Court.

25. Grievance of the petitioner is not on the merit of the self-assessment as the petitioner is aggrieved by the failure on the part of the respondents to carry out amendment in the Bills of Entry by replacing the incorrect CTH by the correct one namely by replacing CTH '85176990' with '85176930' which was declared inadvertently by the petitioner at the time of fling the Bills of Entry. This request of the petitioner, in our opinion, falls squarely within the domain of section 149 read with section 154 of the Customs Act. Upon amendment in the Bills of Entry by correcting the CTH, consequential re-assessment order under *section 17(4)* of the Customs Act would be in order.

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27. The expression "mistake" appearing in section 154 of the Customs Act may be defined as something done unintendedly or through inadvertence. The section itself says that the error in any decision or order should be due to any accidental slip or omission. Moreover, it can be a mistake of law or a mistake of fact. In all cases it need not be an arithmetical error alone. It may connote errors which can be discerned upon due verification. Having said so, we may also indicate that power to amend documents available under section 149 of the Customs Act read with correction of clerical or arithmetical mistakes or errors in orders due to accidental slip or omission under section 154 thereof is different and distinct from the appellate power exercised under section 128 of the Customs Act. The power of amendment or correction, as the case may be, is vested on the same officer who had passed the initial order or an officer of equivalent rank. On the other hand, appellate jurisdiction is directed to correct decisions or orders passed by an inferior or

> lower authority. By its very nature an appellate authority is superior to the authority which had passed the order appealed against."

13. Now coming to the facts in the present case, I am of the view that the reliance placed by the learned commissioner on the decision of the Hon'ble Supreme Court in the matter of *ITC (supra)*, for coming to the conclusion that the assessment order has to be challenged by the importer in appellate forum and re-assessment be done afterwards in commensurate with the order of the Appellate Authority, is also misplaced as in the light of the decision of the Bombay High Court (supra) in which the *ITC (supra)* decision has been explained by observing that even the order of self-assessment can also be modified u/s. 149 ibid.

14. In view of the decision of the Hon'ble Bombay High Court (supra), I am of the view that the issue involved herein is no longer *res integra* and learned Commissioner (Appeals) is not justified in setting aside the Order of re-assessment dated 5.2.2020 and the Order-in-Original dated 5.3.2020 passed by the respective lower authorities which are completely in conformity with the aforesaid decision. Accordingly the appeals herein are allowed by setting aside the impugned order.

(Pronounced in open Court on 08.04.2025)

(Ajay Sharma)
Member (Judicial)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70199 of 2021

(Arising out of Order-in-Original No.06 to 08/Commr/ 2020-21 dated 19.03.2021 of the Commissioner Customs (Preventive), Lucknow)

M/s Shakti Traders, **.....Appellant**
(Sahebganj, Gorakhpur)

VERSUS

Commissioner of Customs (Pre), Lucknow **....Respondent**
(Kendriya Bhawan, Sector-H, Aliganj, Lucknow)

With

I. **Customs Appeal No.70227 of 2021 (Shri Vikas Kumar Gupta),**
II. **Customs Appeal No.70228 of 2021 (Shri Aakash Kumar Gupta),**

APPEARANCE:

Request for adjournment, for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

DATE OF HEARING : 28 August, 2024

AND

III. **Customs Appeal No.70270 of 2021 (Shri Kush Agarwal, Director)**
IV. **Customs Appeal No.70271 of 2021 (Shri Kush Agarwal, Director)**
V. **Customs Appeal No.70272 of 2021 (Shri Kush Agarwal, Director)**

APPEARANCE:

Shri Kamaljeet Singh, Advocate for the Appellants
Shri Santosh Kumar, Authorised Representative for the Respondent

DATE OF HEARING : 03 May, 2024

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NOs.70548-70553/2024

DATE OF PRONOUNCEMENT : 30 August, 2024

SANJIV SRIVASTAVA:

These appeals are directed against Order-in-Original No.06 to 08/Commr/ 2020-21 dated 19.03.2021 of the Commissioner Customs (Preventive) Lucknow by the impugned order following has been held:

"ORDER

(1) DRI /LZU/CI/26/INT-14/RL/2019/DATED 28.09.2020 IN RESPECT OF M/S RAGHUNATH LAXMINARAYAN, KANPUR & OTHERS :-

i) I order for confiscation of the seized goods valued at Rs. 51,45,857/- covered under aforesaid 03 Bills of Entry No. 4904698 dated 14.09.2019, No.4908226 dated 16.09.2019 and No 4908143 dated 16.09.2019 under Section-111(m) of the Customs Act, 1962. As the said goods had already been auctioned and the amount of Rs 73,13,133/- (Rupees seventy three lakhs thirteen thousands one hundred thirty three only) was realised as sale proceed, I order to appropriate the same under Section 126 of the Act ibid;

ii) I impose a penalty of Rs. 12,00,000/- (Rupees twelve lakhs) on M/s Raghunath Laxminarayan,51/27-A, Ramganj, Kanpur, under Section 112 (b) of the Customs Act, 1962;

iii) I impose a penalty of Rs.50,00,000/- (Rupees fifty lakhs) on Shri Saurabh Maheshwari, Authorised Representative, M/s Raghunath Laxminarayan, House No. 30, Anandpuri, Kanpur, under Section 114 AA of the Customs Act, 1962;

iv) I impose a penalty of Rs.50,00,000/- (Rupees fifty lakhs) under Section 114AA and Rs. 12,00,000/- (Rupees twelve lakhs) under Section 112 (b) of the Customs Act 1962 on Shri Kush Agarwal, Director, M/s

Padam Parmeshwari Ventures Pvt. Ltd., D-122, Bulandshahar Road Industrial Area, Ghaziabad.

(2) DRI/LZU/CI/26/INT-14/bN/2019 DATED 28.09.2020 IN RESPECT OF M/S B.N.INTERNATIONAL, KANPUR & OTHERS

i) I order for confiscation of the seized goods valued at Rs. 50,91,475/- covered under aforesaid 04 Bills of Entry 4911036 dated 16.09.19, No. 4916107 dt. 16.09.19, No.4919107 dated 16.09.19 and No. 5026770 dated 24.09.2019 (Job No. 4794276 dt 23.09.2019), under Section- 111(m) of the Customs Act, 1962 as discussed above.

ii) I impose a penalty of Rs 50,00,000/- (Rupees fifty lakhs) on Shri Brijendra Narayan Rai, Prop. M/s B.N. International Kanpur, U.P. under Section 114 AA and Rs 12,00,000/- (Rupees twelve lakhs), under Section 112 (b) of the Customs Act 1962. After the imposition of penalty on Shri B.N.Rai, being the Proprietor of the firm, I do not impose any penalty on the proprietorship firm M/s B.N. International Kanpur, U.P; innnn nntod-19-03-2021 54

iii) I impose a penalty of Rs. 50,00,000/- (Rupees fifty lakhs) under Section 114AA and Rs 12,00,000/-(Rupees twelve lakhs) under Section 112 (b) of the Customs Act 1962 on Shri Kush Agarwal, Director, M/s Padam Parmeshwari Ventures Pvt. Ltd., D-122, Bulandshahar Road Industrial Area, Ghaziabad;

(3) DRI/lZU/CI/26/INT-14/2019/ Shakti Traders , DATED 28.09.2020 IN RESPECT OF M/S SHAKTI TRADERS GORAKHPUR & OTHERS

i) I order for confiscation of the seized goods valued at Rs.63,77,246/-covered under aforesaid Bill of Entry 4895246 dated 13.09.2019 under Section-111(m) of the Customs Act, 1962 as discussed above.

ii) I impose a penalty of Rs. 15,00,000/- (Rupees fifteen lakhs) on M/s Shakti Traders, Sahebganj, Gorakhpur , under Section 112 (b) of the Customs Act, 1962;

iii) I impose a penalty of Rs. 60,00,000/- (Rupees sixty lakhs) under Section 111 114AA and Rs 15,00,000/- (Rupees fifteen lakhs) under Section 112 (b) of the Customs Act 1962 on Shri Vikas Kumar Gupta of M/s Shakti Traders, Sahebganj, Gorakhpur, of the Customs Act,1962;

iv) I impose a penalty of Rs. 60,00,000/- ([Rupees sixty lakhs) under Section iv 114AA and Rs 15,00,000/- (Rupees fifteen lakhs) under Section 112 (b) of the Customs Act 1962 on Shri Akash Kumar Gupta of M/s Shakti Traders, Sahebganj, Gorakhpur;

v) I impose a penalty of Rs. 60,00,000/- (Rupees sixty lakhs) under Section 114AA and Rs 15,00,000/- (Rupees fifteen lakhs), under Section 112 (b) of the Customs Act 1962 on Shri Kush Agarwal, Director, M/s Padam Parmeshwari Ventures Pvt. Ltd., D-122, Bulandshahar Road Industrial Area, Ghaziabad.

(4) *ORDER IN RESPECT OF SEIZED DRY DATES OF M/S B.N.INTERNATIONAL KANPUR & M/S SHAKTI TRADERAS, GORAKHPUR :- As the total seized dry dates i.e 2,47,500 kgs (1,10,000 Kgs of M/s B.N. International , Kanpur and 1,37,500 kgs of M/s Shakti Traderas, Gorakhpur) had already been e-auctioned and a total consolidated amount of Rs 1,95,77,555/- (Rupees one crore ninety five lakhs seventy seven thousands five hundred and fifty five only) was realised as sale proceed, I order for appropriation of the same, proportionately ,in respect of both these Noticees, under Section 126 of the Act ibid;*

1.2 Early hearing applications filed by Appellant Shri Kush Agarwal in three appeals filed by him i.e Appeal No C/70270, 70271 & 70272/2021 have been allowed vide Miscellaneous Order No 70061 to 70063/2021 dated 18.112021.

1.3 It has been informed by the registry Note 17.01.2022 that against the same order in original, three more appeals namely C/70199/2021, C/70227/2021 and C/70228/2021 and vide order sheet dated 25.0102022, bench directed as follows:

> *"3. Keeping in view the said submissions and to avoid the multiplicity of decisions, registry is directed to do the needful and list all the 6 (six) appeals before the next division bench in the month of March, 2022."*

1.3 Thus all the 6 (six) appeals field against the same order in original have been tagged together and listed for hearing. As no other appeal has been filed or brought to our notice either by the appellants, respondents or registry, we are limiting ourselves to the case against these appellants only.

2.1 The office of Directorate of Revenue Intelligence, Lucknow Zonal Unit received specific intelligence that some importers namely M/s Raghunath Laxminarayan, Ramganj, Kanpur, M/s B.N. International , Kanpur & M/s Shakti Traders, Sahebganj, Gorakhpur have connived with some overseas persons and imported Pakistan origin Dry dates, through Bills of Entry filed at ICD Panki, Kanpur, evading Customs duty by mis-declaring the country of origin of the said goods.

2.2 A Customs duty @ 200% was imposed on all goods originating or exported from the Islamic Republic of Pakistan, vide Notification No. 05/2019-Cus dated 16.02.2019, and as per the said Notification, the said item has to be classified under CTH 98060000 These importers have thus attempted to evade higher rate of Customs duty by mis-declaring country of origin of the said Pakistan origin Dry dates as UAE and classifying them under CTH 0808041030, where Customs duty is @ 20% instead of its correct CTH 98060000, attracting Customs duty @ 200%.

2.3 On the basis of above said specific intelligence, an enquiry on the above subject was initiated. The examination of the containers were conducted on 01.10.2019 & 03.10.2019 of M/s Raghunath Laxminarayan, Ramganj, Kanpur) 28.09.2019 and

04.10.2019 of M/s B.N. International, Mall Road, Kanpur) 27.09.2019, 28.09.2019 & 30.09.2019 M/s Shakti Traders, Sahebganj, Gorakhpur) respectively.

2.4 To ascertain the country/ area of origin with respect to the aforesaid import consignments of Dry dates in all containers pertaining to these three importers an independent opinion has been sought from M/s Atul Rajasthan Date Palms Limited (ARDPL), Rajkiya Paudh Shala, Chopasani, Jodhpur by sending representative samples , who vide letter dated 11.10. 19 (M/s Raghunath Laxminarayan Kanpur), dated 16.10.19 (M/s B.N. International, Kanpur) &.16.10.2019 (M/s Shakti Traders, Gorakhpur) forwarded identical reports in respect of samples of all three importers that on the basis of physical examination, the said goods are of "INDIAN SUB CONTINENT". Politically, the Indian subcontinent includes all or part of Bangladesh, Bhutan, India, Maldíves, Nepal, Pakistan and Sri Lanka, whereas UAE is the part of Arabian Peninsula .

2.5 Point no. 2.2.1 (4) of Chapter 2 of the Food Safety and Standards (Packing and Labelling) Regulation 2011 issued by FSSAI provides that "Label in pre- packaged foods shall be applied in such a manner that they will not become separated from the container.' During the course of examination, it was noticed that a similar type of mode of packing were adopted by all three importers and each bag of containers was found stapled with a slip containing details of exporter & importer gross weight, net weight country of origin and FSSAI No., which can easily be separated from such packaging bags. Hence, it was found that the provisions of Food Safety and Standards (Packing and Labelling) Regulation, 2011 were not followed properly on the packaging bags of the said goods by all three importers.

2.6 During the course of investigation, statements under Section 108 of the Customs Act, 1962 of various person including, Shri Saurabh Maheshwari Authorised representative of M/s Raghunath Laxminarayan, Kanpur, Shri B.N.Rai ,Prop.

M/s B.N. International , Kanpur , Shri Vikas Kumar Gupta & Shri Akash Gupta of M/s Shakti Traders. All of them admitted that the Dry dates lying at ICD, Panki, Kanpur were of Pakistan origin, which were supplied by Shri Kush Agarwal of M/s GVO Global FZC by re-routing the same through Dubai, UAE ; that Shri Kush Agarwal managed & arranged all the import documents, especially the Certificate of Origin (CO0) issued by the concerned UAE authorities relating to the said import consignments of Dry dates of Pakistan origin.

2.7 Therefore, on reasonable belief that

- the impugned goods i.e. Dry dates of Pakistan origin were attempted to be imported by the said three importers i.e. M/s Raghunath Laxminarayan, Kanpur M/s B.N. International, Kanpur & M/s Shakti Traders, Sahebganj, Gorakhpur through ICD. Panki, Kanpur, by mis-declaring country of origin as UAE of the said impugned goods with the intention to evade payment of higher rate of Customs duty @ 200% as per Notification No. 05/2019-Cus dated 16.02.2019;
- there was also a non-compliance of Food Safety and Standards (Packing and Labelling) Regulation, 2011 with respect to the said import consignments of Dry dates,
- the said goods were found liable for confiscation under Section 111 of the Customs Act, 1962 and accordingly, the impugned goods was seized under Section 110 of the Customs Act, 1962.

2.7 After completion of investigations Show Cause Notices were issued to the importers and concerned as detailed in table below

Sl. No.	SCN No.	Party	Bills of Entry No. & Date	Amount of imported goods (Rs.)	Duty (Rs.)
1	DRI/LZU/CI/26/INT-14/RL/2019/10215 dated 28.09.2020	(i)M/s Raghunath Laxminarayan,	4904698 dated 14.09.2019	51,45,857	1,42,84,899

		Ramganj, Kanpur, (ii) Shri Saurabh Maheshwari, Kanpur. (ii) Shri Kush Agarwal, Ghaziabad	4908226 dated 16.09.2019 and 4908143 dated 16.09.2019		
2	DRI/LZU/C1/26/IN-14/BN/2 019 dated 28.09.20	(i) M/S B.N. International. Mall Road, Kanpur (ii) Shri Bijendra Narayan Rai (iii) Shri Kush Agarwal	4911036 dated 16.09.19, 4916107 dt 16.09.19 4919107 dated 16.09.19 and 4794276 dt 23.09.2019	50,91,475	1,41,33,935
3	DRI/LZU/C1/26/IN-14/BN/2019/ dated 28.09.20	(i) M/s Shakti Traders Traders, Sahebganj. Gorakhpur (ii) Shri Vikas Kumar Gupta, Authorised Representative of M/S Shakti Traders (iii) Sri Akash Kumar Gupta, Sahebganj Gorakhpur (iv) Shri Kush Agarwal, Ghaziabad	4895246 Dated 13.09.2019	63,77,246	1,77,03,235

The three importers & Shri Saurabh Maheshwari, Shri Bijendra Narayan Rai, Akash Gupta , Vikas Gupta & Shri Kush Agarwal were required to show cause as to why:-

(i) Seized Dry dates of three importers as detailed in Table (A) should not be confiscated under Section 111(m) of the Customs Act, 1962?

(ii) Penalty should not be imposed upon M/s Raghunath Laxminarayan, Ramganj, Kanpur, M/s B.N.International, Kanpur & M/s Shakti Traders Gorakhpur under Section 112 (a) and/or 112(b) of the Customs Act 1962?

(iii) Penalty should not be imposed upon Shri Saurabh Maheshwari, M/S Raghunath Laxminarayan, Ramganj, Kanpur under Section 114 AA of the Customs Act 1962?

(iv) Penalty should not be impose upon , Shri Bijendra Narayan Rai, Vikas Gupta & Akash Kumar Gupta under Section 112 (a) & /or 112(b) and 114AA of the Customs Act 1962?

(v) Penalty should not be imposed upon Shri Kush Agarwal under Section 112 (a) and/or 112(b) and 114AA (in all three SCNs separately)?

(vi) In case the Competent Authority wants to redeem the impugned goods under Section 125 of the Customs Act, 1962, duty should not be demanded by the Competent Authority from them alongwith the redemption fine as decided?

2.7 The show cause notices have been adjudicated as per the impugned order.

2.8 Aggrieved appellants have filed these appeals. As observed earlier no appeals have been filed by M/s Raghunath Laxminarayan, Ramganj, Kanpur, Shri Saurabh Maheshwari, Kanpur, M/S B.N. International. Mall Road, Kanpur, Shri Bijendra Narayan Rai. In absence of any appeal by these persons the impugned order to the extent it is against these persons acquires finality.

3.1 When the matter was listed on 03.05.2024, we heard Shri Kamaljeet Singh Advocate for the appellant in appeal No C/70270, 70271 and 70272/2021. Counsel for appellant in other three appeals sought adjournment.

3.2 Counsel for Appellant in appeal No C/70199/2021, C/70227/2021 and C/70228/2021 Shri Shubham Agarwal,

Advocate sought adjournments repeatedly when the matter was listed 10.03.2022, 04.04.2024, 03.05.2024, 21.05.2024, 03.06.2024 and 28.08.2024. The manner in which repeated adjournments have been sought it appeared that appellants in these appeals were not interested in appearing before the Tribunal for arguing their case. Accordingly, on 28.08.2024 bench observed-

> ***"The matter arising out of the same impugned order is already heard on 03.05.2024 and orders were reserved.***
>
> ***2. Request for adjournment filed by the learned Counsel is rejected. We have heard the learned Authorized Representative appearing for the respondent. Order reserved."***

In view of the decision of the Hon'ble Supreme Court in case of Rishi Nandan Pandit [1999 (114) E.L.T. 779 (S.C.)] observing as follows, these appeals are not being dismissed for non prosecution in terms of Rule 20 of CESTAT Procedure Rules, 1982 but are being considered on merits on the basis of records available:

> ***"4.*** *When the Counsel engaged by the appellants in a criminal appeal does not turn up there is no obligation for the Court of Appeal to wait for him or even to adjourn the case awaiting his presence. The earlier view of a two Judge Bench of this Court in Ram Naresh Yadav and Ors. v. State of Bihar - AIR 1987 SC 1500, that in such a situation the Court could only dismiss the appeal for default, has been held erroneous by a three Judge Bench of this Court in Bani Singh and Ors. v. State of U.P. - 1996 (4) SCC 720. A.M. Ahmadi, CJ, speaking for the Bench, has stated the legal position thus :*
>
> *"The law clearly expects the appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial Court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to*

sastisfying itself that the reasoning and findings recorded by the trial Court are consistent with the material on record. The law, therfore, does not envisage the dismissal of the appeal for default or non-prosecution but ony contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav case (AIR 1987 SC 1500) that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution".

3.3 We have heard Shri Santosh Kumar, Authorized Representative for the revenue.

3.4 Arguing for his client, Shri Kamaljeet Singh, submitted that:

- These three appeals have been filed by his client against above referred order-in- original wherein the importers are :-
  - M/s. Raghunath Laxminarayan
  - M/s.B.N. International.
  - M/s. Shakti Traders.
- the dispute in the present case is regarding the country of origin of the dry dates exported by the appellant and imported by the above three importers.
- the goods are duly supported/covered by "country of origin certificate issued by the Ajman Chamber of Commerce which is the competent designated authority of the Govt. of UAE for issuing 'country of origin' certificates. The said certificate of country of origin is bar coded, yet it authenticity has not been verified by the Department.
- Since the 'country of origin' certificate has been issued by the competent designated authority of the Govt. of UAE, its genuineness cannot be doubted.

- there is no allegation in the show cause notice or finding in the impugned order that 'certificate of origin' is not genuine. No enquiry has been made by the Revenue from the Ajman Chamber of Commerce, UAE or from the Govt. of UAE to ascertain whether or not the 'certificate of origin' is genuine. In the absence of any enquiry, the allegation that the goods (dry dates) have not originated in UAE is not sustainable
- No reliance can be placed on the so-called expert opinion given by M/s. Atul Rajasthan Date Palms Ltd., Jodhpur for reasons as follows:
    - they have not mentioned in their test report "whether they have a lab to test country of origin of dates".
    - they have not mentioned what tests were done by them to ascertain country of origin.
    - they have given only on basis of physical appearance. The opinion was given within one day from date of receipt of letter of DRI by them.
    - they are not accredited by the Govt, to carry out any tests on food items. The FSSAI has notified 183 NABL Accredited Laboratories as mentioned in M.F. (D.R.) Instruction no. 1/2020-Cus dated 12.02.2020 where the Customs Department can get testing of food products done. The name of M/S. Atul Rajasthan Date Palms Ltd. is not in this list of 183 NABL Accredited Laboratories.
- the expert who has given opinion regarding country of origin was not produced for cross-examination. In view of the above factors, no reliance can be placed on the expert opinion obtained from M/s. Atul Rajasthan Date Palms Ltd,

- Impugned order in 'Discussions and Conclusion' part of the states that in the Export (Customs) Declaration dated 25.08.2019, in column 24, the country of origin is mentioned as 'PK'. This factually in incorrect. The document relied upon in the show cause notice is dated 20.08.2019 and not 25.08.2019 (RUD 48 Refer page 30 of show cause notice). In Column 24 of this document i.e. Export (Customs) Declaration only mentions the words 'AE' which stand for 'not for local sale' i.e. the goods are export goods. The words 'PK" are not mentioned in column 24 of this declaration or in any other part of this Declaration. Hence the finding in the impugned order is not sustainable

3.6 Learned authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 Before we proceed to consider the issue we would record the background in which the above notices have been issued culminating into the impugned order. This background has been recorded by the Hon'ble Supreme Court in the case G S Chatha Rice Mills [2020 (374) E.L.T. 289 (S.C.)]

"A. The aftermath of Pulwama

2. *A terrorist attack took place at Pulwama on 14 February, 2019. On 16 February, 2019, the Union Government issued a notification under Section 8A of the Customs Tariff Act, 1975. The notification introduced a tariff entry by which all goods originating in or exported from the Islamic Republic of Pakistan were subjected to an enhanced customs duty of 200%. The precise time at which the notification was uploaded on the e-Gazette was 20:46:58 hours. …."*

The goods in question namely dry dates otherwise attracted duty at rate of 30% if imported from any place other than *Islamic Republic of Pakistan* whereas as per the notification dated 16.02.2019 when imported from Pakistan attracted duty at rate of 200%. On the basis of intelligence to the effect that in order to avoid the higher rate of duty on these goods importers started routing the said goods though of Pakistan origin from various countries in Middle East, by declaring the goods to be of that origin, investigations and enquiries were undertaken by the revenue authority and all the consignment pending clearance were detained and seized under reasonable belief that the country of origin certificate have been manipulated to claim the benefit of lower rate of duty. Subsequently the show cause notices as detailed earlier have been issued to the importers and other concerned which are subject matter of these appeals. As indicated earlier we are in present case concerned with the order in original by which the goods imported by the three importers namely M/s. Raghunath Laxminarayan, M/s.B.N. International and M/s. Shakti Traders have been confiscated. Penalty have been imposed on the importers and other concerned with the said imported goods, including Shri Kush Agarwal, who is said to have exported the said goods from UAE.

4.3 As out of the three importers appeal have been filed only by one importer namely M/s Shakti Tarders we are referring to the portion of impugned order which is in respect of the said importer and the same is reproduced below:

"14. The following defence Replies were submitted by the parties in reference to their respective Show Cause Notices.

1. *SCN NO:- DRI/LZU/CI/26/IN-14/RL/2019/10215 dated 28.09.2020 M/s Raghunath Laxminarayan, Kanpur through their Shri S. A. Khan submitted a reply dated 18.02.2021 (during last opportunity of Personal Hearing) alongwith its enclosures.*
2. *SCN No. :-DRI/LZU/CI/26/IN-14/BN/2019 dated 28.09.2020 Shri B. N. Rai, Prop M/s B. N. International*

Kanpur, appeared for virtual hearing on 23.12.2020 and presented the version on behalf of him and his firm (both Noticees).

3. *SCN NO:- DRI/LZU/CI/26/INT-14/SHAKTI RADERS/2019 DT, 28.09.2020:- M/s Shakti Traders, Sahebganj, Gorakhpur, Shri Akash Gupta & Shri Vikas Gupta, through their authorized counsel Shri Raghvendra Pratap Singh submitted a reply dated 02.01.2021.*

Shri Kush Agarwal is common Noticee in all three Show Cause Notices, but neither he nor any one on his behalf appeared during all opportunities of Personal Hearings. However, later on his counsel Shri Kushal Miglani, submitted his defense replies in respect of all three Show Cause Notices.

In this connection it is submitted that the major points of defence reply received on behalf of the noticees, are discussed excessively in the discussion & findings, where submissions of every noticee have been dealt separately while discussing their roles in the case, therefore, the same are not dealt here.

DISCUSSION & FINDINGS:-

15. …….

16. I observe that the main dispute in the respective cases revolves around the classification of the impugned goods. I observe that the importers had allegedly attempted to evade higher rate of Customs duty by mis-declaring the country of origin of the said Pakistan origin Dry dates as United Arab Emirates in the bills of entry, classifying them under CTH 0808041030 where Customs duty is @ 20% instead of its correct CTH 98060000, attracting Customs duty @ 200% as contended by the department. Besides it, confiscation of the impugned goods, imposition of penalty on Noticees under various Sections of the Customs Act

1962 , proposed in the subject Show Cause Notices, shall also be discussed

17. ***EVIDENCES EMERGED DURING THE INVESTIGATION****:-I find that the allegations of allegedly attempt to evade higher rate of Customs duty by mis-declaring the country of origin of the said Pakistan origin Dry dates as United Arab Emirates by these importers with the help of the alleged master mind Shri Kush Agarwal is mainly based on the following tangible and corroborative evidences emerged during the investigation, done by the DRI:-*

(I) REPORT OF M/S ATUL RAJASTHAN DATE PALMS LIMITED*:*

I find that to ascertain the country/area of origin with respect to the aforesaid import consignments of Dry dates pertaining to M/s Raghunath Laxminarayan, Kanpur, M/s B.N.International, Kanpur and M/s Shakti Traders, Gorakhpur was sought from M/s Atul Rajasthan Date an independent opinion Palms Limited (ARDPL), Rajkiya Paudh Shala, Chopasani, Jodhpur by sending them three representative samples of seized dry dates of these three importers. I observe that M/s Atul Rajasthan Date Palms Limited is a subsidiary company of Atul Limited with 26% shareholding of Rajasthan Horticulture Development Society, Government of Rajasthan. They have the expertise in tissue culture raised date palms and also have a tissue culture laboratory for Date Palms at Jodhpur. Representative sample drawn from the said import consignments of Dry dates was sent to M/s Atul Rajasthan Date Palms Limited for examination. M/s Atul Rajasthan Date Palms Limited vide letter dated 11.10.2019, in respect of all three samples of these importers reported that on the basis of physical examination, the said goods is of "INDIAN SUBCONTINENT". In this regard it is evident that politically, the Indian subcontinent includes all or part of Bangladesh,

Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka, whereas UAE is the part of Arabian Peninsula consisting of the countries - Yemen, Oman, Qatar, Bahrain, Kuwait, Saudi Arabia and the United Arab Emirates. Hence the documents filed by the petitioner before the customs authorities stating that the said dry dates imported by them are of UAE origin appeared false.

(II) STATEMENTS OF RELATED PERSONS INCLUDING THE IMPORTERS, ALL RECORDED UNDER SECTION 108 OF THE CUSTOMS ACT 1962:-

I find that all the importers in these three cases, and other related persons like Shri Anil Agarwal, Shri Chandan Chaudhary , Shri Manoj Bansal etc, in their respective statements, all recorded under Section 108 of Customs Act 1962, before the Officers of DRI, have categorically exposed the modus operendi adopted by them in this case for the import of dry dates in connivance with Shri Kush Agarwal , that has already been discussed in this order. However the main points of their statements are being discussed as under:-

(a) SCN NO.;-DRI /LZU/CI/26/INT-14/RL/2019/10215 DATED 28.09.2020 - SHIR SAURABH MAHESHWARI OF M/S RAGHUNATH LAXMINARAYAN (STATEMENT DATED 18.10.2019) :-

Shri Maheshwari stated that Shri Sunil Khanna of Venkat Traders Kanpur, who had also imported Dry dates told him about Shri Kush Agarwal that thereafter he had a conversation with Shri Kush Agarwal, who revealed him that they were supplying Pakistan origin Dry dates to India by re-routing the same through UAE, but all the concerned import documents have been got prepared in the name of UAE ; that regarding certificate of origin Sh. Kush Agarwal informed that he would arrange the same issued from UAD itself for smooth importation of the said goods, because as per the documents these Dry dates would

appear as of UAE origin and the actual Pakistani supplier of these Dry dates would not come into picture, as already been done in respect of previous supplu of Pakistan origin dry dates to other Indian importers made bu him Shri Agarwal) , that finding this scheme cheaper, he agreed for the importation of the said Dry dates of Pakistani origin by following the same modus operandi ; that the said 04 containers of Dry dates have been imported from the firm of Shri Kush Aqarwal i.e. M/s GVO Global FZC, UAE by adopting the same modus-operandi and all the required documents including Certificate of Origin for the said import consignments have been arranged but Shri Kush Agarwal, who supplied the said goods on credit basis ; that he did not found any difference between the Dry dates imported bu them through Shri Kush Agarwal and the dry dates earlier imported from Pakistan bu their firm ; that he is in agreement with the report of M/s Atul Rajasthan Date Palms Limited, Jodhpur dated 11.10.2019 that the imported Dru dates are of Indian sub-continent origin.

(b) SCN No. :-DRI/LZU/CI/26/IN-14/BN/2019 dated 28.09.2020, SHRI BIJENDRA NARAYAN RAI , (STATEMENT DATED 12.10.2019)

I observe that Shri Rai stated that he visited Dubai in the year 2018 for business purpose, where his client Shri Sayyadji introduced him to his brother Shri Saajid and another person Shri Kush Agarwal , who was the owner of the firm M/ S GVO Global FZC, UAE ; hat he came to know that Dry dates hnad been imported into India from Pakistan in the past, but it is closed now due to imposition of 200% of Customs duty but , import of Dry dates in India was taking place in unlawful manner; that Shri Kush Agarwal assured him that though Dry dates had been procured by him from Pakistan, but all the import documents including C00 (certificate of origin) relating to the import consianments of said Dry dates would be issued from UAE

and there would be no problem in customs clearances of the said goods and the said goods would be supplied on credit basis ; that on being satisfied, he finalised the import of one container of Dry dates though ICD Panki, Kanpur in August2019,; that encouraged by this deal , he (Shri Rai Jasked Shri Kush Agarwal to supply four more containers of Dry dates, which arrived at ICD Panki, Kanpur in the month of September2019; that apart from that, one card was also tagged on each bag containing details viz. name of his firm , Ms B N International, name of M/ S GVO Global, FSSAI no. of his firm, quantity of goods etc. These cards were found either stitched or stapled on the bags ; that he found a marking of month & year of production & expiry' on the bags. Apart from that, one card was also found stapled on each bag containing details viz. name of his firm M/s B N Interational, name of M/S GVO Global, FSSAI no. of his firm, quantity of goods etc. This time, such cards were neither stitched nor pasted on the bags ; that in the earlier import consignment of Dry dates in one container,

some of these cards were found stapled on the bags. In the subsequent import consignments of Dry dates in four containers, such cards were found stapled on all the bags. This kind of stapled cards can onlu be treated as labels which can be separated anyway and accordinglu, the same is against Food Safety and Standards [Packing and Labelling) Regulation, 201 1 [point no. 2.2.1 (4) of Chapter 2 issued bu FSSAI: that on comparing all such Dry dates, he does not find anu difference between Dry dates imported from Pakistan and Dry dates imported by his firm from Dubai, UAE.

(c) SCN NO.:- DRI/LZU/CI/26/INT-14/SHAKTI TRADERS/2019 DT. 28.09.2020:-

(i)SHRI VIKAS KUMAR GUPTA (STATEMENT DATED 04.10.2019) that thereafter, their firm, M/s Shakti Traders had imported three containers of Dry dates in the month of

July'2019 under Bill of Entry no. 4218360 dated 25.07.19 and imported two containers of Dry dates in the month of August'2019 from M/s GVO Global FZC (UAE) through ICD, Dadri ; that in the month of Julv'2019, Sh. Kush Agarwal contacted him telephonically from Dubai 8 told him that he was engaged in the business of Dry dates in Dubai and he would fully arrange the supply of Dry dates from Dubai, if he (Vikas) so desired and that documents related to the said import of Pakistan origin Dry dates shall be arranged; that thereafter, he received the said goods in three containers on 05.08.2019 at Gorakhpur. Similarly he received the said goods in two containers on 21.08.2019 directly at Gorakhpur; that after receiving the said imported goods from ICD, Dadri, he felt that the transportation cost would be less on importing the said goods through ICD, Panki due to shorter distance and, thereafter, he came to know about M/s Oneworld Shipping India Put. Limited and contacted Sadab Khan on phone for CHA related work regarding import clearance of the goods. Subsequently, he contacted Kush Agarwal on phone and asked him to supply the goods. After receiving the import related documents through Courier, he forwarded the said documents to Sadab Khan along with his IEC, AADHAAR card, FSSAI certificate etc.; that however, the goods could not be cleared as the same were held up for checking;

(ii) SHRI VIKAS KUMAR GUPTA (STATEMENT DATED 10.10.2019) stated that Shri Pradeep , Prop. of M/ S New Lal Shahbaj Traders, Pakistan provided him the contact no. of Chandan CHA, of M/ S SS MOMMY International Pvt. Ltd., NOIDA and also asked him to restart import of Dry dates, supply of which would be managed by Shri Kush Agarwal, the Owner of M/s GVO Global, UAE and its import documents would be provided by Shri Agarwal; that he imported 05 containers of Dry dates through ICD, Dadri from M/ S GVO Global, UAE and thereafter, he again placed orders to Kush Agarwal for the import of Dry dates in

another 05 containers through ICD Panki, Kanpur; that on 20.09,2019, he received a call from CHA Sadab informing him that the cards containing details related to exporter, importer, PSSAI no., quantity etc. are found to be stapled on the packaging bags of Dry dates contained in 05 containers at ICD Panki, Kanpur, which is against the provisions of FSSAI So, next day on 21.09.19, he contacted Kush in this regard to which he responded that there is no problem in it.; that after looking at the samples of Dry dates drawn from 5 nos. of containers of Dry dates imported by his firm M/S Shakti Traders from M/ S GVO Global through ICD Panki, Kanpur, he does not find any difference between the said sample of Dry dates and Dry dates earlier imported by them from Pakistan.

(iii) SHRI AKASH KUMAR GUPTA (STATEMENT DATED 10.10-2019) that Since Pakistani traders devised another route for supply of their Dry dates through Dubai and also, lured them with supply of the said Dry dates on credit and assured that all the documentation in respect of the said Dry dates would be in the name of a Dubai based firm ie. M/S GVO Global and the country of origin of such Dry dates would be of Dubai and a certificate in this regard will also be provided , hence they agreed to import Dry dates of Pakistan origin Via Dubai; that they imported Dry dates in 05 containers through ICD, Dadri in the month of July 19 through Pakistani supplier of Dry dates; that Pradeep and Kush Agarwal, the owner of GVO Global FZC had connived together to devise a plan for supply of Dry date of Pakistan origin and Pradeep had qiven details of a person namely, Chandan for clearance of the said goods & thereafter, he (Akash) had made detailed discussion with his elder his brother, Shri Vikas Gupta told him that first Pradeep Ji would supply Dry dates of Pakistan origin from Pakistan to Dubai, which in turn would be supplied to India by Shri Kush Agarwal through his firm M/s GVO Global FZC and Shri Kush Agarwal will provide all the import

documents to them through Chander and in this wau, theu would import Dry dates of Pakistan origin into India via Dubai; that the supply of Dry dates of Pakistan origin, imported bu their firm M/S Shakti Traders) in 05 containers in July'19, was first managed by the Pakistani supplier of Dry dates, Shri Pradeep Ji in connivance with Shri Kush Agarwal from Pakistan to Dubai and then Shri Kush Agarwal exported this Dry dates of Pakistan origin to India through his firm M/S GVO Global FZC ; that subsequent consignments of Dry dates of Pakistan origin in 05 nos. of containers, which are held up at ICD Panki for verification, also got re-routed through Dubai by Pradeep ji in with Shri Kush Agarwal through his firm M/S GVO Global FZC in similar manner; that there is no difference between the samples of Dry dates drawn from 05 nos. of containers of Dry dates imported by their firm M/'S Shakti Traders from M/ S GVO Global FZC through ICD Panki and Dry dates imported by them from Pakistan earlier.

(iv) SHRI MANOJ KUMAR BANSAL (STATEMENT DT. 19.11.19) stated that they purchased Dry dates from different parties of Lucknow, Gorahpur, Delhi and Ghaziabad including M/S Shakti Traders, Gorakhpur; that they purchased 7500 Kgs of Dry dates from M/'S Shakti Traders, Gorakhpur in the month of Aug'2019; that in the conversation recorded therein was between him and Shri Akash Gupta, he was exploring the prospects of importing Dry dates and during this process, he came to know that the import of Pakistan origin Dry dates from Pakcistan had stopped due to imposition of 200% of Customs duty on Pakistan origin Dry dates; that on getting the information with regard to import of Dry dates by M/'S Shakti Tradres, Gorakhpur from UAE, he had the aforesaid conversation with Shri Akash Gupta; that during this conversation, Shri Akash Gupta accepted that the Dry dates imported by them through UAE, is not the produce of UAE, The said goods were being supplied by the Pakistani supplier into India bu

managing its supplu (first importing the said goods from Pakistan into Dubai and then re-routing to India) as huge quantity of Dry dates is now accumulated in Pakistan and they (Pakistani supplier) have to sell the said qoods.

(v) SHRI CHANDAN CHAUDHARY (STATEMENT DATED 16.10.2019) stated that their firm started the import clearance work of Dry dates in the month of May 2019 for M/ S Goodwill Traders, which they got through $hri Anil Agawal of M/S K V Metal Industries, Gautam Budh Nagar ; that apart from this, their firm had also undertaken the import clearance work in respect of M/s Padam Parmeshwari Ventures Put. Ltd. , M/s Omega Packwell Pvt. Ltd. M/s Navarshi Overseas, M/s Shakti Traders, M/s Suresh Kumar & sons, M/s Venkat Traders, M/s Jai Baba Traders & M/s Varun Traders,; that it came to his knowledge that. though Dry dates were of Pakistan origin but on the basis of documents, imports of the said Dry dates had been shown as supplied from UAE and Shri Manoranjan Singh had connived with Shri Anil Agarwal in execution of this work.

(vi) SHRI ANIL KUMAR AGARWAL, MANAGER, S PADAM PARMESHWARI VENTURES PVT. LTD.GHAZIABAD (STATEMENT DATED 04.112019) stated that Shri Kush Agarwal (his niece, bhanja)and his wife Smt, Sonali Agarwal are the Directors of the firm, There is another firm namely -M/ S Golden valley overseas situated at D-122, Bulandshahar Industrial Area Ghaziabad wherein Smt. Vijaya Rani Agarwal (mother of Shri Kush Agarwal) has 50% Partnership and remaining 50% Partnership is with Shri Rohit Talwar & Shri Lakshya Talwar ; that Shri Kush Agatwal looks after all the work related to the said firm on behalf of his mother; that Shri Kush Agarwal went to Dubai in Feb'2019 and established a firm namely, M/S GVO Global there in April-May'2019; that Shri Kush Agamal either himself or through him had also given directions to Shri

Manoranjan Singh and Shri Chandan Chaudhary of M/S SS Mommy International for the customs clearance of the imported Dry dates ; that he also looked after the import related work of M/ S Shakti Traders, Gorakhpur; and some other firms for the import clearances of Dry dates supplied by M/S GVO Global, UAE.

vii) SHRI ANIL KUMAR AGARWAL (STATEMENT DATED 06.12.2019) stated that he was very well aware that Dry dates imported by M/S Padam Parmeshwati Ventures Put, Ltd.in 08 nos. of containers in the months of June 19 & August' 19 from M/ S GVO Global FZC, UAE was of Pakistan origin ; that before this import, Shri Kush Agarwal discussed the matter with him and told that he has devised a modus operandi for importing Dry dates of Pakistan origin into India by re-routing the said goods through Dubai, UAE & also revealed that he would manage 'Certificate of origin' of the said Dry dates of Pakistan origin issued by the UAE authority and accordingly, the said Dry dates procured from Pakistan would be treated as produce of UAE; that thereafter, Shri Kush Agarwal got prepared all the import documents including Certificate of origin in Dubai, UAE in respect of the said 08 (eight) nos. of containers of Dry dates of Pakistan origin and sent the same to him through courier at the address i.e. D-122, Bulandshahar Road Industrial Area, Ghaziabad, which he provided to CHA firm, M/S SS Mommy International (Pvt..) Ltd. Ghaziabad for custom clearance; that he was in contact with Shri Manoranjan Singh and Shri Chandan Chaudhary of M/s SS Mommy International (Pvt..) Ltd. since December' 2018 and had also provided the import documents pertaining to other importers viz.M/s Shakti Traders, Gorakhpur; and other firms with respect to import consignments of Dry dates of Pakistan origin re-routed through UAE into India to M/s SS Mommy International (Pvt..) Ltd., Ghaziabad for customs clearance, which he received from Shri Kush Agaiwal; that his firm had earlier

imported Dry dates from Pakistan in the uear 2017-18 and he did not find any difference in the two consignments of Dry dates.

(III) INVESTIGATION FROM THE PURCHASERS OF IMPORTED DRY DATES FROM THE NOTICEES:-

During the investigation it was revealed from the purchasers of dry dates from the notices as in his statement dated 01.11.2019 Shri Rajaram Agarwal, prop, M/ s Preeti traders Lucknow admitted and Shri Anoop Jhamtani, PROP. Vasudev Parmanand & Sons in his statement dated 14.11.2019 both stated that they had imported dry dates from Pakistan earlier but stopped the same from February 2019 ; that they had purchased dry dats from M/s B.N. International, Kanpur for the first time in August 2019 and found no difference between the dates imported by them from Pakistan and dry dates purchased from M/s B.N. International. Similarly Shri Sachin Agarwal, Proprietor, M/s Amamath Sachin Kumar, Subhash Marg, Lucknow in his, statement on 07.10.2019 stated that he is aware of the fact that earlier import of Dry dates was mainly from Pakistan but after increase of duty in February 19, import of Dry dates from Pakistan declined that there is no difference between Dry Dates purchased by them prior to February 19 and Dru Dates purchased from M/s Shakti Traders. Shri Aiay Keshari, Proprietor of M/s Rajaram Kesarwani, Varanasi, another Purchaser of dry dates from M/s Shakti Tarders, Sahebganj, Gorakhpur, , in his statement dated 11.112019 stated that they had imported Dry dates earlier from Pakistan but now it is stopped since Februrar 2019 and they had purchased Dry dates from M/s Shaktj Traderst Gorakhpur for the first time in of August 2019.

IV) TELEPHONIC CONVERSATION ABOUT THE ORIGIN OF IMPORTED DRY DATES :-

I find that in his statement Shri Vikas Kumar Gupra of M/s Shakti Traders admitted that he heard carefully two audio files extracted from his mobile and he put on/appended his signature on the printout of this conversation in token of his agreement ; that these audio files were sent to his phone by his brother Shri Akash Gupta through whatsapp; that in the said printout, the first person is Shri Manoj Bansal, who runs a shop, in the name of Bansal' brothers at Ismailpur, Gorakhpur and the second person is his younger brother, Shri Akash Gupta ; that in the said conversation, it is admitted that Dry dates imported by them is not of UAE origin and the same were supplied from Pakistan.This conversation was also confirmed by Shri Akash Kumar Gupta in his own statement dated 10.10.2019, and by Shri Manoj Bansal in his statement dated 19.11.2019, both recorded under Section 108 of the Customs Act 1962.

(V) CONTRAVENTION OF tHE PROVISINS OF THE FOOD SAFETY AND STANDARDS (PACKING AND LABELLING) REGULATION, 2011 ISSUED BY FSSAI :-

I find that as per the records a major discrepancy was detected by the investigating officer during the course of examination, as each bag of the said 04 containers was found stapled with a slip which contained details of exporter & importer, gross weight, net weight, country of origin, IEC no. and FSSAI No. of importer. This slip was easily separable from such packaging bags in clear violation of the point no. 2.2.1 (4) of Chapter 2 of, which provides that "Label in pre-packaged foods shall be applied in such a manner that they will not become separated from the container.

(VI) INVESTIGATION IN RESPECT OF FZ TRANSIT OUT CUSTOMS DECLARATIONS :-

I observe that on being requested the shipping line of the importer i.e. M/s Mexicon Shipping Agencies, submitted copy of Export (Customs) Declarations. On going through

the above Export (Customs) Declarations, it is noticed that these are FZ Transit Out Customs Declarations which were filed with Dubai Customs, Federal Customs Authority, UAE for transit of containers containing Dry dates . The perusal of the same revealed a fact that in column no. 24 of the Export (Customs) Declaration dated 25.08.2019, the Origin is mentioned as 'AE' whereas in column no. 24 of the Export (Customs) Declaration, the Origin is mentioned as PK. Further in column no. 48 of both the declarations there is a remark as Not for Local release'

Further, 'Declaration and Clearance procedure' of Dubai Customs is available on website add. https://www.dubaicustoms.gov.ae/en/Procedures/Customs Declaration/Pages /FreeZones.aspx. This procedure describes the provisions relating to "Goods in Transit" as under: Goods in transit :- "Imported goods from outside the country for the interest of a foreign importer addressed in his name or the name of a licensed agent carrier by a competent authority on the importer's behalf, The goods shall only be registered since transiting the territories of the country to a final destination. A deposit amount equivalent to the total value of goods shall be collected to ensure exit of goods outside the country within 30 days from the transactional processing date.' Customer guide of Dubai Customs, Dubai is available on website- https://www.dubaicustoms.gov.ae/en/Publications/Publications/Customer_Guide_Booklet_EN.pdf. Para 15.12 of this Customer guide describes "Transit" provisions as under:

15.12. Transit "Goods destined to elsewhere in the rest of the world but landing in Dubai may be moved to the destination under transit procedure. Normally customs clear such transit movements against payment of deposits or under guarantees and may take additional guarantees if necessary. Following Declaration Types are required to be

cleared under Transit Regime for various transit movements-

Transit (ROW to ROW)

FZ Transit In -

FZ Transit Out -

FZ Transit In from GCC and other Emirates FZ and GCC Local Market –

FZ Transit between Dubai based FZ.

FZ Transit Out' is defined under Para 15.12.3 as under:

15.12.3. FZ Transit Out

"Export of goods stored in the free zone to the rest of the world is cleared on this declaration against deposits which is refunded on production of proof of export. Even ifthe goods are exported directly from the free zone without paying any deposits, the exporter must submit the proof of export failing which customs will charge a penalty of %61 0 of the value of goods.

Considering the above customs procedures pertaining to Dubai Customs (UAE), regarding export of goods out of free zones, it appeared that FZ Transit Out declaration is applicable in those cases only, where a Free Zone Company (i.e. FZ Company) imports goods from a third country for its subsequent export to another country. The said provisions imply that the containers in respect of which FZ Transit Out declarations have been filed, originate from a third country and thereafter, move to the place of transit i.e. Dubai from where the containers finally move to the destination country.

Therefore, filing of FZ Transit Out declaration with Dubai Customs in respect of Container covered under impugned Bills of Entry filed by these importers at ICD Panki, Kanpur clearly indicates that the goods i.e. Dry dates stuffed in the said containers were originated from a country other than

United Arab Emirates (UAE) in contrary to Country of origin (COO) filed by the said importer claiming therein the country of origin as UAE. This also corroborates the statement of various importers , recorded under Section 108 of the Customs Act 1962 that Dry dates supplied by M/s GVO Global FZC, UAE was of Pakistan origin (i.e. a country other than United Arab Emirates).

Further, in one of the FZ Transit Out Customs Declarations filed with Dubai Customs, Federal Customs Authority, UAE, the Origin is found mentioned as PK'. On going through the website of International Organization for Standardization i.e.iso.org, it is noticed that "PK" is the ISO alpha-2 code of Pakistan. The ISO country codes are internationally recognized codes that designate every country and most of the dependent areas a two-letter combination or a three-letter combination. It is like an acronym that stands for a country or a State. Hence, the said FZ Transit Out Customs Declaration filed with Dubai Customs at the time of transit of the said consignments of the impugned goods i.e. Dry dates for its subsequent export to Indian importer clearly indicates that the impugned goods i.e. Dry dates has the country of origin as Pakistan. I find that as per the import statistics/data available and as stated by all representatives of the importers in their respective statements it came to light that all of .them were engaged in importation of Dry dates from Pakistan since long ; that the import of Dry-dates from Pakistan had been stopped since Feb'19 after increase of Customs duty rate by the Govt. of India on the imports from Pakistan. ; that as per the available records, they had started looking for a way to import Dry dates of Pakistan origin at reasonable price after the increase of Customs duty rate to 200% by the Govt. of India on the import of Dry dates from Pakistan and when they came to know about the aforesaid modus-operandi as devised by Shri Kush Agarwal, they immediately adopted the same for the import of Pakistan origin Dry dates. ***(VII) FAILURE***

TO COMPLY WITH THE ONUS PLACED ON HIM FOR SELF- ASSESSMENT:-

I would like to draw the attention towards Section 17(1) of the Customs Act, 1962 reproduced as under:-

"Assessment of duty : (1) An importer entering any imported goods under Section 46, or an exporter entering any export goods under Section 50, shall, save as otherwise provided in Section 85, self-assess the duty, if any, leviable on such goods."

In this connection, I observe that the importers had failed to comply with the onus placed on him relating to self-assessment and has not correctly declared the classification and exemption notification in respect of the impugned goods as discussed in the preceding paras. Thus, I find that the same was a deliberate attempt on the part of the respective importers to evade Customs Duty by misclassification and availing exemption Notfn. Not applicable on the subject goods.

Further, reliance is also placed on the ratio of judgement passed by the Apex Court in case of CC vs D. Bhoormull 1983(13)ELT 1546(SC), wherein it was held, that:-

"Department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of facts in the issue.....prosecution is not obliged to prove as part of its primary burden the facts which are especially within the knowledge of accused. Since smuggling is done secretly, it is impossible for preventive department to unravel every link of the process. .....It is for him(accused)to explain or establish those facts within his peculiar knowledge , failing which the prosecution will be entitled to take advantage of the presumption of facts arising against him, in discharging its burden of proof. .....Deptt. Would be deemed to have dischrgedits burden

(of proof) if it adduces so much evidence , circumstantial or direct , as is sufficient to raise a presumption in its favour with regard to the existence of fact sought to be proved." read along with the ratio of judgement passed by the Apex Court in case of Commissioner of Central Excise Madras Vs. Systems and Components (P) Ltd. reported in 2004(165)ELT 136 (SC), wherein it was held that What is admitted need not to be proved.'

WHETHER THE IMPUGNED GOOdS ARE LIABLE TO CONFISCATION UNDER SECTION 111 OF THE CUSTOMS ACT, 1962:-

18. As regards proposed confiscation of seized goods covered by various Bills of entry imported by respective importers I would like to first reproduce the relevant statutory provisions of the Customs Act, 1962, hereunder: -

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

(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 transhipment, with the declaration for transhipment 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; 3[(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.] Now, I am taking up the issue as to

whether the impugned goods in the subject cases are liable to confiscation or not?

19. I observe that the goods in question have been proposed for confiscation under Section 111(m) of the Customs Act, 1962 which have been reproduced in the preceding paras. Hence the seizure of the aforesaid imported dry dates was based on the reasonable belief that the petitioner mis-declared the country of origin of the imported dry dates and the packing of the imported dry dates is not as per the provisions of Food Safety Regulations. Moreover Shri Saurabh Maheshwari, Shri B.N.Rai, Shri Akash Gupta & Shri Vikas Kumar Gupta in their respective statements , under Section 108 of the Customs Act, 1962, clearly admitted that the consignments of dry dates imported by them at ICD, Kanpur against which Bills of Entry are filed by declaring Country of Origin as "United Arab Emirates" are actually of Pakistan origin. The test report of the independent authority, declaring the dry dates imported by the petitioner of Indian Sub-Continent Origin was also perused by them. Thus the reasonable belief on the basis of which the above said seizure of the various containers of dry dates imported by the Noticees later on proved true. Hence the seizure of the dry dates imported by the Noticees effected by DRI is in accordance to the provisions of Customs Act, 1962 and hence as per law

20. also find that as per records ,out of these three impugned Show Cause Notices, in respect of M/ s Raghunath Laxminarayan, Kanpur,U.P. , through his Counsel's letter dated 15.11.2019 requested for provisional release of seized dry dates , mentioned in three bills of entry out of four. The order for provisional release of seized goods was issued by the then Additional Commissioner, vide order dated 21.02.2020 with conditions 1. Execution of full value of Bond Rs 51,45,857/- & 2. Furnishing bank

guarantee or security deposit of Rs 1,02,91,714/-. However, the counsel vide his letter dated 17.06.2020 informed that they are not willing for the provisional release of the dry dates. I also find that in the other two cases i.e. M/s B.N. International Kanpur, U.P. (Prop Shri Bijendra Narayan Rai) and M/s Shakti Traders , Gorakhpur, no request letter for provisional release of seized dry dates was received in this office. In the meantime it has been gathered that due to the perishable nature of the seized goods and no party did turn up for provisional release of the said goods, the same were sold by way of auction , as detailed below :-

S.NO.	*SCN NO & DATE*	*NAME OF THE PARTY*	*AMOUNT REALISED AFTER AUCTION OF SEIZED DRY DATES*
01	*DRI /LZU/CI/26/INT-14/RL/2019/10215 dated 28.09.2020*	*M/s Raghunath Laxminarayan, Ramganj, Kanpur*	*Rs 73,13,133/-*
02	*DRI/LZU/CI/26/IN-14/BN/2019 dated 28.09.2020*	*M/s B.N. International, Mall Road, Kanpur*	*Rs 1,95,77,555 /- Consolidated*
03	*DRI/LZU/CI/26/IN-14/BN/2019/ Shakti Traders dated 28.09.2020*	*M/s Shakti Traders, Sahebganj, Gorakhpur*	

21. I also conclude that all three importers had contravened the provisions of Section 12 & 17 of the Customs Act read with Notf No 05/2019-Cus dated 16.02.2019 by attempting to evade payment of higher rate of Customs duty @200% imposed by the said notification on Pakistan origin goods, by mis-declaring Country of Origin' of the impugned goods as UAE and same were imported by wrongly classified under CTH 0808041030 instead of its correct CTH 98060000 as discussed in the preceding paras, Further the provisions of Food Safety and Standards (Packing and Labelling) Regulation, 2011 were also violated by the importers in as much as the instructions relating to labeling of packaging of the said goods were not followed as also discussed above, thus, relying on the above mentioned

judgements and the reasons discussed above, I find the impugned goods in the subject cases are liable for confiscation under Section 111(m) of the Customs Act, 1962.

DISCUSSION ON ALLEGATION OF NOTICEES REGARDING USE OF DURESS, COERCION AND THREAT BY OFFICERS OF DRI IN RECORDING OF STATEMENTS :-

22. I find that Shri Anil Kumar Agarwal vide letter dated 07.12.2019 has submitted his retraction from his statement dated 06.12.2019. I find that it is very much on records that an enquiry has been ordered in the matter appointing the Deputy Director, DRI, LZU, Lucknow as the enquiry officer. During the course of enquiry, the allegations levelled by Shri Anil Kumar Agarwal were found incorrect and outcome of the enquiry has also been communicated to Shri Agarwal vide this office letter dated 22.01.2020. I also find that some other Noticees have also retracted from their earlier statements, all recorded under Section 108 of the Customs Act 1962, especially in their written submission.

23. I also find that it has been pleaded by the Noticee that the statement dated 18.10.2019 of Shri Saurabh Maheshwari was taken under duress and threats of arrest and detention. In this regard, I observe that Shri Shyam Sunder Maheshwari, Proprietor M/s Raghunath Laxminarayan, Kanpur, in his statement dated 26.09.2019 revealed that his younger son Shri Saurabh Maheshwari is looking after his business presently. Shri Shyam Sunder Maheshwari, vide letter dated 17.10.2019 authorised his son Shri Saurabh Maheshwari to answer the queries w.r.t. summons dated 14.10.2019 by attesting signature of Shri Saurabh Maheshwari. In his statement dated 18.10.2019 Shri Saurabh Maheshwari himself presented the said letter dated 17.10.2019 authorising him to answer the queries of

the department and also stated the same in his statement dated 18.10.2019 Further it is pertinent to mention that during his statement dated 27.01.2020, Shri Shyam Sunder Maheshwari, perused the statement dated 18.10.2019 tendered by Shri Saurabh Maheshwari and as a token of agreement with the said statement he also appended his dated signature thereon. Also in his statement dated 27.01.2020 Shri Shyam Sunder Maheshwari, divulged that he is 66 yrs old and due to age as well as health problems he is not actively involved in the day to day working of the firm and therefore his son Shri Saurabh Maheshwari looks after the business and used to take all the important decisions related to firm. He also stated that he has no role in the import of said dry dates and all the decisions and discussions regarding the import of said dry dated were held by Shri Saurabh Maheshwari.

24. Therefore the allegation that the statement dated 18.10.2019 of Shri Saurabh Maheshwari was taken under duress and threats of arrest and detention is totally false. Shri Saurabh Maheshwari, himself in his statement recorded under section 108 of Customs Act, 1962 has stated that the voluntary statement given by him is without any duress or coercion or harm. It is also worth to mention that neither Shri Saurabh Maheshwari nor Shri Shyam Sunder Maheshwari filed retraction from his statements tendered. Now the Noticees, after more than sixteen months has come up with new purported story which deserves to be rejected

This invites my attention to the findings in the case of Gulam Hussain v. S. Reynolds (2002) 1 SCC 155 = 2001 (134) E.L.T. 3 (S.C.) wherein the Hon'ble Supreme Court has held:

"The ban contained in section 25 of the Evidence Act is an absolute ban. But it must be remembered that there is no ban in regard to the confession made to any person other

than a police officer, except when such confession was made while he is in police custody. The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non- police personnel.

25. Scrutiny of records to cross check the genuineness of statements of Noticee's recorded under section 108 of the Act reveals that:

(i) In the instant case, the Noticees have not only simply retracted the confessional statements but also failed to support it with any corroborative evidence;

(ii) Further, their retraction attracts the case of KTMS Mohammed vs UOI AIR 1992 SC 1831, wherein the Apex Court has held that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is for the maker of the statement who alleges inducement, threat, promises etc. to establish his allegations of inducement, threat etc. against the officer who recorded the statement;

(iii) That in most of the cases, the theory of retraction by the co-noticees has first time surfaced in their respective 'defence submissions; that none of the noticees or the persons whose statements tendered u/s 108 of the Act and relied upon in the instant matter have retracted their statements or brought to the light to the investigating agency or adjudicating authority that their statements were forcefully recorded under duress at the first available opportunity; that the noticees are alleging duress, coercion and threat in their defence submissions but nothing to substantiate these allegations have been adduced by them.

(iv) All the Noticees were free and had enough time to contemplate & furnish their retraction but it came in existence after a lapse of much time in the form of their defence replies &; Such a big time span, especially in light of availability of ample opportunity with them makes me infer that their retraction is nothing but an afterthought floated to save their skin from the clutches of law;

(v) Besides these facts, in the case of Surjeet Singh Chhabravs UOI 1997 AIR SCW 2507, the Hon'ble Supreme Court has held that a confession made before Customs Officer is binding even if retracted later.

26. In respect of corroborative evidences, on perusal of records I observe that besides the confessional statements of co-noticees and other persons i.e. (all recorded u/s 108 of the Customs Act, 1962) clearly establishing the role played by the noticees, there are sufficient material & cogent evidences which have been vividly discussed in the preceding paras containing therein the roles played by various noticees.

27. Therefore, placing reliance to above findings, I observe that the noticees are relying on the baseless plea of harassment and thereby retracting their statements which are an afterthought for protecting their skin from the action that might be taken by the department in the subject case and further I also observe that investigation in the case had resulted into emergence of many effective corroborative cogent vidences in support of the establishment of the act of smuggling in the subject case. Therefore, I find that the above mentioned submission of the noticee are an afterthought and an attempt to dissuade the proceedings that might be taken against them in the subject case.

***THE LEGALITY OF THE STATEMENTS RECORDED UNDER SECTION 108 OF THE CUSTOMS ACT 1962 IN THIS CASE** :*

28. I observe that some noticees have raised the point of legality of the statements recorded by the officers, therefore, I would like to proceed to discuss the legality of the statements drawn in this case under Section 108 of the Customs Act 1962. In this regard, it is pertinent to mention that the statements recorded under Section 108 of the Customs Act, 1962 are very vital and can be used as evidence in any Court of Law. In connection to the same reliance is placed on following judgements:

In the case of Naresh J. Sukhawani Vs. Union of India' - 1995 (11) TMI 106 - SUPREME COURT OF INDIA, the Supreme Court held that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. It is a material piece of evidence collected by Customs Officials under Section 108 of the Customs Act, 1962.

Moreover, in 'Commissioner of Customs V. Ghanshyam Gupta' - 2010 (3) TMI 1067 - PATNA HIGH COURT, the Division Bench of Patna High Court held that there is no doubt about the legal position that the statements in the scheme of the Act are admissible evidence in terms of Section 108 of the Act.

29. In the light of above, and applying the ratio of judgements, I conclude that the confessions of the said Noticees made before the DRI Officers while tendering their statements u/s 108 of the Customs Act, 1962, stand undiluted and are admissible as evidence.

DISCUSSION ON THE DEFENCE REPLIES OF THE NOTICEES:-

30. I find that the Noticees have submitted their replies, detailed as under :-

1. SCN NO;-DRI/LZU/CI/26/INT-14/RL/2019/10215 dated 28.09.2020:-

M/s Raghunath Laxminarayan, Kanpur through their authorized counsel Shri S. A. Khan submitted a reply dated 18.02.2021 (during last opportunity of Personal Hearing) alongwith its enclosures

2. SCN No.:-DRI/LZU/CI/26/IN-14/BN/2019 dated 28.09.2020

Shri B. N. Rai, Prop M/s B. N. International Kanpur, appeared for virtual hearing on 23.12.2020 on behalf of him and his firm (both Noticees) and presented his version.

3. SCN NO:- DRI/LZU/CI/26/INT-14/SHAKTI TRADERS/2019 DT. 28.09.2020: *M/s Shakti Traders, Sahebganj, Gorakhpur, Shri Akash Gupta & Shri Vikas Gupta, through their authorized counsel Shri Raghvendra Pratap Singh & submitted a reply dated 02.01.2021.*

Shri Kush Agarwal is common Noticee in all three Show Cause Notices, but no one appeared on behalf of Shri Kush Agarwal during all opportunities of Personal Hearings. However, his counsel Shri Kushal Miglani, submitted his defence replies in respect of all three Show Cause Notices

Further, the major points of the all the defence replies are reproduced and discussed as under:-

1. M/S RAGHUNATH LAXMINARAYAN AGARWAL IN R/O SCN NO.;-DRI /Lzu/CI/26/INT-14/RL/2019/10215:

(iv). WHEN WRIT PETITION PENDING, ADJUDICATION OF THE CASE IS PREMATURE:- he Noticee has stated that Writ Petition No. 11283 M /B of 2020 challenging the seizure made by 1.0. of DRI in the instant case is still pending, in which Commissioner , Customs (P) Lucknow is Respondent No. 2. The Senior Standing Counsel has filed Counter Affidavit on 28.01.2021 on behalf of DRI and Customs authorities including this Ld. Authority also in which he has categorically stated in Para 5 that "Further enquiry regarding the genuineness of the Certificate of Origin

submitted by the petitioner at ICD Kanpur for clearance of the goods is underway.

Since this Ld. Authority has himself filed affidavit before the Hon'ble High Court of Allahabad through Shri Deepak Seth, Sr. Standing Counsel [Ref: Para 5 of Counter Affidavit filed on 28.01.2021] stating therein that verification of 'Certificate of Origin' is still underway the adjudication of the case is premature and deserves to be kept in abeyance till completion of the enquiry.

DISCUSSION & CONCLUSION:-

In respect of the counsel's plea that adjudication/issuance of impugned Shoe cause notice is pre-mature , I find that as per the records , there is no iota of doubt that the impugned Show Cause Notice, along with other two notices on identical issue has been issued only after completing all the investigation regarding the 'Certificate of Origin' of the seized dry dates. In this regard ,attention is also invited towards Para 'D.6 of the impugned show cause notice dated 28.09.2020 , wherein investigation made by DRI in respect of Export (Customs) Declarations, declaration and clearance procedure of Dubai Customs and FZ Transit Out have been mentioned in detail that clearly substantiate that the impugned dry dates had the country of origin as ' Pakistan'. Besides the report from an independent agency M/s Atul Rajasthan Dates Palms Limited, Jodhpur, a subsidiary company of Atul Limited with 26% shareholding of Rajasthan Horticulture Development Society, Government of Rajasthan and also having the expertise in tissue culture raised date palms and also have a tissue culture laboratory for Date Palms confirmed that the seized dry dates reported that on the basis of physical examination, the said goods is of INDIAN SUBCONTINENT" Regarding the point ,raised by the counsel of Noticee that the Senior Standing Counsel's remark in the Counter Affidavit on 28.01.2021, I find that it is on the record that

the comments in respect of applicant's writ petition no. 11283 M/B of 2020 were forwarded to the. Senior Standing Counsel on 07.08.2020 in the light of facts/evidences available at that particular time. So it appeared that the counsel has deliberately ignored these development in the case , which took place thereafter

Therefore ,I do not find any force in this plea of the counsel of the Noticee and it appeared to be nothing but a tactics adopted by the Counsel to further delay the proceedings, thus not acceptable

(v). …

2. REPLY DATED 13.01.2021 OF SHRI KUSH AGARWAL IN R/O SCN NO:-DRI [LZU/CI/26/INT-14/RL/2019/10215, SCN NO:-DRI /LZU/CI/26/IN-14/BN/2019 & SCN NO:- DRI/LZU/CI/26/INT-14/ SHAKTI TRADERS/2019 ALL DATED 28.09.2020.

From the perusal of all three replies submitted by Shri Kushal Miglani, the Counsel of Shri Kush Agarwal, in respect of all three Show Cause Notices, I find that the points raised and language of all three replies are exactly the same. Though the role of Shri Kush Agarwal has also been discussed in the preceding paras and also later on in this order , during discussion on role of Noticees, I proceed on discussing the common points raised in the all three identical replies:-

(i) THE IMPUGNED DRY DATES HAD BEEN EXPORTED BY M/S. GVO GLOBAL FZC, UAE, AFTER OBTAINING REQUISITE PERMISSIONS &, COMPLETION OF FORMALITIES:- *M/s. GVO Global FZC, UAE, is a duly incorporated distinct legal entity registered in accordance with UAE laws having all the requisite permissions / licenses for effecting import and export of commodities in UAE as also to export from 'Free Zone' warehouses; that the subject 'dry-dates' were purchased by them from the 'Free Zone Warehouse' after following strict procedure from*

competent Governmental Authorities viz., Ajman Chamber of Commerce regulated by Ajman Government in U.A.E. , affiliated by International Chamber of Commerce (ICC) that the consignment was duly cleared and supported by Invoice & Packing List Certificate of origin (issued by Ajman Chamber of commerce), Fumigation Certificate and Phytosanitary Certificate by UAE Government ; that in U.A.E. all material is stored in warehouses owned by various logistic companies and the local agents show the required material and if it is found as per the specific demand indicated by the purchaser, the material is purchased without having regard to the buying source of the seller, it being a Free Zone'; that thereafter the material is exported after obtaining requisite permissions, complction of formalities in this regard ; once the Goods are stored in the warehouse in the Free Zone' in JAEi.c. after being unloaded from the Shipping Vessel, the same loses the significance of its' original source ; that the 'Certificate of Origin' is the conclusive proof being unquestionable document issued by Ajman Chamber of Commerce and it places on record sufficient proof of origin being issued by the internationally recognised chamber; that the International Chamber of Commerce (ICC) for the purposes of harmonising procedures' used for issuance of Certificates of Origin (COs) by Chambers of Commerce worldwide, ICC World Chambers Federation (WCF) has established a universal set of procedures for issuing and attesting COs by chambers and those accepted procedures have been completely disregarded in issuance of the SCN under reply; That they have got nothing to do with the subject imports in India, the purpose or the channel used by the importer ; that the role of exporter gets over the moment, the export formalities are complete and the goods left Jebel Ali port with all the requisite papers related to customs clearance from the Government authorities of UAE; that no fault can be found with the exporter as

regards any act done or declaration furnished by the importer or his custom clearing agent.

DISCUSSION AND CONCLUSION:-

I observe that the counsel of Shri Kush Agarwal has tried to shift the onus on the importers by stating that role of exporter gets over the moment, the very moments export formalities are complete and the goods left Jebel Ali port. But this plea of the Counsel is contrary to the basic principles of Export-import, which are obligatory for both the concerned parties i.e importer and exporter. The investigation has exposed a nexus comprising of both importers and Shri Agarwal by gathering various cogent and tangible evidences in the form of manipulation in customs declaration, report from an independent agency, statements of concerned persons etc. For example , in respect of Export (Customs) Declarations, filed with Dubai Customs, Federal Customs Authority, UAE, the perusal of one of the said declarations revealed. that in column no. 24 of the Export (Customs) Declaration dated 25.08.2019, the Origin is mentioned as AE' whereas in column no. 24 of the Export (Customs) Declaration, the Origin is mentioned as 'PK'. Further in column no. 48 of both the declarations there is a remark as Not for Local release'

Further, 'Declaration and Clearance procedure' of Dubai Customs describes the Goods in transit as : "Imported goods from outside the country for the interest of a foreign importer addressed in his name or the name of a licensed agent carrier by a competent authority on the importer's behalf. The goods shall only be registered since transiting the territories of the country to a final destination.

Customer guide of Dubai Customs, Dubai describes "Transit" provisions as under:

15.12. Transit "Goods destined to elsewhere in the rest of the world but landing in Dubai may be moved to the destination under transit procedure. *Normally*

customs clear such transit movements against payment of deposits or under guarantees and may take additional guarantees if necessary. Following Declaration Types are required to be cleared under Transit Regime for various transit movements-

***'FZ Transit Out'** is defined under Para 15.12.3: "Export of goods stored in the free zone to the rest of the world is cleared on this declaration against deposits which is refunded on production of proof of export. Even if the goods are exported directly from the free zone without paying any deposits, the exporter must submit the proof of export failing which customs will charge a penalty of %10 of the value of goods."*

Considering the above customs procedures pertaining to Dubai Customs (UAE), regarding export of goods out of free zones, it appeared that FZ Transit Out declaration is applicable in those cases only, where a Free Zone Company (i.e. FZ Company) imports goods from a third country for its subsequent export to another country. The said provisions imply that the containers in respect of which FZ Transit Out declarations have been filed, originate from a third country and thereafter, move to the place of transit i.e. Dubai from where the containers finally move to the destination country Therefore filing of 'FZ Transit Out' declaration with Dubai Customs in respect of Container covered under impugned Bills of Entry filed by these importers at ICD Panki, Kanpur clearly indicates that the goods i.e. Dry dates stuffed in the said containers were originated from a country other than United Arab Emirates (UAE) in contrary to Country of origin (COO) filed by the said importer claiming therein the country of origin as UAE.

Further, in the instant cases, I find that in one of the FZ Transit Out Customs Declarations filed with Dubai Customs, Federal Customs Authority, UAE, the Origin is found mentioned as PK'. As per website of International

Organization for Standardization i.e.iso.org, "PK" is the ISO alpha-2 code of Pakistan. The ISO country codes are internationally recognized codes that designate every country and most of the dependent areas a two-letter combination or a three-letter combination. It is like an acronym that stands for a country or a State.

(ii) PICK & CHOOSE POLICY OF DEPARTMENT:- *The Counsel has raised the point that , in the SCN no. DRI F. No. DRI/NRU/CI-26/INT-0/Enq-572019 /9456 - 9462 dated 29.06.2020 issued in case of M/s. Jai Baba Traders and four others., the exporter has not been made a Noticee, which shows bias of the department against the noticee,(Kush Agarwal), who has been pestered without any legal justification.*

DISCUSSION AND CONCLUSION :- In this regard, I find that as the SCN no. DRI F. No. DRI/NRU/CI-26/INT-0/ Enq-572019/9456 - 9462 dated 29.06.2020 is not pending before me for adjudication because of the jurisdiction issue, thus offering any comment regarding the query raised by the Counsel does not appear proper However, it would not be out of context to mention that the facts and circumstances of every case may differ from the another one depending upon the availability of evidences against certain person/firm and role played by him

(iii) BEING EXPORTER, HAD NO ROLE IN SUBMISSION OF DECLARATION FILED BY IMPORTERS AND PROVISIONS OF SECTION 112 & 114 DO NOT APPLY ON HIM:- *The Noticee has argued that the noticee shifted to United Arab Emirates much prior to the time when the notification enhancing the duty on dry-dates came to be published. The trading firm established was in accordance with the rules and regulations prevalent in UAE. No fault can be found in business transactions between two contracting parties, unless and until there is material evidence of delinquent conduct on their part and motive*

cannot be attributed without existence of any overt act. As has been shown in preceding paragraphs the importer in the present case has paid much more amount of duty than any of the contemporaneous import by any other party; That although, the noticee had no role in the declaration submitted by all three importers with Indian Customs since acted only as an exporter based in a foreign country. It would be fruitful to refer to that these provisions of Section(s) 112 and 114 of the Customs Act, 1962 do not apply to him, being exporter based in foreign country; The observations of the Ld. Appellate Tribunal in the case of Narendra Lodaya vs. Commissioner of Customs, Nava Sheva are quite relevant and are reproduced hereunder;

"The importer, and the importer alone, creates the relationship of obligation upon and by making the prescribed declaration. Likewise, the goods landed in India are to be made available by or on behalf of the importer for any verification to ascertain the conformity of the declaration under Section 46 of the Customs Act, 1962. The responsibility and obligation of the persons concerned in relation to clearance of the goods commences with the filing of the bill of entry under Section 46. All the transactions preceding such filing would fall outside the ambit of any obligation under the Customs Act, 1962. Purther, the obligations and the penalties, if any, adjudged for contravention of the obligations will revolve exclusively around the contents of the bill of entry or in relation to production of the goods for completion of the assessment.

The appellant is situated outside the country. The appellant has not filed the bill of entry nor subscribed to the veracity of its contents. The appellant is not concerned with the production of goods for verification. In these circumstances, the scope of creating an obligation under the Customs Act, 1962 for the appellant does not appear to have any legal basis where issue of an invoice, which, for

any reason, has been rejected in the process of assessment, may not be easily susceptible for initiating penal proceedings under Section 112 of the Customs Act 1962; the scope for action for participation in negotiation leading to issue of invoice is non-existent. Otherwise shippers/ consignors based outside the country would also have to be made noticees and be subject to the same penal provisions as the importers themselves in each and every proceedings. Contemplation of such a jurisdiction caricaturises the customs enforcement. The situation of the appellant is not much different from that of shippers/ consignors of the goods.

Accordingly, the imposition of penalty on the appellant for an alleged act that has nothing to do with the obligation devolving on imports under Section 46 and Section 47 of the Customs Act, 1962 may not be proper. Lack of jurisdiction that precludes the appellant from approaching the Settlement Commission is a clear indication that the provisions of Section 112 were not intended to cover persons who are not concerned with the goods after its landing in India.

DISCUSSION AND CONCLUSION:- *In this regard, the noticee' plea that he had shifted to United Arab Emirates much prior to the time when the notification enhancing the duty on dry-dates was issued does not make any difference to the case. I also find that the Noticee has also stated that there is no material evidence of delinquent conduct on their part and also no ulterior motive in the case. In this regard I find that it has been established in the investigation that Shri Kush Agarwal was the main person involved in the whole web of import under taken by this syndicate consisting of Shri Agarwal and the importers and as the owner of M/s GVO Global FZC, UAE, Shri Kush Agarwal was the brainchild behind this re- routing of the said impugned i.e. 'Dry dates of Pakistan origin' through UAE in all three*

cases . Initially he contacted various Indian importers, who had stopped importing dry dates from Pakistan after enhancement in the import duty to 200% and encouraged them to import the same Pakistan origin dry dates fro his firm & by supplying the said goods on credit basis. It has also been substantially established that he was not only engaged in supplying the said impugned goods i.e Dry dates of Pakistan origin' to the Indian importers through his firm i.e. M/S GVO Global FZC, UAE, but also managed & arranged all the import documents especially the concocted Certificate of origin (COO) issued by the concerned UAE authorities relating to the said import consignments of Dry dates of Pakistan origin. Besides the plea of the Noticee that being exporter based in foreign country, penalty under Section 112 & of the customs Act 1962 can not be imposed on him, is also not acceptable as Shri Agarawal is an Indian citizen , having a full- fledged office operating at Noida. There all provision of any law of the land are squarely applicable on him and any violation of the same attracts penal action against him. I also find that facts and circumstances of the case cited by the Noticee is entirely different from the instant case.

(iv) SUBMISSION ON MERITS:- *The Noticee has argued that there is no plausible reason or material to attribute ill-motive or culpable mind to the noticee. As a matter of fact he undoubtedly believed and so maintains that the country of origin was UAE and nothing else. It is an accepted position of Customs in countries throughout the world that many a times; the goods are kept in the warehouse as 'trans-shipment` intended to be exported again awaiting good offering of price. In such eventuality, it is quite legal for the purchaser of the material to export the material to its customer in another country. It is inherent in import-export business practice in the usual course of business and nothing amiss can.be imputed either to the exporter of importer in such a case since it is based on mutual contract*

between parties and very well within the framework of international trade practices as also ratified by the International Chamber of Commerce (ICC); that there is no material to infer any conspiracy, meeting of mind between parties to evade higher amount of duty. Pertinently, the role of answering noticee no.3 gets over once the material has been loaded from the port of Jebel Ali'. In so far the 'meeting of mind' and "collusive bidding' the Department has failed to adhere to the established principle which governs this aspect and the basic requirements before it could be inferred that there was a meeting of mind. The law in this regard is explicitly clear; that aware of the misuse of the law of conspiracy Woodroffe & Amir Ali in Law of Evidence, l6thEdition, Page 576 stated:-

"The wide range of evidence in conspiracy cases has led judges to insist upon careful scrutiny of the evidence. Fitzgerald, J., in Irish State Trials of 1867 said: "The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously guarded and never to be pressed beyond its true limits..

To conclude, the crime of conspiracy afford supports for the proposition that criminal law is an instrument of Government. The opportunity which the vagueness of this crime can offered to governmental operation has been recognized by an independent judiciary. It creates a genuine fear in all minds So Prof. Sayre writes : "A doctrine vague in its outline and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to law : it is a veritable quicksand of shifting opinion an ill-considered thought.

That the Show-cause Notice under reply is beset with conjectures and surmises rather than proper investigation & collation of substantive material material/evidence and appreciation of the facts & circumstances unearthed / revealed during the protracted investigation which was

biased, partisan and tainted, and is a result of jumping on perfunctory half-baked conclusions un- permitted by law because the limited extent of appreciation discernible from the material gathered or reflected in the SCN is contrary to the well-established principles governing the finding of a prima facie case for the purpose of seizure and initiating proceedings.

DISCUSSION AND CONCLUSION :- I find the counsel has contested that as a regular practice, the goods are kept in the warehouse as 'trans-shipment intended to be exported again &.it is quite legal for the purchaser of the material to export the material to its customer in another country, based on mutual contract between parties and very well within the framework of international trade practices of the International Chamber of Commerce (ICC); ; that the role of noticee no.3 gets over once the material has been loaded from the port of Jebel Ali'. In this regard , I find that a detailed discussion in this subject has already been made by me in the preceding para while discussing the first point of the Counsel and I do not find it necessary to reiterate the same here.

I also find that the Counsel of the Noticee has claimed that that there is no material to infer any conspiracy, meeting of mind between parties to evade higher amount of duty. In this regard I would like to quote the meeting of Shri Kush Agarwal with importers, when they (importers)visited UAE, as categorically stated in the Statements of Shri B.N.Rai and Shri Saurabh Maheshwari, recorded under Section 108 of the Customs Act 1962. In these statements they also informed about their regular telephonic conversation with Agrawal on relation to the import of impugned dry dates.

3. M/S B N INTERNATIONAL IN R/O SCN NO. DRI/LZU/CI/26/IN-14/BN/2019

Shri Brijendra Narain Rai, Noticee No 2, and proprietor of M/s B.N. International, Mall Road Kanpur (Noticee No. 01)

appeared for virtual Hearing for him and his firm as well on 23.12.2020. During the personal hearing, Shri Rai stated that he established this firm M/s B.N. International, Mall Road, Kanpur in 2018 to export vegetables; that he visited Dubai to sort-out some business /cargo related problems of vegetable export, where he came into contact with Shri Kush Agarwal; that after his return to India, Shri Kush Agarwal contacted him telephonically and offered him to import dry dates on credit basis, on which he consented and started importing dry dates (geRT), but faced this problem; that he joined this business of import of dry dates due allurement of profit and for growth of his business; that he is not in touch with Shri Kush Agarwal for a long time that his (Shri Rai's) refusal for payment of the impugned consignment may be the reason for the same; that he does not know much about Shri Kush Agarwal, but someone told me that Shri Kush Agarwal resides at Ghaziabad;

DISCUSSION AND CONCLUSION :- After the confession of Shri B,N. Rai that he got himself involved in this malpractice due to the allurement of profit and for growth of his business, there is no further scope of discussion.

4. AKASH KUMAR GUPTA, VIKAS KUMAR GUPTA AND SHAKTI TRADER THROUGH SHRI RAGHVENDRA PRATAP SINGH IN RESPECT OF SCN NO .:- DRI/LZU/CI/26/INT-14/SHAKTI TRADERS/2019 ALL DATED 28.09.2020.

On behalf of the afore said three noticees, Shri Raghuvendra Pratap Singh submitted defense reply dated 02.01.2021, wherein it is submitted that they have imported the said 'dry dates' with valid documents and they possess all the legal documents related to the consignment; that the charge framed by DRI officers in SCN that the goods have been smuggled, is wrong; that the DRI officers recorded their statement forcibly, we refute the same and not agree

what they have recorded; that the dry dates has been imported from UAE not from Pakistan

DISCUSSION AND CONCLUSION:- *I find that though they have claimed that the import of the said dry dates was done with valid records, but did not produce any evidence in support of their claim. The confessional statements of Shri Akash Kumar Gupta and Shri Vikas kumar Gupta, never retracted till this submission duly supported with other cogent evidences and corroborative ones had ciearly exposed this unholy alliance of Noticees The allegation of use of duress, coercion and threat by officers of DRI in recording of statements had already been discussed in the preceding para in detail and I do not find it necessary to reiterate the same here.*

PENALTY ON THE NOTICEES:-

31.1. I find that penalties have been proposed on all Noticees of three Show Cause Notices, detailed as under :-

S.NO	*SCN NO & DATE*	*NOTICEES*	*SECTION UNDER WHICH PENALTY PROPOSED*
01.	*DRI /LZU/CI/26/INT-14/RL/2019/10215 dated 28.09.20*	*(i)M/s Raghunath Laxminarayan, Ramganj, Kanpur*	*112(a) and/or 112(b)*
		(ii) Shri Saurabh Maheshwari, Kanpur.	*114 AA*
		(ii) Shri Kush Agarwal, Ghaziabad	*112(a) and/or 112(b)& 114 AA*
02.	*DRI/LZU/CI/26/IN-14/BN/2019 dated 28.09.20*	*(i) M/s B.N. International, Mall Road, Kanpur*	*112(a) and/or 112(b)*
		(ii) Shri Bijendra Narayan Rai	*114 AA*
		(iii) Shri Kush Agarwal, Ghaziabad	*112(a) and or 112(b)& 114 AA*

03.	*DRI/LZU/CI/26/INT-14/BN/2019/ Shakti Traders dated 28.09.20*	*(i) M/s Shakti Traders, Gorakhpur*	*112(a) and/or 112(b)*
		(ii) Shri Vikas Kumar Gupta, Gorakhpur	*112(a) and/or 112(b)& 114 AA*
		(iii) Sri Akash Kumar Gupta Gorakhpur	*112(a) and/or 112(b)& 114 AA*
		(iv) Shri Kush Agarwal, Ghaziabad	*112(a) and/or 112(b)& 114 AA*

31.2 I find that in the impugned three Show Cause Notices penalty under Section 114 AA has been proposed against Shri Saurabh Maheshwari of M/s Raghunath Laxminarayan, Ramganj, Kanpur, (SCN NO.DRI LZU/CI/26/INT 14/RL/2019/10215 dated 28.09.2020) Shri B.N. Rai, Kanpur (SCN No:- DRI/LZU/CI/26/IN-14/BN/2019 dated 28.09.2020) and on Shri Vikas Kumar Gupta, Gorakhpur & Sri Akash Kumar Gupta, (SCN No;-DRI/LZU/CI/26/INT-14/BN/2019/ Shakti Traders dated 28.09.2020) & against Shri Kush Agarwal in all three Show Cause Notices.

In this context, before discussing the penalization on the noticees under this section, I am reiterating the Section 114AA of the Act as under:-

[Section 114AA of the Customs Act, 1962 is reproduced as under:-

"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."

31.3 I also find that in the impugned three Show Cause Notices penalty under Section 112 (a) and/or (b) has been .proposed against M/s Raghunath (SCN No.DRI/LZU/

CI/26/INT- Laxminarayan, Ramganj, Kanpur 14/RL/2019/10215 dated 28.09.2020) Shri Bijendra Narayan Rai (SCN No:- DRI/LZU/CI/26/IN-14/BN/2019 dated 28.09.2020) M/s Shakti Traders, Shri Vikas Kumar Gupta, Gorakhpur & Sri Akash Kumar Gupta, (SCN No;- DRI/LZU/CI/26/INT-14/BN/2019/ Shakti Traders dated 28.09.2020) & against Shri Kush Agarwal in all three Show Cause, Notices.

a) Whether penalty is imposable under Section 112(a) & (b) of the Customs Act, 1962:-

On this point, I observe that the investigating agency has framed two separate charges one proposing therein imposition of the penalty simultaneously under sections 112(a) and or 112 (b) of the Customs Act, 1962 on the above mentioned noticees for their involvement in the case. I believe that the penalty under Section 112(a) and 112 (b) should be imposed on the basis of extent of involvement and role of each noticee in the current episode. For the sake of convenience and utilization of time, I am clubbing both the proposed charging paras for imposition of penalty on the noticees. I am replicating the Section 112 of the Customs Act, 1962 again for discussion of an important issue-

SECTION 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 person,- 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,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;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent of the duty sought to be evaded or five thousand rupees, whichever is higher :

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty SO determined;]

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;]

(iv) in the case of goods falling both under clauses (i) and (ii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;]

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty 1[not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]

On perusal of the sub-section (a) and (b) of the Section 1 12, it appeared that sub-section (a) is imposed in the cases

of omission or commission or abetment while sub-section (b) is imposed in cases of carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing of goods liable to confiscation Section 11 of the Customs Act, 1962

Now I proceed to discuss the individual roles of every Noticee to decide the imposition of penal action against them.

ROLE OF THE NOTICEES:-

32. In view of the discussion above and from the investigation conducted, it appeared that the whole activity of import of Dry dates of Pakistan origin was carried out under a well-planned strategy, in which S/ Shri Kush Agarwal, Saurabh Maheshwari, B.N.Rai, Vikas Kunar Gupta & Akash Kumar Gupta have played active roles in importing the said dry dates by submitting false declaration for their respective firms, and showing the country of origin as UAE instead of Pakistan in their respective Certificate Of Origin submitted before the Department It appeared that the following persons have had specific roles for their respective firms in the whole operation of smuggling of Dry dates:

(i) SHRI SAURABH MAHESHWARI: *…..*

(ii) SHRI BRIJENDRA NARAYAN RAI:- *……*

(iii) SHRI KUSH AGARWAL:-

a) KINGPIN: I find that it has been established in the investigation that Shri Kush Agarwal has been alleged to be the main person involved in the whole web of import under taken by this syndicate and as the owner of M/s GVO Global FZC, UAE was the brainchild behind this re-routing of the said impugned i.e. 'Dry dates of Pakistan origin' through UAE in all three cases . He is not only engaged in supplying the said impugned goods i.e 'Dry dates of Pakistan origin' to the Indian importers through his firm i.e.

M/S GVO Global FZC, UAE, but also managed 8 arranged all the import documents, especially the concocted Certificate of origin (CO0) issued by the concerned UAE authorities relating to the said import consignments of Dry dates of Pakistan origin. He also encouraged Indian importer to import the said impugned goods by supplying the said goods on credit basis. It, therefore,. appeared that he is the mastermind behind this modus operandi

b) REPEATED OFFENDER:- I also find that it has been established during investigation that his role was not confined to one case, but in a very systematic manner, he made contact with various importers of India and persuaded them to indulge in this unholy nexus and also assured them to make all manipulations in the records related to dry dates of Pakistan origin, showing them as of UAE origin.

c) TOTAL NON-COOPERATION:- I also notice that Shri Kush Agarwal failed to appear on any of the dates fixed for appearance during investigation and even during the process of adjudication. Thus, it therefore is quite evident that he has tried to escape investigation and appeared to have adopted the delay delaying tactics by not cooperating in the investigation. Further, if he was innocent he would had cooperated with the investigating agency and would had presented his case of non-involvement in the subject case. On the contrary, he always tried to ran away from the authorities and attempted to manipulate & deviate the investigation

d) ROLE EMERGED AS PER THE STATEMENTS OF RELATED PERSONS:- Role of Shri Kush Agarwal emerged during the investigation & mention of him in the statements of other noticees /concerned persons :-

(i) SHRI ANIL AGARWAL, THE MANAGER OF M/S PADAM PARMESHWARI VENTURES PVT. LTD., GHAZIABAD:- In his statement dated 06.12.2019 stated that he was very well aware that Dry dates imported by

M/S Padam Parmeshwati Ventures Pvt.Ltd.in 08 nos. of containers in the months of June' 19 & August 19 from M/S GVO Global FZC, UAE was of Pakistan origin ; that before this import, Shri Kush Agatwal discussed the matter with him and told that he has devised a modus operandi for importing Dry dates of Pakistan origin into India by re-routing the said goods through Dubai, UAE & also revealed that he would manage Certificate of origin' of the said Dry dates of Pakistan origin issued by the UAE authority and accordingly, the said Dry dates procured from Pakistan would be treated as produce of UAE ; that thereafter, Shri Kush Agarwal got prepared all the import documents including Certificate of origin in Dubai, UAE in respect of the said 08 (eight) nos. of containers of Dry dates of Pakistan origin.

(ii) SHRI SAURABH MAHESHWARI PROP. OF M/S RAGHUNATH LAXMINARAYAN, KANPUR :- In his statement dated 18.10.2019 stated that he received a call on his mobile no. from Kush Agarwal from Dubai who told him that he (Kush) was engaged in the business of Dry dates in Dubai and he would ully arrange the supply of Dry dates from Dubai Kush Agarwal further told him that he does not need to take any pain regarding documents related to the said import of Pakistan origin Dry dates.

(iii) SHRI BIJENDRA NARAYAN RAI, PROP, OF M/S B.N.INTERNATIONAL, KANPUR:- In his statement dated 26.09.2019 stated that he visited Dubai for search of new market, where during a meeting with other traders , he met Shri Kush Agarwal of M/S GVO Global of Ajman, UAE, who assured to supply dry dates on credit ; that initially, he had imported one container of Dry dates from Shri Kush Agarwal on credit, which was sold in the market very easily ; Further, four containers of Dry dates were also moved during this period, hence, no payment has been made by him with respect to said imports of Dry dates ; that Dry dates to be imported vide said invoices are of UAE origin,

as stated by his supplier and in this regard, he handed over all the relevant documents like invoices, Packing lists, Bills of Lading and Certificates of Origin issued by Ajman Chamber, UAE to his CHA for customs clearances.

In his another statement dated 12.10.2019 stated that that he visited Dubai in the year 2018 for business purpose, where his client Shri Sayyadji introduced him to Shri Kush Agarwal, the owner of M/S GVO Global FZC, UAE ; that Shri Kush Agarwal assured him that though Dry dates had been procured by him from Pakistan, but all the import documents including COO (certificate of origin) relating to the import consignments of said Dry dates would be issued from UAE and there would be no problem in customs clearances of the said goods and the said goods would be supplied on credit basis.

(iv) SHRI VIKAS KUMAR GUPTA:- In his statement dated 04.10.2019 stated that that he had a talk with Shri Kush Agarwal, who revealed him that they were supplying Pakistan origin Dry dates to India by re-routing the same through UAE, but all the concerned import documents have been got prepared in the name of UAE ; that regarding certificate of origin, Sh.Kush Agarwal informed that he would arrange the same issued from UAE itself for smooth importation of the said goods, because as per the documents these Dry dates would appear as of UAE origin and the actual Pakistani supplier of these Dry dates would not come into picture, as already been done in respect of previous supply of Pakistan origin dry dates to other Indian importers made by him (Shri Agarwal)

In the light of above discussion, I conclude that Shri Kush Agarwal is also liable to penal action under the provisions of the Customs Act, 1962. (4) SHRI VIKAS KUMAR GUPTA , OF M/S SHAKTI TRADERS, GORAKHPUR:-I also observe that being the importer of the said impugned goods i.e. 'Dry dates of Pakistan origin', has played an active role in importing the said goods at lower rate of Customs duty for

his firm M/s Shakti Traders, Gorakhpur , by mis-declaring the 'Country of origin' of the said goods as "UAE" in the said concocted Certificate of origin (COO) in connivance with Shri Kush Agarwal, the owner of M/S GVO Global FZC, UAE and supplier of the said impugned goods. He was very well aware that the impugned goods to be imported are of Pakistan origin and its re-routing through UAE. Therefore, he is liable to penalty under the provisions of the Customs Act, 1962 . He is also liable to penalty under Section 114AA of the Customs Act, 1962 in as much as he knowingly & intentionally has submitted the concocted import documents before the Customs Authority for assessment with the intention to evade payment of higher rate of Customs duty.

(5) SHRI AKASH KUMAR GUPTA OF M/S SHAKTI TRADERS, GORAKHPUR: *I also observe that Shri Akash Kumar Gupta ,being the importer of the said impugned goods i.e. 'Dry origin', has also played an active role in importing the said goods at lower rate Of Customs duty for his firm M/s Shakti Traders, Gorakhpur , by mis- declaring the Country of origin' of the said goods as UAE in the said concocted Certificate of origin (CO0) in connivance with Shri Kush Agarwal, the owner of M/s GVO Global FZC, UAE and supplier of the said impugned goods. He along with his elder brother, Shri Vikas Kumar Gupta was very well aware that the impugned goods to be imported are of Pakistan origin and its re-routing through UAE . He, in fact, discussed this matter with Shri Manoj Bansal from Gorakhpur as evident from 02 audio files, extracted from his brother's phone, wherein he categorically admitted that the said import consignments Of Dry dates are not a produce Of UAE and are being supplied to them after importing the same from Pakistan, He also confessed in the conversation that they are satisfied with the Said import as this import of Dry dates Of Pakistani Origin is rerouted through Dubai and they have not imported the said goods*

directly from Pakistan. Therefore, he is liable to penalty under the provisions of Section of the Customs Act, 1962.

WHETHER PENALTY CAN BE IMPOSED ON BOTH THE FIRM & IT'S PROPREITOR IN A PROPREITORSHIP FIRM :-

33. …...

FINAL CONCLUSION ON THE PENALTIES ON THE NOTICEES :-

The individual role of Shri Saurabh Maheshwari, (SCN No. DRI /LZU/CI/26/INT-14/RL/2019/10215 dated 28.09.2020) Shri Bijendra Narayan Rai (SCN No:- DRI/LZU/CI/26/IN-14/BN/2019 dated 28.09.2020) Shri Vikas Kumar Gupta, & Sri Akash Kumar Gupta, (SCN No;-DRI/LZU/CI/26/INT-14/BN/2019/ Shakti Traders dated 28.09.2020) & Shri Kush Agarwal (in all three Show Cause Notices) have been discussed in detail in the preceding paras of this order that how the impugned goods i.e. Dry dates of Pakistan origin were attempted to be imported by the said three importers i.e. M/s Raghunath Laxminarayan, Kanpur, Shri B.N. International, Kanpur & M/s Shakti Traders, Sahebganj, Gorakhpur, through ICD, Panki, Kanpur with the active support of Shri Kush Agarwal in all three cases, by mis-declaring country of origin as UAE of the said impugned goods with the intention to evade payment of higher rate of Customs duty @ 200% imposed vide Notification No. 05/2019-Cus dated 16.02.2019 on Pakistan origin goods. Thus it is obvious that all the above- mentioned persons/firms knowingly and intentionally submitted false declaration, showing the Country of Origin of these impugned goods as UAE, instead of Pakistan with the active connivance of Shri Kush Agarwal as discussed in detail in this Order. It also evident that Shri Saurabh Maheshwari , Shri B.N.Rai, Shri Vikas Kumar Gupta, & Sri Akash Kumar Gupta knowingly and intentionally made, signed/ used, false and incorrect. declarations, / document during the

import of import of the impugned dry dates . Thus, I conclude that by this act, they have rendered themselves for penal action under Section 114 AA of the Customs Act 1962.

34. Moreover, I find imposition of both these sections 112(a) and 112 (b) of the Act ibid simultaneously shall be a little illogical and imprudent, as both these sections possess different gravity. Section 112(a) is imposed in the cases where offence committed by one is light in nature, whereas 112(b) is imposed where offence is grave in nature. I find that the impugned goods i.e. Dry dates of Pakistan origin were attempted to be imported by the said three importers i.e. M/s Raghunath Laxminarayan, Kanpur (SCN No.DRI LZU/CI/26/INT- 14/RL/2019/10215 dated 28.09.2020), Shri B.N. International, Kanpur (SCN No:- DRI/LZU/CI/26/IN-14/BN/2019 dated 28.09.2020)& M/s Shakti Traders , Gorakhpur through Shri Vikas Kumar Gupta, Gorakhpur & Sri Akash Kumar Gupta, (SCN No;- DRI/LZU/CI/26/INT-14/BN/2019/ Shakti Traders dated 28.09.2020) & Shri Kush Agarwal (in all three Show Cause Notices) through ICD Panki, Kanpur, by mis-declaring country of origin as UAE of the said impugned goods with the intention to evade payment of higher rate of Customs duty Accordingly, I find that it is well established fact that a syndicate involving all three firms & persons were actively involved in the subject case and have played their respective roles in respect of goods liable to confiscation Section 11 of the Customs Act, 1962. Further the offence being of grave nature which have been duly discussed by me infer me to render that they are liable to penal action under Section 112 (b) of the Customs Act, 1962."

4.4 We find that the entire case of the revenue rests on the following evidences:

(i) Sample examination report given by M/s Atul Rajasthan Date Palms Limited.

(ii) Statements of certain related unrelated persons with the imports made.

(iii) Non compliance with FSSAI Regulations, 2011

(iv) FZ Transit Out Customs declarations which were filed with Dubai Customs, Federal Customs Authority, UAE for transit of containers containing Dry Dates and obtained from the Shipping Lines.

4.5 Before we further take up the matter for discussion we are constrained on plain reading of the impugned order that the same has been passed with a pre conceived mind, without application of judicial mind to the facts and law in the matter. Impugned order records in respect of an affidavit filed by the revenue in case of M/s Raghunath Laxminarayan Agarwal, in writ petition No 11283 M/B of 20202 challenging the seizure made (still pending in High Court) staing as follows:

> *"5. Further enquiry regarding genuiness of the Certificate of Origin submitted by the petitioner at ICD Kanpur for clearance of is underway."*

Without waiting for the outcome of enquiry which was being made by the revenue same authority proceeds to adjudicate the case. Further no explanation has been given in respect of such enquiry. Even the show cause notices are dated 28.09.2020 and the in counter affidavit filed on28.01.2021 certain enquiries being made in respect of "Certificate of Origin" has been mentioned. In our view either revenue was itself not sure of sufficiency of evidences or was misleading the Hon'ble High Court by way of this submission. The enquiry that we can contemplate could have been made only with the certificate of origin issuing authority UAE as per Rule 6 of the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020. However if any such enquiry was being made the outcome of the said enquiry should have been part of the impugned order, for the reason that the only case is in respect of the said Certificate of Country of Origin.

4.6 Certificate of Origin of the shipments is accompanied by following documents where in origin is being decided by UAE Government authorities:

(a) PHYTO SANITARY CERTIFICATE: issued by Ministry of Climate Change & Environment UAE wherein the ministry has verified the origin as UAE the same certificate is duly barcoded

(b) FUMIGATION CERTIFICATE: issued by pesticide company which is duly approved by Ministry of Agriculture UAE wherein in each Fumigation certificate they have specifically mentioned origin as UAE.

The Adjudicating authorities straightway rejected the Country of Origin without even taking note of the evidences in available on the record in form of Phyto Sanitary Certificate and Fumigation Certificate. If the certificate was to be rejected the same should have been done in consultation with the Cerificate issuing authority. Thus, the Custom Authorities under Custom Act, 1962, have no jurisdiction to challenge the documents issued by the Government Authorities of the other Country as has been held in the following cases:

- Pradip Polyfils Pvt. Ltd. [2001(173) E.L.T. 3 (BOM.)]
- Khanna Paper Mills Ltd. [2011(273) E.L.T 149 (Trib.-Del.)]
- S. Chandra Sekhran [2011 (132) E.L.T 751 (Trib-Chennai)]
- Titan Medical Systems Pvt. Ltd. [2003 (151) E.L.T 254 (S.C)]
- Symphony International [Final Order No A/10194/2024 dated 23.01.2024}

  "8. Considered. It is clear from the factual narrative that, the certificate of origin in the present instance was issued by the designated authority i.e 'Ministry of International Trade and Industry (MITI) Malaysia' which is competent authority to issue such certificate under ASEAN FTA (AIFTA) mentioning the Regional Value content (RVC) to be much higher than stipulated 35% i.e. 47%. The Free Trade Agreement stands incorporated in the Customs Tariff vide Notification No. 46/2011-Cust., dated 01.06.2011 available to impugned product i.e. Natural Cocoa Power originating from Malaysia. The differential duty of Rs. 6,44,233/- was demanded by the department, denying benefit on the

ground that in another investigation taken up by DRI in respect of certificate of origin pertaining to another party in the year 2014, Cocoa Beans were suspected to be derived from Ghana and not Malaysia by that importer. The matter was taken up by director (ICD) of CBEC, New Delhi with the High Commissioner of Malaysia in Delhi vide letter F. No. 456/12/2013-Customs–V dated 10.01.2014 for verification. The party involved in that case of the year 2014, was M/s. Morde Foods Pvt. Ltd., and the exporters were two Malaysian companies. In response to the letter of Director (ICD), CBIC, New Delhi, the Ministry of International Traders Industry (MITI) vide letter dated 18.03.2014 informed CBEC that they had conducted internal investigation by visiting two factories of M/s. J B Cocoa and M/s. Guan Chong Cocoa who were suppliers in that case and both had confirmed that value addition of 35% was obtained at theirs. However, company did not provide cost data due to data privacy and since the Board was of the opinion that under AIFTA cost data cannot be denied, therefore, in the present case in the Year-2018, since impugned goods have been supplied by M/s. Guan Chong Cocoa as manufacturer, the proceedings for denial of exemption despite claim of 47% value addition have been initiated even without attempting to verify the documentary evidence by way of the Certificate of Origin by the designated authority issued under the agreement. We find that this is nothing but attempt to make case on the basis of assumptions and presumptions even without as much as verification having been attempted to be made by the authorities. The same is therefore, not maintainable. Department has been provided a documentary evidence by way of a stipulated certificate from the designated authority under the agreement. On production of such agreement which is in the nature of the documentary evidence, the onus to prove fakeness of its content or otherwise clearly shifts on the department.

Unlike, the course of action adopted in respect of other importers who made imports in the Year-2014, the department has not even attempted to do verification with Government of Malaysia and has proceeded in the instant case, on the basis of following assumptions and presumptions without rebuttal of the documentary evidence procured and produced by the appellant:-

- *That in absence of cost data in relation to imports in 2014, the¬ certificate duly verified by the Malaysian authority was presumed to be in genuine even in this case, one of the party being same. Despite much higher claim of 47% CV claim by the appellant in this instance, four years later.*
- *It was also presumed that Malaysian authorities will not be able to get¬ cost data on the manufacturing unit and will simply agree to the percentage on the basis of their own verification of 47%.*
- *That there is no need of any verification and old verification or lack of¬ it holds goods in the Year 2018 also.*
- *That the onus of getting the contents of certificate verified has shifted¬ from Government to Government basis (G to G) to (G to I) basis i.e. Government to importer basis.*

8.1 Case law relied upon by the department in the matter of M/s. SURYA LIGHT Vs. COMMISSIONER OF CUSTOMS, BANGALOR as reported in 2008 (226) E.L.T 74 (Tri. – Bangalore) and 2007 (217) E.L.T. 437 reported in ALFA TRADERS Versus COMMISSIONER OF CUSTOMS, COCHIN are clearly distinguishable, as in case of former invoice was faked and in the latter judicial notice of no production in country of origin of the relevant agricultural product was taken and percentage of value addition in concerned country was never in dispute.

9. In view of the forgoing, in the present case in the face of certificate of origin having been produced and no

verification process having been conducted before issuance of show cause notice, the demand of duty cannot be sustained. We also find that the appellant has correctly relied from the decision of M/s. R.S INDUSTRIES (ROLLING MILLS) LTD. Versus COMMISSIONER OF C.EX., JAIPUT-I as report in 2018 (359) E.L.T. 698 (Tri. - De.) to emphasize that the certificate issued by the competent authority of exporting country is to be given weightage. Similarly, the decision of Hemang Resources Ltd V/S Commissioner of Customs (Prev.) Jamnagar of this bench as reported in 2022 (381) ELT 404 (Tri. Ahmed.) is squarely applicable, which made incumbent upon department to discharge burden to get verification done from concerned Government. Therefore, in absence of such burden having been discharged or even having been attempted till such belated stage, the show cause notice cannot be sustained. Similarly, the decision of this bench in the matter of Alfakrina Exports V/s. Commissioner of Customs, Mundra vide Final Order No. A/11759/2023 dated 23.08.2023 which has relied upon various decisions of High Courts and Supreme Courts in holding that without check of authenticity of the Certificate of Origin issued by Malay Chamber of Commerce Malaysia, Certificate of Origin and consequent benefit cannot be denied, equally holds good in the present instance."

- Shirazee Traders [Final Order No. A/12060/2023 dated 15.09.2023]

  "4.1 We find that to displace the certificate of origin issued by the Malaysian authority, which is in the nature of documentary evidence, the verification process by the Customs Authorities of India reference to issuing authorities to do a retroactive check is required. In the present instance no such request for verification report in respect of the appellant has been brought on record. We find that this fails to comply with the requirement of the Annexure-III (ibid) of the relevant free trade agreement."

4.7 We do not find any merits in the reliance placed by the adjudicating examination report given by M/s Atul Rajasthan Date Palms Limited, as the same is based on the experience of the person signing the said report without stating any reasons. In the case of Ram Prakash [2003 (161) ELT882(T)] following has been observed

> *"7. The opinion given by Shri Jai Prakash Gupta that the impugned scrap is of foreign origin is not acceptable for the simple reason that he has tendered his opinion without mentioning the reasons to arrive at such a conclusion. The learned Counsel for the appellants had rightly contended that he is not an expert as he has never imported copper scrap. He had himself deposed in his cross-examination that it is difficult to give a definite criteria of assessing imported copper scrap; it can only be assessed by a person dealing in this trade. …"*

4.8 Determining Country of origin of any goods is a complex matter and it cannot be decided by way of visual inspection of goods only. In the case of Krishna Das [2014(303) ELT 548 (T)] following has been observed:

> ***"7.*** *Apart from so called expert opinion of Shri Anand Agarwal, there is virtually no evidence on record to reflect that betel nut in question were of foreign origin. The appellants have taken a categorical stand that betel nuts are grown in abundance in Jalpaiguri and Coochbehar in West Bengal and in the entire States of Assam, Arunachal Pradesh, Meghalaya, Tripura, Manipur, etc. Admittedly the consignment was booked from Guwahati to Delhi. The appellants have rightly contended that distance between Guwahati to Delhi is around 2000 kms whereas distance from Nepal to Delhi-I 1500 kms. As such nobody would smuggle the goods from Nepal boarder to Guwahati which is around 900 kms away and then transport the goods from Guwahati to Delhi after crossing State barriers at places in between.*

8. *Apart from the fact that there is no evidence on record to show that the foreign origin of the goods, I also note that the betel nuts are neither notified under Chapter IV of the Customs Act nor under Section 123 of the Act. As such, the onus to prove that the same have been smuggled lies very heavily upon the Revenue and is required to be discharged by producing sufficient positive and tangible evidence. The Revenue in the present case apart from relying upon so called expert opinion as regards the foreign origin of the goods have not produced any evidence to establish the smuggled nature of the goods. It is not the case of the Revenue that betel nuts of foreign origin are not legally imported into India and the same are not available in the open market. As such, in the absence of any evidence to show that betel nuts in question were actually smuggled, the confiscation of the same cannot be upheld."*

4.9 Similarly the expert opinion taken from ADRF in respect of import of Betel Nuts has been rejected by the Hon'ble High court of Patna, Allahabad and Meghalaya. The relevant excerpts are reproduced below:

Ayesha Exports [2020 (371) E.L.T. 353 (Pat.)]

12. *Having heard Learned Senior Counsel for the petitioner and Learned Additional Solicitor General of India, this Court is of the considered opinion that once the Learned Coordinate Bench of this Court has held that in absence of there being any material to show that M/s. Arecanut Research & Development Foundation, Mangalore is an accredited laboratory by competent authority under the Act and Rules, it's report cannot have a consequence of fastening of any legal liability and 'No legal liability can flow from the report of such an institution' the respondent authorities were not justified in again relying upon the ARDF Mangalore's report to justify the seizure in question. In fact such an attempt of the respondent authorities would be*

contemptuous in nature as it is likely to cause harassment to the traders, by not following the judgment of the Court.

13. *This Court also finds from Annexure-P/12 that it is a reply of the Directorate of Arecanut & Spices Development, Government of India which clearly provides that no laboratory test have been standardized for tracing the country of origin.*

Maa Gauri Traders [2019 (368) E.L.T. 913 (All.)]

"15. *Applying the principles enshrined in the aforesaid decisions to the facts of the case at hand, it is apparent that the CESTAT after considering all the material on record including the orders passed by the authorities below, have given a concurrent finding of fact that the Revenue could not establish the foreign origin of the betel nuts. The documents produced by the respondents indicated that the goods in question were purchased from local markets, and in support of the purchases they produced the market receipts which has not been doubted by the Revenue Authorities themselves at any stage of the proceedings. The report of the ARDF has also been held to be not reliable inasmuch as it could not be shown with any degree of certainty that the origin of the betel nuts could be established by testing in a laboratory, as is clear by the answer to the RTI query given by Directorate of Arecanut and Spice Development, Ministry of Agriculture and Farmers Welfare, Government of Kerala."*

MAA KAMAKHYA TRADER [2024 (389) E.L.T. 185 (All.)]

26.*Third, no material has been shown to us to reach conclusion different from that reached by the Meghalaya High Court in C.C. (Preventive), NER Region, Shillong [2022 (382) E.L.T. 592] wherein it was observed as below :-*

"4. The Division Bench of the Tribunal recordedthe finding that the confiscated betel nut is non-notified goods and therefore, burden to prove the fact of smuggling lies on the

department and same has not been discharged. In this regard, the department relied upon the certificate issued by the Arecanut Research and Development Foundation, Mangalore to show that the confiscated goods/betel nuts are of foreign origin. However, the Tribunal refused to consider this certificate on the ground that the said Institution is not accredited and hence the report was not relied on. The Tribunal in this regard relied on the decision of the Patna High Court reported in 2020 (371) E.L.T. 353 (Pat.)."

Therefore, we are not inclined to give any undue credence to the report of ARDF than it may otherwise deserve.

Thus we are not in position to accord any evidentiary value to this report of M/s Atul Rajasthan Date Palms Limited

4.10 Similarly the reliance placed on the uncorroborated statements without even allowing the cross examination could not be accepted as discharge of burden of proof in the present case to hold that these goods were not of UAE origin. Reliance is placed on the decisions in following cases:

- Vinod Salonika [2009(233) ELT 157(SC)]
- Vishnu & Co. PVT. Ltd. [2016 (332) ELT 793 (Delhi.)]
- Shree Nakoda Ispat Ltd. [2017 (348) ELT 313(Tri. Delhi)]
- Tarachand Naresh Chand [2017 (355) ELT 495(Trib. Delhi.)]

As this issue has been considered in detail by us in our own Final Order referred in next paragraph we need not further elaborate here.

4.11 The similar case in of importation of Dry Dates relying on the same evidences have been considered by us in case of Omega Packwell [Final Order No 70331-70336/2024 dated 07.06.2024] and following was observed:

"17. On the issue of country of origin, we find that in all documents viz., invoice, country of origin certificate, phytosanitary certificate etc. country of origin of dry dates in present case was shown UAE. Slips tagged with bags of dry dates were showing country of origin of the goods

UAE. No enquiry was conducted by the Department to prove that country of origin certificate duly issued by the Competent Authority of the exporting country was fake. As per the country of origin certificate, the same was issued by Ajman Chamber of commerce after verification of goods. At Sl.No.12 of the certificate, it has been certified by the Competent Authority of Ajman Chamber of Commerce, UAE that evidences produced before them satisfy that the said goods originate in the country shown in the certificate which is UAE in the present case. It shows that the said certificate was issued after proper verification of origin of goods. Authenticity of the said certificate was never challenged by way of any enquiry from the exporting country. We further notice that phyotsanitary certificate which was issued by National Plant Protection Organization of exporting country also indicates country of origin UAE. No evidence was brought out to infer that country of origin shown in the said phytosanitary certificate was incorrect. Bags of dry dates were found, during physical verification, carrying slips on which country of origin was mentioned as UAE. Mere suspicion is not enough to discard aforesaid documents. Rule 6 of the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 provide as under:

Rule 6. Verification request .-

1. *The proper officer may, during the course of customs clearance or thereafter, request for verification of certificate of origin from Verification Authority where:*
    a. *there is a doubt regarding genuineness or authenticity of the certificate of origin for reasons such as mismatch of signatures or seal when compared with specimens of seals and signatures received from the exporting country in terms of the trade agreement;*

b. there is reason to believe that the country of origin criterion stated in the certificate of origin has not been met or the claim of preferential rate of duty made by importer is invalid; or

c. verification is being undertaken on random basis, as a measure of due diligence to verify whether the goods meet the origin criteria as claimed:

Provided that a verification request in terms of clause (b) may be made only where the importer fails to provide the requisite information sought under rule 5 by the prescribed due date or the information provided by importer is found to be insufficient. Such a request shall seek specific information from the Verification Authority as may be necessary to determine the origin of goods.

2. Where information received in terms of sub-rule (1) is incomplete or nonspecific, request for additional information or verification visit may be made to the Verification Authority, in such manner as provided in the Rules of Origin of the specific trade agreement, under which the importer has sought preferential tariff treatment.

3. When a verification request is made in terms of this rule, the following timeline for furnishing the response shall be brought to the notice of the Verification Authority while sending the request:

a. timeline as prescribed in the respective trade agreement; or

b. in absence of such timeline in the agreement, sixty days from the request having been communicated.

4. *Where verification in terms of clause (a) or (b) of sub-rule (1) is initiated during the course of customs clearance of imported goods,*
    a. *The preferential tariff treatment of such goods may be suspended till conclusion of the verification;*
    b. *T he verification Authority shall be informed of reasons for suspension of preferential tariff treatment while making request of verification; and*
    c. *The proper officer may, on the request of the importer, provisionally assess and clear the goods, subject to importer furnishing a security amount equal to the difference between the duty provisionally assessed under section 18 of the Act and the preferential duty claimed.*
5. *All requests for verification under this rule shall be made through a nodal office as designated by the Board.*
6. *Where the information requested in this rule is received within the prescribed timeline, the proper officer shall conclude the verification within forty five days of receipt of the information, or within such extended period as the Principal Commissioner of Customs or the Commissioner of Customs may allow: Provided that where a timeline to finalize verification is prescribed in the respective Rules of Origin, the proper officer shall finalize the verification within such timeline.*
7. *The proper officer may deny claim of preferential rate of duty without further verification where:*
    a. *The verification Authority fails to respond to verification request within prescribed timelines;*

b. *The verification Authority does not provide the requested information in the manner as provided in this rule read with the Rules of Origin; or*

c. *The information and documents furnished by the Verification Authority and available on record provide sufficient evidence to prove that goods do not meet the origin criteria prescribed in the respective Rules of Origin.*

Nothing has been placed on record by which it can be said any verification request has been made by the custom authorities with concerned authorities in UAE to verify the genuineness and correctness of the Certificate of Origin issued by them. In view of the above concrete proofs regarding country of origin, we hold that said goods were of UAE origin.

We find that in the case of Challissari Kirana Merchant (supra), the Hon'ble Kerala High Court has held that for determination of country of origin due weightage should be given on the country of origin certificate in case of any suspicion. In the case of Yellamma Da Sappa vs. Commissioner of Customs, Bangalore [2000 (120) E.L.T. 67 (Kar.)], the Hon'ble Karnataka High Court has observed as follows:-

> *"9. A valid certificate has been issued and the said certificate, even as on date, has not been withdrawn or cancelled for any alleged violation of the condition by the appellant. Unless the said certificate is cancelled, the Customs Authorities cannot impose customs duty. The seizure of the equipment is only a consequential act that would follow the cancellation of the certificate issued in favour of the Appellant. So long as the certificate is not cancelled, the respondents could not, in our opinion, have initiated seizure proceedings in the case on hand.*

Petitioner-appellant was sent only a questionnaire and the said questionnaire has been answered by the appellant herein. No further action has been taken by the respondents. The Director General of Health Services has also not issued any cancellation of certificate as on date. In these circumstances, we are clearly of the view that without withdrawing or cancelling the certificate already issued, the present seizure cannot stand. Therefore we hold that the seizure effected by the respondents is not in accordance with law. The impugned order of the learned Single Judge, in these circumstances, requires to be set aside and accordingly the same is set aside."

The Tribunal in the case of Alfakrina Exports vide Final Order No.11759/2023 dated 23.08.2023(Tri – Ahmd) on the issue of non-acceptability of Country of Origin Certificate for deciding origin of goods held that the Certificate of country of origin cannot be discarded without checking its authenticity and benefit if any cannot be denied.

In view of the above settled legal position, we hold that goods, in question, were of UAE origin and confiscation of goods on the ground of mis-declaration of country of origin is not sustainable.

18. The Adjudicating Authority has also held that noncompliance of FSSAI Regulations, 2011 in respect of dry dates imported by the Appellants established as slips tagged with bags showing mandatory particulars were not securely affixed. Circular No.9/2015-Cus dated 31.03.2015 issued by CBIC provides that out of charge order by Customs would be given only after receipt of Release Order from FSSAI [para-3(v) of the Circular]. We find that import of food articles is regulated as per provisions of FSSAI (Import) Regulations, 2017. In accordance with the provisions of Regulation 6(10) of FSSAI (Import)

Regulations, 2017, the Authorized FSSAI officer shall reject the consignment not complying with the provisions of Labeling and Packaging Regulations, 2011 at the visual inspection and no sample shall be drawn from the consignment. Similarly, under Regulation 9(1) of FSSAI (Import) Regulations, 2017, it has been again provided that the Authorized Officer of FSSAI shall ensure compliance with the Food Safety and Standards (Labeling and Packaging) Regulations, 20115 in respect of imported food items. It shows that proper officer for pointing out noncompliance of FSSAI Regulations, 2011 of an imported food item is Authorized Officer of the FSSAI. In the present case, the consignment of dry dates was referred to FSSAI for ensuring compliance of FSSAI Act and Rules and Regulations made thereunder. The FSSAI Authorized Officer inspected the consignment and found that the FSSAI Regulations, 2011 was complied with, then, drew the sample and finally issued "No Objection Certificate" vide NOC No.NOC20190005632 dated 30.09.2019. It is certified in the NOC as:-

> *"This office has no objection if the product mentioned above is released from this port as the result of the inspection /analysis shows that the sample conform to the specification under the FSSAI Act and rules and regulations."*

From the above it is established that the proper agency, i.e., FSSAI was fully satisfied with the compliance of the FSSAI Regulations, 2011 in respect of dry dates imported under the said bill of entry. The allegation of the DRI regarding noncompliance of the FSSAI Regulations, 2011 is, therefore, baseless and devoid of facts and the order for confirmation of non-compliance of said Regulation does not hold valid. In the case of Unlimited Nutrition Pvt. Ltd. vs. Commissioner of Customs [2016 (334) E.L.T. 255 (Del.)], it has been observed by the Hon'ble Delhi High Court that

FSSAI is the Authority to clear food items relating to compliance of the FSSAI Regulations.

19. It is further observed that the goods imported under the said bill of entry were physically examined by the Inspector (Exam. Shed) and Superintendent (Exam. Shed) before allowing the clearance and the same were found proper. As per para-1 of chapter-3 of the Customs Manual, it is responsibility of the Examining Officer to check import cargo to confirm the nature of goods, valuation and other aspects for ensuring the compliance of restriction. As per para 4.3 of chapter 8 of the Customs Manual, customs during examination shall exercise „general checks" and if products are not found to be satisfying requirements, clearance will not be allowed. In para 4.4 of chapter 8 of the Manual, „General check" includes verification of product to ensure compliance of labeling requirement also. Examining officers did not express any discrepancy regarding non- compliance of the FSSAI Regulations, 2011. It proves beyond doubt that there was no non-compliance of the FSSAI Regulations, 2011 in the present case. The confiscation order on account of non-compliance of FSSAI Regulations, 2011 is, therefore, invalid.

20. In the present case, confiscation of goods has been ordered under section 111(m) of the Act, 1962 on the ground that country of origin of goods has been mis-declared. Dry dates imported, in the instant case, were ordered by the Adjudicating Authority to be of origin of Pakistan. From the records we find that dry dates were shipped by the exporter at Jebel Ali port in UAE, in invoice country of origin was shown as UAE and certificate of country of origin was also with the consignment where country of origin was declared to be UAE. During physical examination of goods, it was found that the country of origin was described as UAE on the packages. Allegation of mis-declaration of country of origin is, therefore, based on assumption and presumption only without any tangible

evidence. There is also no evidence to show that the Appellant was involved in any manner to mis-declare the country of origin. The bill of entry was filed as per invoice, packaging list and certificate of country of origin, declaring therein country of origin UAE provided by the suppler. There was no mala fide on the part of the importer. The importer has declared country of origin as was informed by the overseas supplier in import documents. The import of dry dates is neither prohibited under the Act, 1962 nor under the Foreign Trade Policy. It has already been settled in series of judicial decisions that if the importer files bill of entry on the basis of information provided in invoice and other documents, charge of misdeclaration does not survive. In this context, reliance is placed on the decision of the Tribunal in the case of Agarwal Industrial Corporation Ltd. vs. Commissioner of Customs, Mangalore [2020 (373) E.L.T. 280 (Tri.-Bang.)] where it has been observed that "Mis-declaration of country of origin - Confiscation, redemption fine and penalty - Bitumen shipments loaded in Iran imported through Karwar Port but UAE declared as country of origin - Bitumen not prohibited goods either under the Act, 1962 or Foreign Trade Policy or any other law in force at time of importation of goods - Importer filing bill of entry on basis of documents supplied to him by supplier based at UAE - No document produced by Revenue on record to show involvement of importer in any way in said mis-declaration country". In the case of Dharam Steels Services Pvt. Ltd. vs. C.C. (Import), Nhava Sheva [2013 (297) E.L.T. 291 (Tri.-Mum.)], the Tribunal has held that declaration made in bill of entry as per invoice and packing list of overseas supplier does not show any misdeclaration by the importer and goods are not liable to confiscation. The Tribunal in the case of Penshibao Wang P. Ltd. vs. Commissioner of Customs (Seaport-Import), Chennai [2016 (338) E.L.T. 597 (Tri.-Chennai)] has observed that declaration made in

the bill of entry as per invoice and other documents does prove mis-declaration by the importer if goods are found different. In the case of Wings Electronics vs. Commissioner of Customs, Mumbai [2006 (205) E.L.T. 1146 (Tri.-Mum.)] the Tribunal has held that "the assessments made cannot be reopened now for valuation by taking the shelter of misdeclaration of country of origin as USA when goods were marked as Australia, subsequent to the clearance by the proper officer having assessed & cleared the goods after examination & not having taken cognizance of the said mis-declaration of country of origin. There was & is no mis-declaration of the import. Proceedings of confiscation & duty demands therefore cannot be upheld & are to be set aside." The decision has also been upheld by the Hon"ble Supreme Court as per report [2015 (323) E.L.T. 450 (S.C.)]. The Apex Court has observed that Tribunal setting aside confiscation and redemption fine on the ground that declarations regarding country of origin were to be made by supplier/exporter and that assessment once finalized cannot be re-opened for valuation in guise of mis-declaration of country of origin. In view of above judicial decisions, it is abundantly clear that declaration made in the bill of entry as per invoice and other import document cannot be treated as mis-declaration when there is no proof of involvement of the importer. It is further submitted that there is also no violation of the provisions of the FSSAI Regulation, 2011. Hence, the goods i.e., dry dates were not liable to confiscation under Section 111(m) of the Act, 1962.

21. We find that enquiry against the Appellants was initiated on the basis of intelligence that some unscrupulous importers started importing of dry dates of Pakistan origin by re-routing the same through Dubai and by mis-declaring country of origin subsequent to hike in rate of customs duty on the import of goods of Pakistan origin or from Pakistan to 200% vide Notification

No.05/19-Cus dated 16.02.2019 and due to which import of goods from Pakistan who happened to be a major exporter of dry dates to Indian market was stopped as the same became unviable. The Appellants started import of dry dates of UAE origin from Dubai based M/s GVO Global FZC, after increase in rate of customs duty on the import of dry dates of Pakistan origin, under sale contracts executed between the Appellants and M/s GVO Global. The goods i.e., dry dates were supplied under cover of import documents including country of origin certificate issued by the approved Competent Authority of the exporting country, phytosanitary certificate etc. In all said documents country of origin was declared as UAE. Dry dates were cleared after final assessments of BEs, physical examination and after NOC from FSSAI Authorities regarding compliance of FSSAI Act/Rules/Regulations. Dry dates imported under bill of entry No.4981646 dated 20.09.2019 at ICD Dadri was seized and were confiscated on the basis of three evidences namely, (i). expert opinion obtained from Atul Rajasthan Date Palm Ltd., (ii). Export Declaration which was obtained from the shipping line and (iii). statements of Chandan Chaudhary and Anil Kumar Agarwal which were indicating, as per the Adjudicating Authority, that the said goods were of Pakistan origin but the same was mis-declared to be of the origin of UAE. It is found that on the aspect of country of origin of dry dates imported by the Appellants, opinion given by ARDPL, Jodhpur is as follows:- "On opening and upon physical examination the above representative samples, based upon my experience, my opinion regarding country/ area of origin is Indian subcontinent". ARDPL is engaged in production and marketing of tissue culture raised date palm plants with the aim to enhance the economy and ecology of the arid regions of India as per details available on its website www.ardp.co.in. It is not any scientific laboratory having expertise in identification of origin of dry

dates. It is further noticed that experience and qualification of the person inspecting sample was not disclosed. In absence of such declaration, it is very difficult to recognize him as an expert. The opinion has been issued only on the basis of visual inspection without carrying out any chemical analysis. Differences between dry dates of UAE origin and of other areas have not been discussed. As per the provisions Section 45 of the Indian Evidence Act, when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identify handwriting or finger impression, the opinion upon these points of persons especially skilled in such foreign law, science, or art in questions as to identify of handwriting or finger impressions are relevant facts. A fact is something cognizable by he senses such as sight or hearing, whereas opinion involves a mental operation. Country of origin of any goods is a complex matter and it cannot be decided by way of visual inspection of goods only. "In the case of Swastic Mechatronics Pvt. Ltd. [2014(314) ELT 373(T)] Hon"ble CESTAT has held that the visual examination of goods cannot be considered as expert opinion." "In the case of Krishna Das [2014(303) ELT584(T)] it has been observed by CESTAT that the Country of Origin of goods cannot be decided on the basis of expert opinion given merely by visual inspection." "The Tribunal in the case of Ram Prakash [2003(161) ELT882(T)] has ruled that the opinion given without indicating reason for arriving at particular conclusion cannot be accepted" In the present case, the expert opinion obtained by the department does not indicate that the goods in question were of Pakistan origin. It is simply gives opinion that they are of Indian Sub-continent is an imaginary geographical and political demarcation. It has no definite boundary. It is only a loose concept consisting of nearby area of India, Bhutan, Nepal, Bangladesh, Sri Lanka, Maldives, Pakistan and Afghanistan. The report is quite vague and it cannot be

presumed that the goods in question are of Pakistan origin. The said expert opinion thus should not have been relied upon. We further find support from the decision of the Tribunal in the case of Orbital Enterprises vs. Collector of Customs [1990 (46) E.L.T. 71 (Tri.-Cal.)] where it has been categorically held on the basis of Supreme Court decision (AIR 1959SC488) that opinion based on inspection only without any chemical examination has no evidentiary value for determination of country of origin. In view of the above, findings of Original Authority to declare dry dates of not UAE origin on the basis of said opinion is not sustainable.

22. The Original Authority placed heavy reliance on the Export Declaration which was received from the shipping line which was engaged in sea transportation of said dry dates from Dubai to India. In the said Export Declaration country of origin was shown "PK" which is short form of Pakistan as per the Department. Export Declaration is filed by the exporter with customs of exporting country. The said document was not procured from the customs Dubai but obtained from shipping line. How the said document is maintained by the shipping line depends upon the shipping line as it was their internal document. It is further observed that in the said document C & F value was declared to USD 44247/- while in the invoice it was USD64827/-. Consignee and consignor names were also mentioned incorrectly. It was an unsigned photocopy of document. The Export Declaration submitted in this case, reflects figures which do not match with other documents and also does not reflect name of shipping line. Hence this document which is full of errors cannot be considered to be an evidence to prove country of origin. In the case of Commissioner of Customs (Imports), Mumbai vs. Ganpati Overseas [2023 (386) E.L.T. 802 (S.C.)], the Apex Court has held that unattested photocopy would not have any evidentiary value. We also find support from the decision

of the Hon"ble Supreme Court in the case of East Punjab Traders [1997 (89) E.L.T. 11 (S.C.)] where it has been held that in case documents are not obtained from the respective customs formation, reliance cannot be placed on such documents. In view of the above, we find reliance on the said document to prove country of origin by the Original Authority is not proper.

23. We further find that Adjudicating Authority has referred expression „FZ Transit Out" mentioned in the Export Declaration received from shipping line to prove that the goods were imported from third country to Dubai for export to India. In para-15.1.2.3 of Customer Guide of Dubai customs which is relied upon document in this case, procedure for export of goods stored in Free Zone of Dubai is provided. Free Zone companies would file „FZ Transit Out" declaration for export of goods stored in their company. It is not provided that only goods which are imported from third country can be exported by declaring "FZ Transit Out". All goods irrespective procured by way of import or by way of local procurement are exported on terms "FZ Transit Out" if such goods are stored in Free Zone. It is provided that Free Zone companies can procure goods from local market and can store them at Free Zone for export. Such locally procured goods stored in Free Zone would also be exported declaring „FZ Transit Out" declaration in Export Declaration. In the present case, dry dates were procured from local market of Dubai by M/s GVO Global FZC UAE, a Free Zone company, and stored at Free Zone for export to Indian buyers as is evident from country of origin certificate. We, therefore of the view that on the basis of the said declaration, it cannot be inferred that said goods were originated in third country.

24. The Adjudicating Authority has placed reliance on the statement of Shri Chandan Chaudhary, Manager, M/s SS Mommy International Pvt. Ltd., a clearing and forwarding agency to prove the allegation of mis-declaration of

country of origin of dry dates. We find from the statement of Shri Chandah Chaudhary that it is based on the discussion among staff that goods imported by the Appellants were of Pakistan origin. It is evident that his statement about country of origin was based on hearsay without any evidence. In the case of Laxmi Narayan Udyog (P) Ltd. vs. Commissioner of Customs (Prev.), Kolkata [2017 (348) E.L.T. 496 (Tri.-Kol.)], the Tribunal has held that hearsay evidence cannot be accepted as reliable evidence for deciding issue against the Appellant. The similar view has also been taken by the Tribunal in the case of Chandreswar Prasad vs. Commissioner of Customs, Patna [2016 (340) E.L.T. 590 (Tri.- Kol.)] where it has been held that statements on hearsay basis without any authenticity cannot be a valid evidence. The conclusion drawn by the Adjudicating Authority on the basis of the said statement is not supported by legal provisions. Hence, it has no evidentiary value.

25. Statement of Shri Anil Kumar Agarwal Manager, M/s Padam Parmeshwari Ventures Pvt. Ghaziabad, where Shri Kush Agarwal, owner of M/s GVO Global FZC UAE, is one of directors was also relied upon by the Adjudicating Authority on the contention that he is nephew of Shri Kush Agarwal. It is an undoubted fact that Shri Anil Kumar Agarwal has no locus standi in the business of supplier company i.e., GVO Global. From his statement, it is evident that he was directed by Shri Kush Agarwal at times to deliver letters received from GVO Global to importers who purchased goods from the company of Shri Kush Agarwal. There is no evidence in any form like electronic chat, documents etc. from which it can be proved that Shri Anil Agarwal was involved in decision making activities of GVO Global FZC. He has not accepted in his statement that he discussed and convinced Indian importers to purchase goods from GVO Global, which were of actually Pakistan origin. It is settled law that statement of any person

cannot be basis for proving an offence if it is not supported by any other cogent evidence. In the case of UOI Vs. Kisan Ratan Singh [2020 (372) E.L.T. 714 (Bom.)], Hon"ble High Court has held that various Courts have kept all these things in mind and come to a conclusion that in the absence of any corroboration by an independent and reliable witness, a statement recorded under Section 108 in isolation could not be relied upon. In the case of Piyush Kumar Jain Vs. UOI [2022 (382) E.L.T. 184 (ALL)], Hon"ble Court has observed as mere statement cannot be sole basis for penalty. Similarly in the case of Commissioner of Service Tax, Mumbai-V Vs. Jasper International [2019 (22) G.S.T.L. 29 (Tri.-Mum.)], the Tribunal has held that no liability can be fastened merely on the basis of statements recorded during investigation if the same is not supported by documentary evidence. Thus, reliance of Original Authority on the above statements is legally not maintainable.

26. We further find that statement of Shri Anil Kumar Agarwal was immediately retracted by him. As per the retraction, he was threatened and was told that he would not be allowed to go out of office till he would write as per dictation of the officers. It was further stated that the whole statement was written by him as dictated by the officers to save himself from mental torture. The cardinal principle of acceptance of a statement as evidence is the statement has to be voluntary and it should be true. The retraction of Shri Anil Kumar Agarwal was rebutted by the team of Inquiry Officer without stating any cogent reason. During the investigation the statement is recorded with the help of Section 108 of the Act, 1962 and if the same is retracted later on then it cannot be used against the maker of the statement if the same is not rebutted by the Department. The Hon"ble Supreme Court in the matter of Mohtesham Mohd. Ismail [2007 (220) E.L.T. 3 (S.C.)] held that even confession of an accused is not a substantive

evidence. The statement is part of the evidence only if it is voluntary and free from any sort of pressure. In the case of Francis Stanly @ Stalin vs. Intelligence Officer, Narcotic Control Bureau, Thiruvanthapuram [2006 (13) SCALE 386], Apex Court has emphasized that confession only if found to be voluntary and free from pressure, can be accepted. The Hon"ble Apex Court in Vinod Solanki Vs. U.I.O. [2009 (233) E.L.T. 157 (S.C.)] again cautioned in using the retracted statement. The relevant para is as follow:-

> *"22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded."*

In view of the above facts and settled legal position it is crystal clear that retracted statement cannot be used to prove any offence.

27. The Adjudicating Authority has imposed penalty on M/s Omega Packwell Pvt. Ltd., under Section 112(a) of the Act, 1962. Penalty under the said Section is imposable on a person when he is involved in any action which makes goods liable to confiscation. In the present case, goods were not liable to confiscation as discussed in foregoing paras. Hence, no penalty is imposable on M/s Omega Packwell Pvt. Ltd.

28. As regards imposition of penalty on Shri Yogesh Gupta under Section 114AA of the Act, 1962, we find that penalty on a person under said Section can be imposed when such

person intentionally makes false declaration before the Customs. It is observed that Yogesh Gupta declared country of origin on the basis of documents supplied by the overseas supplier. There was no manipulation by him to mis-declare country of origin. No evidence was pointed out by the Adjudicating Authority to prove any involvement of Shri Yogesh Gupta in any false declaration. Hence, no penalty under Section 114AA is imposable upon him. In the case of Sree Ayyanar Spinning & Weaving Mills Commissioner Customs, Tuticorin [2019 (370) E.L.T. 1681 (Tri.-Chennai)], the Tribunal has held as :– "10. Viewed from any angle, it is but obvious that the Adjudicating Authority has been injudicious and peremptory in imposition of the impugned penalty under Section 114AA ibid, since, unless it is proved that the person to be penalized has knowingly or intentionally implicated himself in use of false and incorrect materials, there can be no justification for penalty under this Section. This requirement of factual finding itself is not there and nor has it been answered satisfactorily either in the show cause notice or in the orders of the lower authorities and hence, I do not have any hesitation in setting aside the same."

29. Similarly in the case of Ismail Ibrahim vs. Commissioner of Customs, Bangalore [2019 (370) E.L.T. 1321 (Tri.-Bang.)], the Tribunal has observed that the penalty under Section 114AA can only be imposed if the 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. Shri Gupta has not made intentionally any false sign or declaration, incorrect statements or declarations to attract penalty under Section 114AA of the Act. Therefore, penalty imposed under Section 114AA of the Act, 1962 on him is liable to be quashed. Similarly, penalty imposed upon Shri Manoranjan Kumar, Shri Chandan Choudhary, Shri Kush

Agrawal and Shri Anil Agrawal cannot be sustained and are accordingly set aside."

4.12 Interestingly penalties have been imposed in the impugned order on Shri Kush Agarwal, alleging that he has masterminded the entire operation by re-routing the consignments of dry date from Pakistan through UAE by manipulating the "Certificate of Origin". However as we have earlier observed that there is no credible evidence produced to show that the "Certificate of Origin" issue by the designated authorities in UAE was manipulated, in fact no enquiries have been made in this regard from the authorities in UAE. We also note that nothing has been placed on record to show that he has by his act of omission and commission contravened any provision of Customs Act, 1962. He has supplied the goods – dry dates, for being imported into India by the said importers in normal course of business. Even if it is assumed and admitted that he has manipulated the documents to declare country of origin as UAE, then also the offence which has been committed in UAE, action would lie against him under the law of that country.

4.13 In view of the discussions as above we do not find any merits in the impugned order to the extent it is relation to the appellants before us.

5.1 Appeals are allowed.

(Pronounced in open court on- 30 August, 2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Single Member Bench - Court No. – I

Customs Appeal No. 646 of 2012

(Arising out of Order-in-Appeal No.37/2011 (H-II) Customs dt.23.12.2011 passed by Commissioner of Customs & Central Excise (Appeals-II), Hyderabad)

Zain Bilgrami .... **Appellant**
H.No.8-2-316/A/7, Road No.14, Banjara Hills,
Hyderabad, Telangana – 500 034

VERSUS

Commissioner of Customs .... **Respondent**
Hyderabad - Customs
Kendriya Shulk Bhavan, LB Stadium Road,
Basheerbagh, Hyderabad – 500 004

Appearance
Shri P. Sai Makrandh, Advocate for the Appellant.
Shri A. Rangadham, AR for the Respondent.

Coram: HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER NO. A/30103/2025

Date of Hearing: 28.03.2025
Date of Decision: 28.03.2025

Mr. Zain Bilgrami (hereinafter referred to as the appellant) is in appeal against Order dt.23.12.2011 (impugned order) passed by the Commissioner (Appeals), wherein, inter alia, he has upheld the imposition of penalty of Rs.25,000/- on the appellant.

2. The issue, in brief, is that the DRI found an imported motorcycle from the possession of one Mr. K.A.V.S. Ramakrishna Raju, where they had doubt that the said vehicle has been imported illegally into the country without following proper procedure. On subsequent investigation and recording of statement Mr. Raju, he informed that the said vehicle was purchased from the appellant. On further investigation, the appellant stated that the said motorcycle was purchased by him from one Mr. Ali Raza. Subsequent investigation revealed that bill of entry submitted to the RTA at Maharashtra for obtaining temporary registration was itself fake and therefore, entire documentation in relation to the said imported motorcycle was fake and based on fraudulent obtainment of documents by one Mr. Ali Raza, who has

sold to the appellant. It is also on record that the department could not trace the said Mr. Ali Raza and left a remark in the SCN that action would be taken against him for the said offence of smuggling, once he is traced.

3. As far as the confiscation of the motorcycle is concerned, the same has been upheld in the impugned order by the Commissioner (Appeals), however, the appellants, though, initially came for relief on account of valuation, confiscation of the motorcycle as well as imposition of penalty under section 112(b) of the Customs Act, 1962, subsequently, in the course of hearing on 05.03.2025, learned Advocate for the appellant submitted that they are now contesting only the penalty imposed on them and no other issues are being pressed in terms of the said appeal filed by them. Learned Advocate submits that in this case, the appellant is a victim as he has taken all precautions while purchasing the motorcycle from Mr. Ali Raza and therefore, there was no malafide intent or he had no reason to believe that it was liable for confiscation, etc., and therefore, in the facts of the case, penalty imposed on them should be set aside.

4. On the other hand, learned AR points out that it is a fact that motorcycle has been rightly confiscated absolutely by the Original Adjudicating Authority and upheld by the Commissioner (Appeals) because the motorcycle was in the nature of prohibited/smuggled goods. Once confiscation is not being contested by the appellant, nature of goods as smuggled goods is established qua appellant. Insofar as the imposition of penalty is concerned, he submits that the appellant has not only purchased the motorcycle from Mr. Ali Raza, who is still untraceable and who is alleged to be the importer/smuggler for the said motorcycle, for his self use and in fact was further sold by the appellant to Mr. Raju. Therefore, the plea of not having any malafide intent or reasons to believe is not sustainable.

5. Heard both sides and perused the records.

6. Since the appellants are no longer contesting the issue of confiscation of imported motorcycle, the short question, which is to be decided, is whether in the factual matrix of the case, penalty imposed on the appellant is sustainable or otherwise. I find that in this case, admittedly the appellant has purchased the motorcycle from one Mr. Ali Raza under the cover of temporary registration issued by Maharashtra RTA and subsequently, Mr. Ali

Raza also got the vehicle permanently registered with Telangana RTA for which the appellant had to pay an additional amount of Rs.50,000/-. Therefore, the argument that they had acted bonafide has some force. However, I find that it is not that they have purchased it for own use but in fact, they subsequently sold and at that time on selling also, they did not exercise due diligence. The penalty has been imposed for their dealing with imported/smuggled motorcycle and therefore, it is obvious that he has acquired possession and was also engaged in selling of the said motorcycle.

7. The other aspect is whether he knew or had a reason to believe that the said motorcycle was liable for confiscation. This aspect can be culled out of the context in which the sales and purchase have taken place. I find that he has not been able to give any details or whereabouts in relation to the person from whom he had admittedly bought the said motorcycle. Secondly, he has made entire transaction in cash and therefore, there is no trail also to locate the said so called seller Mr. Ali Raza. Subsequently, he has again sold the motorcycle to Mr. Raju. Therefore, it is difficult to accept the argument that he has exercised due diligence while buying an imported motorcycle, which is not like any other imported household good where there may not be any need for exercising due diligence to such a large extent. However, when one is buying commodities like car or motorcycle, it is expected that buyer would exercise greater degree of due diligence. Therefore, I find that in the given factual matrix, it does not appear that the appellant has exercised due diligence to the extent required to be exercised by a purchaser of an imported motorcycle and to that extent he has definitely failed. Accordingly, I do not find any infirmity in the impugned order passed by the Commissioner (Appeals) upholding the imposition of penalty under section 112(b) of the Customs Act, 1962 on the appellant. However, I find that penalty of Rs.25,000/- is not proportionate to the offence committed by the appellant inasmuch as there was also a proposal to impose penalty, both under section 112 as well as under section 114AA, in the SCN against the appellant. However, on adjudication, the penalty has been imposed only under section 112. In other words, the provision of section 114AA was not found tenable in the factual matrix by the Adjudicating Authority, which, obviously, indicates that the appellant had not knowingly or intentionally made, signed or used any declaration, statement or document etc., which is false or incorrect in any material

particular, in the transaction of any business for the purposes of this Act. This is the mitigating factor. Therefore, in view of the same, I find that penalty of Rs.10,000/- under section 112(b) is more than justified. The impugned order is accordingly modified to that extent.

8. Accordingly, Appeal allowed partly.

(Dictated and pronounced in the open Court)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

Veda

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70448 of 2024

(Arising out of Order-in-Appeal No.01(R)-CUS/APPL/LKO/2024 dated 01.03.2024 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow)

Mr. Raj Kumar Swarnkar, **.....Appellant**
(1249/3G, Purani Fal Mandi,
Makarikhoh, Opp. BLJ School, Mirzapur-231001)

VERSUS

Commissioner of Customs, Lucknow **....Respondent**
(3/194, Vishalkhand-3,
Gomti Nagar, Lucknow-226010)

APPEARANCE:

Shri Kartikeya Narain, Advocate for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.- 70154/2025

DATE OF HEARING : 02.01.2025
DATE OF PRONOUNCEMENT : 02.04.2025

The present appeal has been filed by the Appellant assailing the Order-in-Appeal No.01(R)-CUS/APPL/LKO/2024 dated 01.03.2024 passed by the Ld. Commissioner (Appeals), by which absolute confiscation of gold weighing 2 kgs, valued at Rs.59,00,000/- under Section 111(d) and 120 of the Customs Act, 1962[1] along with penalty of Rs.4,00,000/- on the Appellant has been upheld.

2.1 The brief facts as stated in the show cause notice[2] dated 17.10.2017 are that on 24.04.2017, one of the co-noticee Shri Suresh Kumar was apprehended by GRP along with 2 pcs of gold bars, weighing 1 kg each, while he was travelling from Kolkata to Mirzapur since he could not produce documents regarding

[1] Act
[2] SCN

lawful possession of gold. He was then handed over to the Officers of Customs, Varanasi under Fard dated 24.04.2017. The Customs Officers then recorded his statement on 24.04.2017, where he stated that he is working for the Appellant, on the instructions of the Appellant he travelled to Kolkata by Chambal Express with Rs.59,78,000/- to bring gold, he reached Kolkata on 23.04.2017 and visited the premises of one Sri Babloo situated at Bada Bazar, Sonapatti, Kolkata and handed over the amount of Rs.59,78,000/- and received 2 kgs gold from him without any papers and on 24.04.2017 when he reached Mughalsarai station by Howrah-Jodhpur Express train, he was apprehended by the GRP police officials. He also stated that the subject gold is illegally acquired and further clarified that he was informed by the Appellant and Shri Babloo that the subject gold has been smuggled from Bangladesh and brought to Kolkata after which its purity was changed from 999 to 995, while recasting the gold, the foreign origin markings were eliminated and fresh markings were impressed and the place where serial number is marked was also scratched. The recovered gold was seized vide seizure memo dated 26.04.2017 and Shri Suresh Kumar was arrested on 26.04.2017, where after he was remanded to judicial custody by the court of Special CJM (Economic Offence), Varanasi on 27.04.2017.

2.2 In follow up action, search was conducted at the residence of Shri Suresh Kumar on 25.04.2017, during which nothing incriminating was found. Search was also conducted at the residential premises of the Appellant where two firms namely M/s Kamakhya Bullion Centre and M/s M.R. Jewellers were existing. At the time of search, the Appellant was not found present and the search was conducted in the presence of wife of the Appellant Smt. Madhubala Sheth. During the search proceedings, no incriminating goods were found and only 4 file folders containing bank statements, commercial tax registration papers, purchase invoices of gold, ITR returns relating to M/s Kamakhya Bullion Center and M/s M.R. Jewellers were recovered along with three books of tax invoices.

2.3 Based on the disclosure made in the bail application filed by Shri Suresh Kumar to the effect that the subject gold was legally procured from two firms of Kanpur namely M/s Ambay Jewellers and Bullion Merchants, 54/37, First Floor, Annapurna Bhawan, Nayaganj, Kanpur and M/s Radha Mohan Purshottam Jewels Pvt. Ltd., 59/39, Birhana Road, Kanpur, investigation was conducted. The statement of authorised representative of M/s Radha Mohan Purshottam Jewels Pvt. Ltd., Shri Rajiv Nayan Gupta was recorded on 22.05.2017 wherein he accepted to have issued tax Invoice No. KNP/17-18/T-0045 dated 22.04.2017 in favour of M/s Kamakhya Bullion Centre for sale of I kg gold bar bearing marking MMTC-PAMP and serial No.200965 but on showing the coloured photograph of recovered gold bar, he stated that the seized gold bar is not what was sold by them to M/s Kamakhya Bullion Centre. Similarly, the proprietor of M/s Ambay Jewellers and Bullion Merchants, Kanpur, Shri Sanjeev Agarwal in his statement dated 31.05.2017 admitted of having issued tax Invoice No.11 dated 17.04.2017 in favour of M/s Kamakhya Bullion Centre for sale of 1 kg of gold bar, however on showing the coloured photograph of recovered gold bar he stated that the seized gold bar is not what was sold by them to M/s Kamakhya Bullion Centre.

3. SCN dated 17.10.2017 was then issued calling upon the Appellant, Shri Suresh Kumar and Smt. Madhubala Sheth to show cause as to why not the recovered and seized gold be confiscated under Section 111 (b) and (d) of the Act and penalties be imposed on them under Section 112(b) of the Act.

4. By Order-in-Original No.09/ADC/2018 dated 06.07.2018, the SCN was adjudicated confirming the proposals made in the SCN by relying upon the statement of Shri Suresh Kumar to conclude that the subject gold bars were smuggled into India, the subject gold bars were not the gold bars sold by the two firms of Kanpur to the Appellant and Shri Suresh Kumar failed to discharge the burden under Section 123 of the Act. Penalty of Rs.4,00,000/- was also imposed on the Appellant along with

penalties of Rs.2,00,000/- each on Shri Suresh Kumar and Smt. Madhubala Sheth.

5. Aggrieved with the Order-in-Original No.09/ADC/2018 dated 06.07.2018, the Appellant preferred appeal before the Ld. Commissioner (Appeals), which has been dismissed on the reasoning that the statement of Shri Suresh Kumar recorded under Section 108 of the Act is a substantive evidence, his statement was never retracted, cross-examination of Shri Suresh Kumar was never sought and hence no question of non-compliance of Section 138B arises and therefore the subject gold has been rightly confiscated and penalties have been rightly imposed.

6. Aggrieved with the impugned order, the Appellant has filed the present appeal. Heard learned counsel for the Appellant and Ld. Authorized Representative for the revenue.

6.1 Sri Kartikeya Narain, Ld. counsel for the Appellant submitted that the statement of Shri Suresh Kumar was not voluntary as the same was tendered when Shri Suresh Kumar was under the custody of the Customs Officers, the pleadings made in the bail application shows retraction of his statement, Section 123 of the Act has no application in absence of any foreign markings on the subject gold and also in absence of any test report to the effect that the subject gold is of foreign origin, the procedure contemplated under Section 138 has not been complied, hence statement of Shri Suresh Kumar cannot be relied and has to be eschewed from consideration and therefore, the confiscation of subject gold and imposition of penalty cannot be sustained.

6.2 Ld. Authorized Representative, on the other hand reiterated the findings recorded in the impugned order and submitted that the statement of Shri Suresh Kumar was never retracted and hence the same is an admissible evidence to prove the foreign origin and smuggling of subject gold. He prayed for confirmation of the findings recorded in the impugned order.

7. Heard both the sides and perused the appeal records.

7.1 I find that the case of the Revenue is based on the statement of Shri Suresh Kumar, non-retraction of such statement, invocation of Section 123 of the Act and statements of the authorized representative of M/s Radha Mohan Purshottam Jewels and proprietor of M/s Ambay Jewellers and Bullion Merchants.

7.2 A perusal of the impugned order shows that the Appellant raised specific objection in respect of non-compliance of Section 138B *vis-à-vis* the statement of Shri Suresh Kumar, which objection has been turned down on the ground that the cross-examination of Shri Suresh Kumar was never sought by the Appellant. In my opinion, this cannot be a ground for not complying with the mandatory procedure specified under Section 138B of the Act. Hon'ble Punjab & Haryana High Court in ***Jindal Drugs Pvt. Ltd. vs. Union of India 2016 (340) E.L.T. 67 (P&H)***, while considering Section 9D of the Central Excise Act, 1944, which is *pari-materia* to Section 138B of the Customs Act, 1962, laid down the importance of Section 9D as under:-

> *"16. If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.*
>
> *(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and*
>
> *(ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*

17. There is no justification for jettisoning this procedure, statutorily prescribed by plenary Parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise Officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.

18. The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.

19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to

straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

20. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

21. It is only, therefore, -

(i) after the person whose statement has already been recorded before a Gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,that the question of offering the witness to the assessee, for cross-examination, can arise.

22. Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed

from consideration, as they would not be relevant for proving the truth of the contents thereof."

7.3 Hon'ble Delhi High Court in **Basudev Garg vs. Commissioner of Customs 2017 (48) S.T.R. 427 (Del)** has also considered the effect of Section 138B of the Act and has held that both Section 9D and Section 138B are identical. The findings are as under:-

"12. Section 138B of the Customs Act, 1962 reads as under :-

> ***"138B. Relevancy of statements under certain circumstances. -*** *(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*
>
> *(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable or*
>
> *(b) When the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.*
>
> *(2) The provisions of sub-section (1) shall so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."*

It is apparent that both the provisions are identical.

13. This court while upholding the validity of Section 9D of the Central Excise Act, 1944 interpreted its provisions as under :-

> *"12. Bare reading of the above section manifests that under certain circumstances, as*

> *stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazette rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub-section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9D of the Act were invoked by the Collector holding that it was not possible to procure the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal."*

14. The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi judicial proceeding is a valuable right given to the accused/Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi judicial proceedings. The Division Bench also observed as under :-

> *"29. Thus, when we examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."*
>
> *15. The observations and conclusions arrived at by the Division Bench in the case of J&K Cigarettes Ltd. (supra) would apply with equal vigour to the provisions of Section 138B of the Customs Act, 1962. We find that this aspect of the matter has not been considered by any of the authorities below. In fact, Section 138B of the Customs Act, 1962 has not been examined at all."*

7.4 In view of the above binding precedents, compliance of Section 138B of the Act was mandatory before relying upon statement of Shri Suresh Kumar. The compliance of Section 138B was not dependent upon whether the Appellant sought opportunity of cross examination or not. It was for the adjudicating authority to follow the procedure and only then he could have relied upon the statement. Having not done so, I hold

that the said statement cannot be relied upon and has to be eschewed from consideration. Once the statement of Shri Suresh Kumar is eschewed from consideration, I find that there is absolutely no evidence on record, to show that the subject gold was of foreign origin and was smuggled.

7.5 Even otherwise, a perusal of the statement of Shri Suresh Kumar, as narrated in the SCN, shows that Suresh Kumar stated that the subject gold is illegally acquired and that the Appellant and Shri Babloo informed him that the said gold has been smuggled from Bangladesh and brought to Kolkata, where it's purity was changed and on recasting, the foreign origin markings were eliminated and serial number was also scratched. A closer scrutiny of this statement, shows that the same is not based on the personal knowledge of Shri Suresh Kumar but based on what was told to him by the Appellant and Shri Babloo. Therefore, the statement, being an hear say statement cannot be relied upon solely, to conclude that the subject gold was of foreign origin and was illegally imported from Bangladesh.

7.6 The finding in the impugned order that the statement was never retracted also cannot be sustained. As noted in the SCN itself, Shri Suresh Kumar in his bail application made pleadings regarding legal and lawful possession of subject gold by M/s Kamakhya Bullion Centre and denial of the allegations made by the Revenue. The pleadings made in bail application, submitted after few days of statement, in my opinion constitutes a clear retraction of the initial statement. Once the maker of the statement resiled it, then it is no longer safe to rely on it as a substantive piece of evidence, as held by Hon'ble Delhi High Court in **Commissioner of Central Excise vs. Vishnu & Co. Pvt. Ltd. (2016) 332 E.L.T. 793 (Del)**, where the Hon'ble Court held as follows:-

> *"41. What the above submission overlooks is the 'reliability' of such statements. Once it is shown that the maker of such statement has in fact resiled from it, even if it is after a period of time, then it is no longer safe to rely*

upon it as a substantive piece of evidence. The question is not so much as to admissibility of such statement as much as it is about its 'reliability'. It is the latter requirement that warrants a judicial authority to seek, as a rule of prudence, some corroboration of such retracted statement by some other reliable independent material. This is the approach adopted by the CESTAT and the Court finds it to be in consonance with the settled legal position in this regard."

Therefore, the finding in the impugned order that the statement of Shri Suresh Kumar is a substantive piece of evidence, cannot be sustained. The entire case of the revenue thus is based on presumption and not on any material evidence on record.

7.7 Further, since the present case is that of town seizure and not that of seizure at Airport, Seaport or Land Customs Station, the initial onus was on the Revenue to show that the subject gold was of foreign origin and was smuggled into India. Apart from the statement of Shri Suresh Kumar, which has no evidentiary value as discussed above, there is no evidence on record to suggest that the subject gold was smuggled. On the contrary, the Appellant produced invoices regarding legal procurement of subject gold and upon enquiry been made, the sellers also confirmed the transaction of sale of gold by them to the firm of the Appellant.

7.8 I also find that the statement of Shri Rajiv Nayan Gupta, authorised representative of M/s Radha Mohan Purshottam Jewels Pvt. Ltd., Kanpur and also statement of Shri Sanjeev Agarwal, proprietor of M/s Ambay Jewellers and Bullion Merchants, Kanpur, to conclude that the gold bars sold by them were different from the seized gold, also cannot be relied against the Appellant as these statements were not subjected to the rigour of Section 138B and therefore, not admissible as evidence.

7.9 As regards imposition of penalty under Section 112(b) on the Appellant, once necessary material to prove smuggling of subject gold is not on record, no penalty can be imposed on the Appellant.

8. In view of the above discussion, the appeal filed by the Appellant is allowed with consequential relief to the Appellant and direction to the respondent to release the seized gold in favour of the Appellant.

(Order pronounced in open court on- **02nd April, 2025**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

LKS

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75804 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/533-534/2023 dated 19.07.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Sanjay Kumar Mallick **: Appellant**
S/o. Shri Prabhakar Mallick,
1, Seth Bagan Gulli,
Kolkata – 700 006

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Custom House, 15/1, Strand Road,
Kolkata – 700 001

AND

Customs Appeal No. 75625 of 2024

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/533-534/2023 dated 19.07.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Sanjay Kumar Kotal **: Appellant**
S/o. Shri Jayanta Kotal,
Director of M/s. Kanishk Jewellers and Bullion Pvt. Ltd.,
158/A, Bidhan Park,
Kolkata – 700 090

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Custom House, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri Nilotpal Chowdhury, Advocate, [Customs Appeal No. 75625 of 2024]
Shri Prithwijit Sharma, Advocate, [Customs Appeal No. 75804 of 2023]
for the Appellant(s)

Shri Ashwini Kr. Choudhary, Authorized Representative,
For the Respondent

CORAM:

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 75912-75913 / 2025

DATE OF HEARING: 03.04.2025

DATE OF DECISION: 16.04.2025

ORDER:

Customs Appeal No. 75804 of 2023 has been filed by Shri Sanjay Kumar Mallick [hereinafter referred to as the "Appellant No. 1"] against the Order-in-Appeal No. KOL/CUS/CCP/KS/533-534/2023 dated 19.07.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001

1.1. **Customs Appeal No. 75625 of 2024** has been filed by Shri Sanjay Kumar Kotal [hereinafter referred to as the "Appellant No. 2"] against the same Order-in-Appeal.

2. The facts of the case are that on 15.09.2019, Officers of the Headquarters P&I Branch, C.C. (P), West Bengal, Kolkata intercepted Shri Sanjay Kumar Agarwal, the Appellant No. 1, at Shalimar Railway Station. On examination, he was found to be in possession of seven (07) pieces of gold collectively weighing 474.250 grams of gold valued at Rs.18,01,676/-. As the Appellant No. 1 was not having any document for licit procurement of the said gold, the said gold was detained vide Detention Memo No. 03/September/2019-2020 dated 15.09.2019 and later, converted to seizure under Section 110 of the Customs Act, 1962 vide Seizure Case No. 22/IMP/CL/GOLD/P&I/CCP/WB/2019-20 dated 12.10.2019. The gold in question was seized under the belief that the said gold hold had been illegally imported into India without payment of appropriate Customs duties.

2.1. In his statement recorded under Section 108 of the Customs Act, 1962, the Appellant No. 1 inter alia stated that he works under Shri Sanjay Kumar Kotal of M/s. Kanishk Jewellers and Bullin Private Limited, 158/A, Bidhan Park, Netaji Colony, Kolkata – 700 090 (the Appellant No. 2 herein), on whose direction he was proceeding to M/s. Shyam Narayan Jewellers of Bakhargang, Patna, on 13.09.2019 by Shalimar-Patna Duronto Express to deliver the said gold for making gold ornaments.

3. On completion of the investigation, a Show Cause Notice dated 26.02.2020 was issued to both the Appellants for their alleged involvement in the illegal importation of gold of foreign origin, proposing confiscation of the said gold, along with imposition of penalties.

4. The above Show Cause Notice was adjudicated vide the Order-in-Original No.149/ADC(P)/CUS/WB/2021-22 dated 30.03.2022 passed by the Commissioner of Customs (Preventive), Custom House, Kolkata wherein the ld. adjudicating authority has ordered as under: -

> *"[17.01] I order for absolute confiscation of 07 [seven] nos. of cut pieces of GOLD believed to be of foreign origin having 24 Carat [having purity between: 99.6% to 99.7% by wt. of gold], collectively weighing: 474.250 grams, valued at Rs.18,01,676/- [Rupees Eighteen Lakh One Thousand Six hundred and Seventy Six] only vide Seizure Case No.: 22/IMP/CL/GOLD/P&I/C.C.[PJ/WB/2019-2020, Dated: 12.10.2019 in terms of Section 111(b) & Section 111(d) of the Customs Act, 1962.*
>
> *[17.02] I order for confiscation of the seized brown coloured Adhesive Tapes used for wrapping the seized gold believed to be of foreign origin having no commercial value [N.C.V.] in terms of Section 118(a) of the Customs Act, 1962.*

[17.03] I impose Personal Penalty of Rs. 5,00,000/- [Rupees Five Lakh] only upon the Noticee No. 2, i.e. Shri Sanjay Kumar Kotal, S/o: Shri Jayanta Kotal, Director of M/s Kanishk Jewellers & Bullion Pvt. Ltd, No. 158/A, Bidhan Park, Kolkata-700090 [Noticee No. 2/ Owner of gold].

[17.04] I impose Personal Penalty of Rs. 50,000/- [Rupees Fifty Thousand] only upon the Noticee No. 1 ie. Shri Sanjay Kumar Mallick, S/o: Shri Prabhakar Mallick, No. 1, Seth Bagan Gulli, Kolkata-700006 [Noticee No. 1/ Carrier of gold].

[17.05] In absence of any proven malafide or absence of proven submitting false / incorrect documents, Penalty is not liable to be imposed in terms of Section 114AA of the Customs Act, 1962. Accordingly, the charges framed against the Noticees No. 2 under Section 114AA of the Customs Act, 1962 as proposed in the impugned Show-Cause-Notice is hereby dropped.

[17.06] I order for disposal of the seized and absolute confiscated gold as mentioned in the Inventory List / Seizure Memo under Case No.: 22/IMP/CL/GOLD/ P&I/C.C.[P]/WB/2019-2020, Dated. 12.10.2019 by the S&D Unit, C.C.[P],W.B. as per instructions/procedure laid down in the Chapter-11 of the department's Disposal Manual-2019."

4.1. On appeal, the Ld. Commissioner (Appeals), vide the impugned Order-in-Appeal dated 19.07.2023, upheld the confiscation of gold and imposition of penalties imposed vide the above mentioned Order-in-Original dated 30.03.2022.

5. Aggrieved by the impugned order, both the Appellants have filed appeals before the Tribunal.

5.1. As both the appeals emanate from the same Order-in-Appeal, both are taken up together for decision by a common order.

6. The contentions raised by both the Appellants in these appeals are summarized as under: -

i) As per Section 110(1) of the Customs Act, 1962, Officers can seize the goods only when there is a 'reasonable belief' that the said goods have been smuggled into the country without payment of applicable duties of Customs. However, in the present case, the Officers have not exercised any 'reasonable belief' that the gold in question was smuggled in nature. There is no foreign marking available on the said gold to indicate that the same had been illegally imported into the country.

ii) The purity of the gold is not 99.9%, which is normally associated with 24 carat gold of foreign origin.

iii) Further, Section 123 of the Customs Act,1962 is applicable only when there is a 'reasonable belief' that the said gold is smuggled in nature. However, in the present case, the Appellants have submitted relevant documentary evidence to show that the gold had been procured domestically from indigenous sources. In this regard, they have submitted the Invoice No. KJ/WB/19-20/1042 dated 31.05.2019 wherein 700 grams was purchased by M/s. Kanishk Jewellers and Bullion Pvt. Ltd. (Appellant No. 2) from M/s. Kartikey Jewellers Pvt. Ltd. Out of this, 474.250 grams of gold was given to the Appellant No. 1 for the purpose of delivering the subject gold to M/s. Shyam

Narayan Jewellers, Bakargang, Patna for the purpose of making ornaments.

iv) The documentary evidence submitted by them have not been negated as false. Accordingly, it is their contention that they have produced sufficient evidence to show that the gold in question had been procured indigenously and hence, the provisions of Section 123 of the Act are not attracted in the instant case.

v) In support of their contentions, the Appellants have cited the following case-laws:

- *Nand Kishore Sumani v. Commissioner of Cus., C.Ex. & S.T., Siliguri [2016 (333) E.L.T. 448 (Tri. – Kol.)]*
- *Ram Naresh Chaurasiya v. Commissioner of Cus. (Prev.), Patna [2019 (365) E.L.T. 940 (Tri. – Kol.)]*
- *Sanjeeb Kumar @ Pappu Kumar vs Joint Commr. of Cus., Lucknow [2019 (369) E.L.T. 1177 (Tri-All.)]*
- *Balanagu NagaVenkata Raghavendra vs Commr. of Cus., Vijayawada [2021 (378) E.L.T. 493 (Tri-Hyd.)]*
- *Commissioner of Cus.(Prev.), Shillong v. Sri Sangpuia [2005(189) E.L.T.321 (Tri. - Kolkata)]*

vi) In support of their contention, the appellants also rely on the decision of the Tribunal, Kolkata in the case of *Ajit Bhosle* reported in *2020 (374) E.L.T. 814 (Tri. Kolkata)*; wherein it has been held that when there is no evidence regarding illegal import of the gold, the seized gold cannot be held to be smuggled in nature.

vii) In the case of *Om Sai Trading* reported in *2020 (372) E.L.T. 542 (Pat.)*, the scope and meaning of the term 'reasonable belief' has been explained, wherein it has been held that "reason to believe" not the subjective satisfaction of the officer concerned but to be exercised in accordance with restraints imposed by law and such belief must be that of an honest and reasonable person based upon reasonable grounds. Reasons should either appear on the face of the notice or must be available on the materials which had been placed before him.

6.1. Regarding applicability of Section 123 of Customs Act, 1962, in this case, the Appellants submit that the key element under section 123 of the Customs Act, 1962 is 'reasonable belief'; that the seizure so made in the present case is clearly without 'reasonable belief'. It is thus argued that when there is clear absence of reasonable belief, the initial burden in terms of Section 123 of the Customs Act, 1962 automatically shifts to the Department.

6.2. The Appellants have also submitted that the documentary evidence submitted them clearly indicate that the gold in question was indigenously procured. It is further submitted by the Appellants that the ld. adjudicating authority has recorded the genuineness of the documents submitted them at paragraphs 15.17 and 16.05 of the Order-in-Original dated 30.03.2022; however, in spite of admitting the genuineness of the said documents submitted by them, the ld. adjudicating authority has finally concluded that the goods are liable for confiscation. In view of the above, the Appellants submit that

provisions of section 123 of the Customs act, 1962 are not applicable in this case and hence the confiscation of the gold in question is not sustainable in law.

6.3. As there is no evidence against them regarding illegal importation of the gold, the Appellants submit that the penalties imposed on them under Section 112 of the Customs Act, 1962 are also not sustainable.

6.4. In view of these submissions, the appellants have prayed for setting aside the impugned order and allowing their appeals.

7. On the other hand, the Ld. Authorized Representative of the Revenue submits that the gold has been confiscated as the Appellants were not having any valid document at the time of seizure to show that the gold had been legally purchased. Accordingly, he contends that the confiscation of the gold and imposition of penalties on the Appellants are sustainable. Thus, he supports the impugned order.

8. Heard both sides and perused the appeal records.

9. I find that the gold weighing 474.250 grams was seized from the possession of the Appellant No. 1 herein, viz. Shri Sanjay Kumar Mallick while he was at the Shalimar Railway Station. In his voluntary statement recorded on 15.09.2019, the Appellant No. 1 has inter alia informed that he works under Shri Sanjay Kumar Kotal, the Appellant No. 2, of M/s. Kanishk Jewellers and Bullion Pvt. Ltd., Kolkata, who had handed over the gold and directed him to deliver the same to M/s. Shyam Narayan Jewellers, Bakargang, Patna.

9.1. The Appellants have contended that Section 110 of the Customs Act is not applicable in this case as there was no 'reasonable belief' that the gold in question was smuggled in nature. In support of their contentions that the gold in question was procured from domestic sources, the Appellants have produced a copy of the Detention Memo No. 03/September/2019-2020 dated 15.09.2019. For the sake of ready reference, the Detention Memo dated 15.09.2019, showing details of the goods seized, is reproduced below: -

STATION: HQRS. P&I BRANCH, C.C.(P), WB, KOLKATA

DETENTION MEMO No. 03/September/2019-20

DATED: 15.09.2019

01	Name and Address of the owner[s]	SRI SANJAY KUMAR MALLICK (M/H/39yrs), S/o Sri Prabhakar Mallick, 1, Seth Bagan Gulee, Kolkata-700006. Mob.no.8820036446
02	Date & Time of the Interception	Interception: 15.09.2019 at 05.45 Hours.
03	Place of the Interception/Recovery	On railway level crossing near Shalimar Railway Station, Howrah-711103
04	Place & Time of the Detention	15.09.2019 at Custom House, 15/1 Strand Road, Kolkata-700001 at 12.30 Hrs.
05	Modus operandi	Illegal importation/possession/transportation/storage of yellow metal believed to be gold of foreign origin without any licit documents, travelled by Train no. 22214, Patna-Shalimar Duranto Express reached at Shalimar railway station on 15.09.2019

[7] Description of goods: - As stated below:-

Sl. No.	Marked As	Details of Yellow Metals believed to be gold recovered from Sri SANJAY KUMAR MALLICK	SHAPE	Total Weight (in grams)	Sample Weight	Remaining weight after sampale
1.	SM-1	1(One) very small Cut piece Yellow Metal believed to be gold having inscription S.K	Uneven shape	39.300	2.080	37.220
2.	SM-2	1(one) Cut piece Yelow Metal believed to be gold having inscription SH3G	Uneven shape	121.070	2.440	118.630
3.	SM-3	1(One) very small Cut piece Yellow [illegible] believed to be gold [illegible]ing inscription FINE	Uneven Shape	40.030	1.720	38.310
4.	SM-4	1(One) Cut piece Yellow Metalbelieved to be gold having inscription 1	Uneven Shape	38.350	1.740	36.610
5.	SM-5	1(One) cut pieces of yellow metal believed to be gold having inscription FINE GOLD 99.5	Uneven Shape	100.990	1.860	99.130
6.	SM-6	1(One) cut pieces of yellow metal believed to be gold having inscription 995.0	Uneven Shape	114.650	1.560	113.090
7.	SM-7	1(One) very small Cut piece Yellow Metal believed to be gold having inscription S.B.R.T	Uneven Shape	19.860	1.980	17.880
8.		Brown Adhesive Tape used for wrapping the yellow metals believed to be gold	N/A			
			TOTAL	474.250	13.380	460.870

Total value of detained gold (99.5 karat) Rs. 18,01,676/- (Rupees Eighteen lakh one thousand six hundred seventy six) only as per value @ Rs. 3799/-per gram as on 15.09.2019

Reason for detention: Shri Sanjay Kumar Mallick is not able to submit/produce any licit documents. He stated that he is not the actual owner of the above-mentioned gold, he is a carrier, works for his employer Shri Sanjay Kumar Kotal, Kolkata.

DATED SIGNATURE OF THE WITNESSES:

[1]. 15/9/19

[2]. Radhakanta Mutty 15/09/19

15/9/19

[S.O./Inspector of Customs]
P&I Branch, C.C.(P), WB Kolkata

VINAY KUMAR
Inspector of Customs
HQ. P&I Branch, CC (P), K...

DATED/SIGNATURE OF THE OWNER/CUSTODIAN/AUTHORISED PERSON

Received the copy of the Inventory [Seizure Memo]

15/9/19

[SMALAY MAJUMDER] 5/9/2019
Superintendent of Customs,
Headquarter Preventive & Intelligence

From the Detention Memo reproduced above, I observe that the term 'reasonable belief' for seizure of the gold bars is not figuring in it. Further, it is seen that the gold is of uneven shape and not of standard weight. There are no foreign markings available on the said gold pieces.

9.2. I find that Board, vide its Circular No. 01/2017 dated 08.02.2017, has instructed to pass a specific order depicting the reasonable belief of the officer concerned while seizing the goods. Therefore, deviation thereof, clearly depicts that the seizure so made is illegal and hence, the goods are liable to be released and in corollary thereof, confiscation under Section 111 of the Customs Act 1962 is not at all warranted. Thus, when preliminary seizure of goods is in dispute, the SCN proceedings become vitiated in nature thereby making the impugned order liable to be quashed.

9.3. I also observe that Section 123 of the Customs Act clearly stipulates that a 'reasonable belief' that the gold is of smuggled in nature is mandatory for invocation of the said provision; However, in the present case no reasonable belief has been formed by the officers that the gold is of smuggled in nature and hence the provisions of Section 123 are not applicable in this case and the burden lies on the Department to prove that seized gold is of smuggled in nature. The Appellants contend that no evidence has been brought on record by the Revenue to substantiate the allegation that the gold is of foreign origin and smuggled in nature.

9.4. In the present case, I observe that no reasonable belief has been formed by the officers that the gold is of smuggled in nature. I also find that no evidence has been brought on record by the Revenue to substantiate the allegation that the gold is of foreign origin and smuggled in nature. I observe that the seizure of the gold without following the 'reasonable belief' that the gold is of smuggled in nature, is not sustainable.

10. The next ground raised by the Appellants is regarding 'Burden of Proof' as envisaged under Section 123 of Customs Act,1962. The Appellants contend that Section 123 of the Act is not applicable to this case. As per this section, the burden of proving that the goods are not smuggled, lies on the person from whose possession the goods were seized. For the sake of easy reference, the said Section 123 is reproduced below:

> *"SECTION 123 – Burden of proof in certain cases*
>
> *(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -*
>
> *(a) in a case where such seizure is made from the possession of any person, -*
>
> *(i) on the person from whose possession the goods were seized; and*
>
> *(ii) if any person, other than the person form whose possession the goods were seized, claims to be the owner thereof, also on such other person;*
>
> *(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.*

(2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may be notification in the Official Gazette specify."

10.1. I find that Section 123 applies inter-alia to gold bars bullion seized on the reasonable belief that they are smuggled goods. The burden of proving that they are not smuggled goods shall be on the person, who claims to be the owner of the goods from whose possession the goods are seized. The contention of the Department is that in the instant case gold bars were not of smuggled in nature, lies on the Appellant No. 1, Shri Sanjay Kumar Mallick from whose possession the impugned goods were seized. The Department contended that the Appellant did not produce any document for the licit procurement of the gold bars.

10.2. I observe that Section 123 of the Customs Act clearly stipulates that a 'reasonable belief' that the gold is of smuggled in nature is mandatory for invocation of the said provision. However, in the present case no reasonable belief has been formed by the officers that the gold is of smuggled in nature and hence, the provisions of Section 123 are not applicable in this case. The burden in the instant case lies on the Revenue to prove that seized gold is of smuggled in nature. However, I find that no evidence has been brought on record by the Revenue to substantiate their allegation that the gold is of foreign origin and smuggled in nature.

10.3. I also observe that the provisions of Section 123 are not applicable to indigenously procured gold. Hence, I find merit in the argument of the appellant that the onus is on the Department to prove that the

gold is of smuggled in nature and the Department has failed to bring in any evidence to prove that the gold is smuggled in nature.

10.4. I observe that the appellants relied upon many decisions to support their contention. In the case of *Sanjeeb Kumar @ Pappu Kumar vs Joint Commr. of Cus., Lucknow [2019 (369) E.L.T. 1177 (Tri-All.)],* it has been held as under:

> *"6. Considering the submissions made by both the sides, we find that the appellants have failed to prove the source of procurement of gold, therefore, we hold that gold is smuggled one but on the same time, Revenue is also failed to prove that gold is of third country origin and smuggled through Nepal. In fact, the Revenue has not adduced any evidence to that effect, whereas on the other side, Shri Sanjeeb Kumar, himself has categorically stated that he is not dealing with the purchase and sale of the gold. Therefore, the Revenue has failed to prove that the gold in question is of third country origin and have been imported/smuggled through Nepal. In that circumstances, the gold in question cannot be held as restricted goods and they can be released on payment of redemption fine and penalty as the goods are smuggled in nature. We also gone through the case law relied upon by the Learned Counsel for the appellants in the case of Prithviraj Pokhraj Jain (supra) wherein in Para 19 which is extracted below wherein the Hon'ble High Court observed as under -*
>
> > *"19. The burden was, therefore, on the prosecution to prove that the goods were smuggled. For this the prosecution relied upon the evidence of Hebbar who stated that he believed the goods to be smuggled, because watches and watch straps were of foreign origin, the import of which was heavily restricted and prohibited and they were found in huge quantity. The foreign origin of the watches is tried to be shown from the foreign markings on the watches. The question whether the foreign markings of goods can be treated as admissible in evidence was considered by Naik J. in Criminal Appeal No. 3 of 1966, decided on 22nd December, 1966. Among the property involved in that case*

> *were some gold slabs. The slabs bore the marking "Johnson Mathey 9990 London". Naik J. observed in his judgment that the markings do not speak for themselves and that evidence would be hearsay evidence. There was nothing to indicate that the markings were really done by Johnson Mathey in London. No presumption can arise in regard to the markings, unless there is evidence to show that those markings were made by a particular company in the ordinary course of business. A Division Bench of the Gujarat High Court has also taken a similar view in Asstt. Collector of Customs, Baroda v. M. Ibrahim Pirjada, 1970 Criminal Law Journal, 1305. There, the Gujarat High Court has held that mere markings cannot be taken as proof of the fact of foreign origin of the goods as such markings and labels would be hearsay evidence. With respect, I agree with the above view."*
>
> *Relying on the said decision, without evidence, the benefit of presumption under Section 123 of the Customs Act, 1962 is not available to the Revenue. Therefore, we hold that the gold in question is not restricted item but being smuggled one liable for confiscation and the same can be redeemed on payment of redemption fine. We also take note of the fact that the value of gold is Rs. 1,26,22,800/- and margin of profit in the trade of gold is very less, therefore, considering the value of gold and margin of profit, we hold that the redemption fine of Rs. 5 lakhs is appropriate in the facts and circumstances of the case. Therefore, we impose redemption fine of Rs. 5 lakhs on the gold in question which can be redeemed on payment of the said redemption fine. Considering the fact, that appellants are involved in the activity of smuggling of gold, therefore, penalty of Rs. 1 lakh each is imposed on all the appellants."*

10.5. The Appellants also relied upon the decision in the case of *Balanagu NagaVenkata Raghavendra vs Commr. of Cus., Vijayawada [2021 (378) E.L.T. 493 (Tri-Hyd.)],* wherein it has been held that the burden under section 123 will not shift on the Appellants when the seizure of gold without foreign markings are

seized from city. The relevant portion of the order is reproduced below.

> *"14. The confiscation of the gold by the adjudicating authority was set aside by the Tribunal and on appeal by the Revenue the Hon'ble High Court of Kerala, in the above factual matrix, has overturned the decision of the Tribunal. Therefore, it was not merely the purity of the gold in question but also the statements made during the investigation which formed the basis of the reasonable belief of the officers. In the present case, none of the statements recorded by the Department admit to or even suggest that the gold was smuggled gold. It has also not been brought out in the show cause notice that the purity of the seized gold is such that it could only have been of foreignconduct of the appellants was suspicious inasmuch as the gold pieces were being carried in newspapers and a letter was found written to one Shri Vijay in Trissur for requesting the gold to be handed over to the bearer of the letter. It is also confirmed by the DCM, Railways that the appellants had travelled from Trissur to Vijayawada by train. However, we note that Trissur is not even a port in itself. The gold was apparently collected from one Shri Vijay in Trissur. There were also several contradictions between different statements as recorded in para 16 of the show cause notice. All these would show that Shri Kanaka Ratnam (Appellant in Appeal No. 30496 of 2017) wrote a letter to Shri Vijay of Trissur to hand over gold to the bearer of the letter and both the letter and the gold were recovered from his son Shri Naga Venkata Raghavendra (Appellant in Appeal No. 30495 of 2017). Both the appellants had travelled by train from Trissur to Vijayawada. Naga Venkata Raghavendra was acting suspiciously when the Officers approached him. Subsequent statements were contradictory to each other. These factors by themselves cannot, in our considered opinion, constitute the basis for forming a reasonable belief that the seized gold was smuggled. Therefore, the Officers did not have a reasonable belief in the first place to assert that the seized primary gold was smuggled gold which is essential to shift the burden on to the accused under Section 123. The case of Om Prakash Khatri (supra) was different inasmuch as in that case while the foreign markings were missing on the gold in that case the carriers had admitted that they were carrying smuggled gold for*

Shri Khatri and that it was smuggled through Kerala and they were carrying it to Bombay and marks and numbers have been deleted to avoid being caught. They also admitted that they avoid air travel as there is a high risk of being caught. Coupled with these statements was the fact the gold of very high purity. The ratio of this judgment does not apply to the present case and the facts are quite different.

15. In view of the above, we find that the officers of the Department had no reasonable belief that the gold was smuggled and therefore they have not discharged their responsibility of forming reasonable belief under Section 123 without which the burden of proof will not shift to the person from whom the gold is seized……."

10.6. I observe that the only ground in which the gold was seized by the officers was that the appellant was not having any document for licit purchase of the same at the time when they were intercepted. I observe that failure to produce documents in respect of the goods carried by a person does not ipso facto prove that the goods are contraband in nature. The allegation of smuggling needs to be proved with cogent reasoning and corroborative evidence thereof. Subsequently, if the appellant could produce documents for its legal purchase, the same cannot be ignored to conclude that the gold is of smuggled in nature. In this regard, the appellant has relied on the case of *Commissioner of Cus.(Prev.), Shillong v. Sri Sangpuia* reported in *2005 (189) E.L.T. 321 (Tri. - Kolkata),* whereby the following has been held:

"3.(d) When interdiction of personal private property of a citizen by an officer is effected the law as in that case, it has to be strictly applied. If the Commissioner (Preventive) is of the opinion that large scale smuggling will be resorted to or is resorted in a particular commodity, he is free to move the concerned authorities to get such goods notified or specified under Chapter IVA or IVB of the Customs Act, 1962 and thereafter liabilities of

vouchers, bills, acquisition records could be invoked and failure would be relevant and onus will be cast on people who want to or possess such goods. In the present case there is no such notification shown to us under these provisions of the Customs Act, 1962. The absence of documents, therefore, does not induce us to share the views of the Commissioner (Preventive) that the goods are of foreign origin and are of smuggled nature. The present appeal made on grounds as in para 2 above cannot be upheld. This Tribunal has to enforce liability as it is written and cannot go into the pleas as made in certain grounds taken by Commissioner (Preventive) in this appeal."

10.7 Further, the purity of the gold in question is not 99.9, as seen from the Test Memo dated 17.09.2019 produced by the Appellant. For the sake of ready reference, the said Test Memo is extracted below: -

Lab no. 2014-2020/SZD (G)-188-194 dated 17.09.19
Detention Memo no: - 03/September/2019-20

Report: Received one sealed paper packet marked as SM-1, SM-2, SM-3, SM-4, SM-5 , SM-6 and SM-7 respectively sealed with seven (07) red lac seals in intact condition with facsimile of seal "CUSTOM (PREV) KOLKATA,W.B.KOLKATA-2".On opening the sealed packet, seven (07) samples were found in seven different auto pressed plastic pouches.

Each of the seven samples is in the form of yellow metallic cut piece, composed of "Gold".

Sl no.	Marking	Net wt. Of sample drawn (in gm).	Wt. Of recovered gold (in gm.)	Wt. Of remnant gold in (gm.)	% of gold (w/w)
1	SM-1	2.06	0.28	1.75	99.7
2	SM-2	2.43	0.29	2.11	99.6
3	SM-3	1.72	0.24	1.45	99.6
4	SM-4	1.73	0.37	1.33	99.6
5	SM-5	1.90	0.30	1.57	99.6
6	SM-6	1.56	0.28	1.25	99.6
7	SM-7	1.97	0.37	1.57	99.6

Remnant samples and recovered gold of the above samples are kept in the respective pouch, packed in the same packet and sealed with "CHEMICAL EXAMINER CALCUS HOUSE NO.1" seal and returned.

30/9/19
PRAVEEN KUMAR RAI
Chemical Assistant

30/9/19
राजेश कुमार वर्मा / Rajesh Kumar Verma
सहायक रासायन परीक्षक / Assistant Chemical Examiner
रासायनिक प्रयोगशाला / CHEMICAL LABORATORY
सीमाशुल्क सदन / Custom House
कोलकाता-700001 / Kolkata-700001

30/9/19
ARUN KUMAR MAURYA
Chemical Examiner Gr-I
CHEMICAL LABORATORY
Custom House, Kolkata

10.8. I find that the above Test Memo / Report indicates that the gold in question is not of 99.9% purity, which is usually associated with foreign origin gold. Also, the gold in question are not of standard weight. Further, I also take note of the fact that the Revenue has not brought in any evidence to prove that the gold was smuggled into India.

10.9. In view of the above discussions and the decisions cited above, I hold that the burden under Section 123 of Customs Act, to prove that the gold is not smuggled in nature, does not lie on the Appellants, in this case. The onus is on the Departmental officers that the gold is of smuggled in nature. However, I observe that the officers of the Department could not establish that the gold is of smuggled in nature.

10.10. I find that the Appellants have produced evidence in support of legal procurement of the gold, vide Invoice No. KJ/WB/19-20/1042 dated 31.05.2019 by which 700 grams of gold was purchased by the Appellant No. 2 (M/s. Kanishk Jewellers and Bullion Pvt. Ltd.) from M/s. Kartikey Jewellers Pvt. Ltd. It has been stated that out of this, 474.250 grams of gold was given to the Appellant No. 1 for the purpose of delivering the subject gold to M/s. Shyam Narayan Jewellers, Bakargang, Patna for the purpose of making ornaments. For the sake of ready reference, scanned copy of the said invoice is reproduced below: -

~~ANNEXURE P2~~ 87

TAX INVOICE

(ORIGINAL FOR RECIPIENT)

83

KARTIKEY JEWELLERS PVT. LTD.
4,HANSPUKUR 1st LANE GROUND FLOOR
KOLKATA-700007
West Bengal - 700007, India
GSTIN/UIN: 19AACCK7494F1Z6
State Name : West Bengal, Code : 19
CIN: U74900DL2006PTC146169
Contact : 03346003248,+919051344486
E-Mail : Umeshsoni99@yahoo.com
www.kjpibullion.com

Invoice No. KJ/WB/19-20/1042	Dated 31-May-2019
Delivery Note	Mode/Terms of Payment BANK
Supplier's Ref. KJ/WB/19-20/1042	Other Reference(s)
Buyer's Order No.	Dated
Despatch Document No.	Delivery Note Date
Despatched through BY HAND	Destination
Terms of Delivery	

Consignee
KANISK JEWELLERS AND BULLION PVT LTD
158/A BIDHAN PARK, KOLKATA, West Bengal - 700090, India
GSTIN/UIN : 19AAACF9955G1Z8
PAN/IT No : AAACF9955G
State Name : West Bengal, Code : 19

Buyer (if other than consignee)
KANISK JEWELLERS AND BULLION PVT LTD
158/A BIDHAN PARK, KOLKATA, West Bengal - 700090, India
GSTIN/UIN : 19AAACF9955G1Z8
PAN/IT No : AAACF9955G
State Name : West Bengal, Code : 19

Sl No.	Description of Goods	HSN/SAC	Quantity	Rate	per	Amount
1	**GOLD BULLION 99.50**	7108	700.000 GMS	3,175.73	GMS	22,23,009.71
	OUTPUT CGST @1.50%			*1.50*	%	33,345.15
	OUTPUT SGST @1.50%			*1.50*	%	33,345.15
	Less : *ROUND OFF*					(-)0.01
	Total		700.000 GMS			22,89,700.00 ₹

Amount Chargeable (in words) *E.& O.E*
Twenty Two Lakh Eighty Nine Thousand Seven Hundred INR Only

HSN/SAC	Taxable Value	Central Tax Rate	Central Tax Amount	State Tax Rate	State Tax Amount	Total Tax Amount
7108	22,23,009.71	1.50%	33,345.15	1.50%	33,345.15	66,690.30
Total	22,23,009.71		33,345.15		33,345.15	66,690.30

Tax Amount (in words) : **Sixty Six Thousand Six Hundred Ninety INR and Thirty paise Only**

Remarks
GOLD SALE OF GOLD VIDE BILL NO-1042.
Company's PAN : **AACCK7494F**
Declaration
We declare that this invoice shows the actual price of the goods described and that all particulars are true and correct.

Company's Bank Details
Bank Name : HDFC Bank-Kolkata-19242320000368
A/c No : 19242320000368
Branch & IFS Code : C R AVENUE KOLKATA & HDFC0001924

for KARTIKEY JEWELLERS PVT. LTD.

Authorised Signatory

SUBJECT TO KOLKATA JURISDICTION

This is a Computer Generated Invoice

*No E-way Bill is required to be generated as the Goods covered under this Invoice are exempted as per Serial No. 4/5 to the annexure to Rule 138(14) of the CGST ...

for KANISK JEWELLERS AND BULLION PVT. LTD.

Director

10.11. In this regard, I observe that the ld. adjudicating authority has given a finding regarding validity of these documents at paragraphs 15.17 and 16.05, which are reproduced below for the sake of ready reference: -

> *"[15.17] I hold that, submitted documents by Shri Sanjay Kumar Kotal [Claimant of gold] i.e. [i] JOBWORK-KJB-KIV-164/2019-2020, dated: 13.09.2019 has not been proven falls (sic) by the investigating authority [but it was not accompanied by the Carrier of the gold at the time of carrying possessing the gold] and [ii] Purchase GST Tax Invoice for gold bullion weighing: 700.000 grams issued by from M/s Kartikey Jewellers Pvt. Ltd. Kolkata, dated: 31.05.2019 has not been proven falls (sic) by the investigating authority rather Director of M/s Kartikey Jewellers Pvt. Ltd. Kolkata has confirmed/certified about its genuinity.*
>
> *…..*
>
> *[16.05] 1 hold that, considering the fact that no corroborative evidence has been placed on record regarding submission of falls / fake documents in respect of claims of gold under seizure by the Noticee No. 2. Accordingly, charges framed against the Noticee No. 2 for imposing penalty under Section 114AA of the Customs Act, 1962 cannot be proper as Section 114AA of the Customs Act, 1962 is held for imposing penalty for extreme fraud / evasion cases under the Customs Act, 1962, 11 was found that no such act has been committed / done by the Noticee No. 2. Although the investigating authority has failed to ascertain that who was the actual supplier of that gold under seizure or from whom the gold was procured by the Noticee No.1, the gold under seizure were fable to confiscation under Section 111(b) & (d) of the Customs Act, 1962 as none of the Noticees were able to submit/produce any proper / related documents in respect of actual procurement of d under seizure while coming from Patna to Shalimar by Patna-Shalimar Duronto Express which was mandatory under Section 123 of the Customs Act, 1962."*

10.12. From the above, I find that the documents submitted by the Appellant have not been proved to be false. However, despite having found that the documentary evidence submitted by the Appellants was genuine, the ld. adjudicating authority has held that the goods are liable for confiscation vide the Order-in-Original dated 30.03.2022. Considering the documentary evidence submitted by the appellants, I do not find any reason to reject the evidence of legal procurement of the gold produced by the Appellants. Consequently, I hold that the provisions of Section 123 of the Customs Act, 1962 are not applicable to this case.

10.13. As the Appellants have submitted enough evidence for legal purchase of the gold domestically, I hold that the confiscation of the gold under Section 111 of the Customs Act, 1962 is not sustainable and hence, I set aside the same.

11. Regarding the penalties imposed on the Appellants, I find that the ld. adjudicating authority has imposed the penalties under Section 112 of the Customs Act, 1962. As the gold is not liable for confiscation, there is no offence committed by the Appellants warranting imposition of penalty under Section 112 ibid. Accordingly, the penalties imposed on the Appellants under Section 112 of the Customs Act are set aside.

12. In the result, I set aside the impugned order and allow the appeals filed by the Appellants.

(Order pronounced in the open court on **16.04.2025**)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd

CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH, COURT NO. II

CUSTOMS APPEAL NO. 51070 of 2022 (SM)

[Arising out of the Order-in-Appeal No. CC (A) CUS/D-II/Imp/TKD/1218/2020 dated 22/12/2020 passed by The Commissioner of Customs (Appeals), New Custom House, New Delhi – 110 037.]

M/s LDPE India **Appellant**
212, First Floor, Harsh Vihar,
Pitampura, New Delhi – 110 034.

VERSUS

The Commissioner of Customs (Appeals), **Respondent**
New Custom House, Near IGI Airport,
New Delhi – 110 037.

Appearance
Shri Anmol Arya, Advocate – for the appellant.
Shri Gopi Raman, Authorized Representative for the Department.

CORAM : **HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)**

FINAL ORDER NO. 50664/2023

DATE OF HEARING/DECISION : 27/04/2023.

ANIL CHOUDHARY :-

Heard the parties. The issue involved in the appeal is whether the appellant is liable to pay Anti Dumping Duty under serial number either 14 or 21 of Notification No. 21/2014-CUS (ADD) dated 13 June, 2014.

2. That in the normal course of trade the Appellant had imported four consignments of 1087 MT of "PVC Resin 565 [Homopolymer of Vinyl Chloride Monomer (Suspension Grade)]:,

from China during the period July, 2018 to March, 2019, assessable value of the goods was Rs. 6.61 Crore. Upon arrival of the goods the Appellant had filed 4 separate Bills of entry for the clearance of the same. That the Appellant had classified the goods under CTH 3904 and paid ADD amounting to Rs. 84.84 lakhs (Sl. No. 14 @ Rs. 91.27 per M.T.), the details of which are as under :

Sr. No.	B/E No.	B/E Date	Item description	Weight (KGS)	Assessable Value (INR)	ADD Paid (INR)	ADD paya-ble (INR)	ADD Short Levied (INR)
1.	7055188	03.07. 2018	PVS Resin SG5 [Homopol-ymer of Vinyl Chloride Monomer (Suspen-sion Grade)]	52	3175836	4429234	531650	104685
2.	2087664	18.02. 2019	- do -	520	30623428	4656894	5589633	1100633
3.	2300305	05.03. 2019	- do -	257.5	16157981	1692146	2743178	1240218
4.	2300713	05.03. 2019	- do -	257.5	16157981	1692146	2743178	1240218
		Total				**8484120**	**11607639**	**3685754**

3. That thereafter the audit scrutiny of the said bills of entry had been conducted by the Inspecting Officer (AP-2), office of the Director General of Audit (Central Receipts), Indraprastha Estate, New Delhi who had alleged that the supplier of the goods was M/s Vesak Singapore PTE Ltd., therefore, the goods were liable to Anti-Dumping duty @ 147.96 USD per MT (as per Sl. No. 21) of Notification No. 08/2016-Customs (ADD), which was levied @ 123.27/941.27 USD per MT. Therefore, due to incorrect

application of ADD rate resulted in short levy of duty amounting to Rs. 36,85,754/-.

4. That thereafter (after pre-notice consultation) the department had issued the demand cum Show Cause Notice dated 30.09.2019 (signed on 01.10.2019) to the Appellant and directed the Appellant to explain as to why the short levy of duty amounting to Rs. 36,85,754/- should not be recovered in terms of Section 28 (1) of the Customs Act, 1962 along with interest at the rate fixed by notification issued under Section 28AA of the Customs Act, 1962.

5. That the Learned Adjudicating Authority had thereafter passed the Adjudication Order dated 30.01.2020 under DIN – 20200174NE00005U548E, vide which he has confirmed the demand of duty short levied, amounting to Rs. 36,85,754/- against the goods imported vide bills of entry mentioned in the Table-A under Section 28(1) of the Customs Act, 1962 and ordered for recovery of interest, as applicable under Section 28AA of the Customs Act, 1962.

6. That being aggrieved by the aforementioned AO bearing No. 10/2020, the Appellant preferred an appeal before the Commissioner of Customs (Appeal), New Delhi.

7. That vide present impugned order dated 22.12.2020 Commissioner of Customs (Appeals) has dismissed the Appeal filed by the Appellant.

8. Being aggrieved by the impugned order-in-appeal appellant is before this Tribunal.

9. Learned Counsel for the appellant has taken me to the copies of documents namely Bill of entry, Bill of lading, commercial invoice, etc. I find from the documents particularly Bill of lading that the goods are being exported by the manufacturer namely M/s Xinjiang Zhongtai Chemical Co. Ltd., China and the goods have been consigned to LDPE India (appellant). The port of loading is Xinjiang Port, China and the port of discharge is in India, place of delivery being ICD, TKD, New Delhi. Thus, the goods have originated from China and have sailed from China to India. M/s Vesak Singapore PTE Ltd., party appears to be the indenting agent or broker in the transaction of import by the appellant from China. I find that court below have erred in holding that actual exporter is M/s Vesak Singapore and not the manufacturer exporter – M/s Xinjiang Zhongtai Chemical Co. Ltd., China. Accordingly, I hold that the appellant is rightly paid Anti Dumping duty under Sl. No. 14 of Notification No. 27/2014-CUS (ADD) – U.S. $ 91.27. Accordingly, this appeal is allowed. The impugned order is set aside. The appellant is entitled for consequential benefit, if any.

(Order dictated and pronounced in open court.)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

PK

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 53938 OF 2023

(Arising out of Order-in-Appeal No. CC(A)CUS/D-II/Import/ICD/TKD/1087/2022-23 dated 17.11.2022 passed by the Commissioner of Customs (Appeals), New Delhi)

M/s. Vijex Vyapaar Private Limited **.....Appellant**
(through its Director Sh. Navratan Baid)
67/4, Ground Floor, DaryaGanj
Delhi-110002

VERSUS

Commissioner of Customs (Import) **.....Respondent**
ICD, Tughlakabad, New Delhi-110020

APPEARANCE:

Shri Ashish Bansal, Advocate for the Appellant

Shri M.K. Shukla, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 29.04.2024
DATE OF DECISION: 23.07.2024

FINAL ORDER NO. 56042/2024

JUSTICE DILIP GUPTA:

M/s. Vijex Vyapaar Private Limited[1] has sought the quashing of the order dated 17.11.2022 passed by the Commissioner of Customs (Appeals)[2], by which the speaking order dated 20.04.2022 passed by the Assistant Commissioner of Customs[3] has been upheld and the appeal has been dismissed. The Assistant Commissioner, by the said order, had rejected the self-assessment of the goods imported by the appellant through a Bill of Entry dated 07.02.2022 and re-assessed the goods under

---

1. **the appellant**
2. **the Commissioner (Appeals)**
3. **the Assistant Commissioner**

section 17(4) of the Customs Act, 1962[4] in terms of Serial No. 2 of the Anti-Dumping Notification dated 05.03.2021.

2. The appellant had filed a Bill of Entry dated 07.02.2022 for clearance of the goods declared as 'Printer Color Toner'. The goods were imported from China and the details of the goods imported through the said Bill of Entry are as follows:

S. No.	Item Description	UQC	Declared Quantity	Declared CTI	Declared Unit Price per UQC (USD)	Assessed Unit Price per UQC (USD)	Assessable Value (INR)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1.	Printer Color Toner TS-07 10KGX2/CTN	KGS	2280	37079090	7.680263	7.680263	1401331.99
2.	Printer Color Toner TS-07 338G/Bag	KGS	101.4	37079090	8.87574	8.87574	72023.23
	Total						**1473355**

3. The assessing officer raised a query that it appeared from examination of the goods imported that they were 'black toner in powder form', which product attracted anti-dumping duty under the Notification dated 05.03.2021. The appellant filed a reply to the aforesaid query stating therein that the color toners required for color printers are Cyan, Magenta, Yellow and Black (commonly called as CMYK) toners, but for print out of any color print, black toner is consumed more when compared to other three color toners. The appellant also pointed out that a black toner for printers is costly than the normal black toner and that a black

---

4. the Customs Act

toner, if part of the color toner, had been kept out of anti-dumping investigation and, therefore, the goods imported by the appellant would not attract anti-dumping duty. The reply filed by the appellant is as follows:

> "a) The color toner required for color printers are Cyan, Magenta, Yellow and Black **for printing any color print out black toner is required and it is consumed more compare to other colors.** Black Toner for color is costly than the normal toner and particles of color black toner are finer (in terms of microne) than normal black toner, we attach herewith product list of various supplier which clearly indicate **the black toner is a must part of color toner (CYMK).**
>
> b) **we disagree to query raised and state in support of the toner we have submitted**:-
>
> 1. Invoice of exporter
>
> 2. Certificate of Origin duly signed by exporter and certified by the customs of exporting country.
>
> 3. **A letter from exporter confirming that the exported toner is a part of color toner-black.**
>
> 4. **anti dumping investigation for black toner were confined to only black toner for printers which have been imported at the lower price than the cost.**
>
> **The following category of black toner were kept out of investigation**
>
> **a. black toner a part of color toner**
>
> b. black toner of MICR toner
>
> c. liquid toner
>
> d. black toner in cartridge form
>
> e. black toner imported by OEM as per the notification 6/6/2020DGFT 18.06.2020.
>
> **This has been clarified in clear terms of final finding by the anti dumping authority. We once**

> **again state that we disagree to the query raised and request you to release the goods at the earliest as the duty for the same has been paid on 18.02.2022, COO and self declaration of shipper uploaded vide IRN Nos. 2022031000028017 & 2022031000028018**"
>
> **(emphasis supplied)**

4. The reply submitted by the appellant did not find favour of the Assistant Commissioner and, therefore, the self-assessment done by the appellant under section 17(1) of the Customs Act was rejected and re-assessment was done under section 17(4) by imposing anti-dumping duty @ USD 1458 per MT. The relevant portion of the order passed by the Assistant Commissioner is reproduced below:

> "9.1 **The ADD Notification No. 12/2021-Customs (ADD) dated 05.03.2021 excludes color toner from the scope of ADD leviability. I find that importer's claim that the goods being imported are "Black Toner in Powder Form" and are part of color toner, does not hold merit as the Notification vide F. No. 6/6/2020-DGTR clearly states the uses of 'Black Toner in powder form', as used in Laser Printer.** It does not anywhere states/implies that "Black Toner in powder form", used in Black and white/monochrome laser printers only.
>
> 10. During verification of self-assessment of Bill of Entry No. 739090 date 07.02.2022 and documents submitted/uploaded by the importer in e-Sanchit, I find that the importer has imported the goods from China, vide Invoice No. TOM20220002 dated 03.01.2022. The same goods were imported from China. The importer did not provide any documentary evidence for the producer of the goods. Hence, I am of considered view that Anti-dumping Duty is payable as per Sl. No. 2 of the Notification No. 12/2021-Cus(ADD) dated 05.03.2022.
>
> 11. **In view of foregoing, I hold that self-assessment done by the importer is liable to be**

rejected under Section 17(4) of the Customs Act, 1962. Therefore, I find that Anti-dumping Duty in respect of subject goods is payable as per Sl. No. 2 of the Notification No. 12/2021-Cus(ADD) dated 05.03.2021."

(emphasis supplied)

5. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals), who by order dated 17.11.2022, dismissed the appeal. The relevant portion of the order of the Commissioner (Appeals) is reproduced below:

"5.2 I note that the Adjudicating Authority and Appellant is not contesting classification of goods. The issue to be decided in the instant appeal is whether the impugned goods attracted Anti-Dumping Duty under Notification No. 12/2021-Customs (ADD) dated 05.03.2021, or not.

5.3 **It is undisputed that impugned goods are "black toner in powder form". However, the Appellant is contending that the 'black toner' is part of 'color toner' for color printing as it is of fine quality and costlier and is excluded from scope of Notification No. 12/2021-Customs (ADD) dated 05.03.2021.**

5.5 **However, I note that distinction made by the Appellant is an artificial distinction to escape ADD.** The Final Findings of the DGTR published vide Notification F. No. 6/6/2020-DGTR dated 28.01.2021 (case no ADD-(OI)-05/2020 clearly says-

"C. Product under consideration and like Article

5. At the stage of initiation, the product under consideration was define as:

The product under consideration is Black Toner in powder form. Toner is used in laser printers, photocopies, digital multifunction devices (MFD), etc. to form the printed text and images on the paper."

> It is nowhere specified that black toner must be used for monochromatic printing only. Further, exclusion clause specifies 'color toner'. **In common parlance, 'color toner' is different from 'black toner'. Thus, I fully agree from the Adjudicating Authority and do not find any reasons to differ with impugned order.**
>
> 5.5 The plea of the Appellant that their product is of fine quality and costlier has no relevance as Notification No 21/2021-Customs (ADD) refers to "Black Toner in Powder Form" and does not make any distinction on basis of fineness and cost."
>
> **(emphasis supplied)**

6. It is this order dated 17.11.2022 passed by the Commissioner (Appeals) that has been assailed in this appeal.

7. Shri Ashish Bansal, learned counsel for the appellant submitted that the goods imported by the appellant were outside the purview of levy of anti-dumping duty as the anti-dumping duty was initiated in respect of black toner and not color toners which contain 'CMYK' toners. Learned counsel also pointed out that the declaration in the Bill of Entry was made as per the supply invoice. Learned counsel also submitted that as the speaking order was not passed within the period of fifteen days from the date of re-assessment of the Bill of Entry as contemplated under section 17(5) of the Customs Act, the re-assessment order deserves to be set aside on this ground alone.

8. Shri M.K. Shukla, learned authorized representative appearing for the department, however, supported the impugned order and submitted that it does not call for any interference. According to the learned authorized representative, the goods imported by the appellant from China are 'black toner in powder form', which toner would attract anti-dumping duty.

9. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

10. The appellant had filed the Bill of Entry dated 07.02.2022 in which the relevant details contained in Part-II relating to Invoice and Valuation details are reproduced below:

1. S. No.	2. CTH	3. DESCRIPTION	4. UNIT PRICE	5. QUANTITY	6. UQC	7. AMOUNT
1.	37079090	**PRINTER COLOR TONER TS-07 10KGX2/CTN**	7.680263	2280.000000	KGS	17511.00
2.	37079090	**PRINTER COLOR TONER-TS-07 338G/BAG**	8.875740	101.400000	KGS	900.00

(emphasis supplied)

11. It needs to be noted that TS-07 in the description of the product is for black toner. Thus, the declaration of 'Printer Color Toner Black' in the invoice denotes 'black color toner'. However, as noticed above, a query was raised by the assessing officer that the goods imported would attract anti-dumping duty. The appellant filed a reply to the query contending that though a color toner has four color toners, including black toner, and that a black color toner is consumed more than the other three color toners and is also costlier than the normal black toner. The appellant also pointed out that a black toner is a necessary part of the color toner required for color printers and as color toner was kept out of the anti-dumping investigation, the product imported by the appellant would not attract anti-dumping duty.

12. The appellant had, however, agreed to pay the additional anti-dumping duty under protest and requested for a speaking order to be passed. The speaking order dated 20.04.2022 was passed by the Assistant Commissioner against which the appeal filed by the appellant was dismissed by the Commissioner (Appeals).

13. It is not in dispute that what was imported by the appellant, as stated in the Bill of Entry, is 'Color Toner Black'. Though, it is correct that the Anti-Dumping Notification dated 05.03.2021, levied anti-dumping duty on 'black toner in powder form', but the Notification also mentions that 'black toner in powder form' would exclude a color toner. The relevant portion of the Notification dated 05.03.2021 is reproduced below:

Sl. No.	HS Code	Description of Goods	Country of Origin	Country of Export	Producer	Amount	Unit	Currency
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1.	*****	*****	*****	*****	*****	*****	*****	*****
2.	3707	Black Toner in Powder Form*	China PR	Any country including China PR	Any producer other than at serial number 1	1458	MT	USD

*Black Toner in Powder Form excluding the following:

i. Color Toner
ii. MICR Toner (Specialized Toner used for printing in Cheques)
iii. Toners imported for the use by Original Equipment Manufacturers of Printing Equipment.
iv. Toner in Cartridges
v. Toner in liquid form

14. It would be seen that a color toner is excluded from levy of anti-dumping duty under the Notification dated 05.03.2021.

15. A color toner has four colors CMYK. 'K' denotes black color. What was imported by the appellant was black color toner for color printers and

not a black toner for black and white printers which, as noticed above, attracted anti-dumping duty. The Assistant Commissioner merely noticed that the goods imported by the appellant were 'black toner in powder form' and completely failed to appreciate that the Anti-Dumping Notification itself stipulated that 'black toner in powder form' would exclude a color toner. This fact was specifically pleaded by the appellant in reply to the query raised by the Assistant Commissioner.

16. The Commissioner (Appeals) observed that the distinction sought to be drawn by the appellant was artificial in nature and also failed to appreciate that the Anti-Dumping Notification itself excluded a color toner from levy of anti-dumping duty. The Commissioner (Appeals) also fell in error in observing that in common parlance 'color toner' is different from 'black toner'. A color toner, as noticed above, has four different color toners, namely CMYK, and a black color toner is one of the four color toners constituting a color toner.

17. In view of the aforesaid discussion, it has to be held that black color toner would not be subjected to levy of anti-dumping duty under the Notification dated 05.03.2021.

18. Such being the position, the order dated 17.11.2022 passed by the Commissioner (Appeals) cannot be sustained and is set aside. The appeal is, accordingly, allowed with consequential relief.

(Order pronounced on **23.07.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Shreya

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 50224 of 2020 [SM]

[Arising out of Order-in-Original Appeal No. CCA/CUS/D-II/IMP./ICD/TKD/1043/2019-20 dated 30.01.2020 passed by the Commissioner of Customs (Appeals), New Delhi]

M/s. Mann Tourist Transport Service Pvt. Ltd. **...Appellant**
29, Panchkuian Road,
Opposite Metro Pillar No.11,
New Delhi - 110001

VERSUS

Commissioner of Customs, New Delhi **...Respondent**
New Customs House,
Near I.G.I. Airport,
New Delhi - 110037

APPEARANCE:
Shri Anup Kumar Srivastava, Advocate for the Appellant
Shri V.J. Saharan, Authorized Representative for the Respondent

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 22.12.2023
DATE OF DECISION: **08.04.2024**

FINAL ORDER No. 55492/2024

DR. RACHNA GUPTA

The appellant has imported four "New Mercedes Benz V220D Sport Extra Long Auto" classifying under CTH No. 87032391. The said goods were imported from M/s Bimta Group Ltd., Castle Court, 41 London Road, Reigate, Surrey, RH2 9RJ, United Kingdom. The appellant filed EDI Bills of Entry No. 2456457 dated 14.07.2017, 2732842 dated 04.08.2017, 2732939 dated 04.08.2017 and 2456119 dated 14.07.2017 for clearance of the said imported vehicles/goods.

1.1 The goods were examined 100% on 1st check basis to check compliance of import licencing note of chapter 87 and to check eligibility of import. As per examination report the goods were found to be New Mercedes Benz V220D Chassis No. Engine No. as per Invoice.

1.2 From the scrutiny of documents submitted by importer, catalogue and COP of Mercedes Benz, the manufacturer, it is noticed that the vehicles are Diesel Driven having Engine Capacity of 2143 CC. The importer had claimed Import policy exemption under Para 7 of Import Licencing Note to Chapter 87. As per Para 7 of the Note 'Import of New Vehicle having an FOB value of USD 40,000 or more and engine capacity of more than 3000CC for petrol run vehicle and more than 2500CC for diesel run vehicles by (a) Individuals, (b) companies and firms or (c) OEMs (Original Equipment Manufacturers who have manufacturing and service network in India) will be exempt from the conditions at S. No. 2(II)(a)(iv) and 2(II)(c) above. However, at the time of Customs clearance, a type approval certificate/COP of an international accredited agency from the country of origin or an EC Type Approval Certificate/ Certificate of COP, of an accredited agency from any member state of EU, including a notarized English translation thereof, shall be furnished. This Type Approval shall stipulate that the vehicle to be imported complies with all the ECE Regulations for the complete vehicle. The importer has to comply with provisions of Para 2 of Import Policy Note which they failed to prove.

1.3 Department therefore formed an opinion that the goods i.e. four Mercedes Benz cars imported vide said four Bills of Entry are liable to confiscation under Section 111(d) of the Customs Act, 1962 as the same shall fit into the category of restricted goods under the Foreign Trade Policy since its import are regulated with certain conditions which have not been allegedly complied by the appellants. Importer was given opportunity to make good the deficiency of the documents requisite for complying with the conditions for the purpose. But vide letter dated 30.08.2017, importer/appellant denied the availability of the requisite certificate even with the ex parte. Hence vide Order-in-Original No. 99/2017 dated 17.10.2017 four of the imported cars valued at Rs.1,41,56,704.64 were ordered to be confiscated under Section 111(d) of the Customs Act, 1962 with an option to redeem on payment of Rs.20,00,000/- as redemption fine. Penalty of Rs.10,00,000/- was also imposed under Section 112(a)(i) of the Act. Proof of compliance to conformity of production as required under Rule 126A of Central Motor Vehicle Rules was directed to be submitted within 6 months of the imports. Being aggrieved the appellant is before this Tribunal.

2. I have heard Shri Anup Kumar Srivastava, learned Advocate for the appellant and Shri V.J. Saharan, learned Authorized Representative for the department.

3. Learned counsel for the appellant submitted that the European Council Certificate of Conformity issued by Surrey Chamber of Commerce (Place of supply) and Type Approval from M/s Mercedes Benz (manufacturer) from abroad, shows that the

vehicles adhered to European Standards. As per Rule 126 of Central Motor Vehicles Rules (CMVR), there has to be a type approval certificate to satisfy that the vehicles comply with Central Motor Vehicles Act and Central Motor Vehicles Rules (CMVR) and meet the relevant technical and safety requirements laid down by the Government. It can be seen that these vehicles have been registered and certified by the Transport Department of Government of NCT of Delhi as complying with all provisions of CMVR. Moreover, these have been given All India Tourist Permits, Insurance and Certificate of Fitness by the Delhi Government. The Certificate of Fitness dated 03.11.2017 specifically states that the vehicle complies with all provisions of Central Motor Vehicle Act and Rules. Therefore, after Delhi Government has certified that these vehicles comply with CMV Act and Rules, the Certificate of Compliance becomes redundant. Thus, it cannot be said that there was violation of import policy. Learned counsel has relied upon the following decisions:

(i) Polixel Security System Pvt. Ltd. Vs. Commissioner of Customs (Import), New Delhi reported as (2023) 5 Centax 167 (Tri.-Del)

(ii) Polyplex Corporation Ltd. Vs. Commissioner of C. Ex., Mumbai reported as 2007 (211) ELT 548 (Tri.-Del)

(iii) Modern Trading & Logistics LLP Vs. Commissioner of Customs (NS-V) reported as (2023) 5 Centax 21 (Tri.-Bom)

(iv) Commissioner of Customs Vs. Ankineedu Manganti reported as 2012 (275) ELT 551 (Ker.)

With these submissions the order under challenge is prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions learned Departmental Representative has relied upon the findings in Para 5.3, 5.4 and 5.5 of the impugned order in appeal. No infirmity is impressed. While relying upon the decision of this Tribunal in the case of **DEPE Global Shipping Agencies Pvt. Ltd. Vs. Commissioner of Customs (Import), Nhava Sheva reported as 2016 (9) TMI 217 – CESTAT Mumbai,** learned Departmental Representative has prayed for dismissal of appeal.

5. Having heard the rival contentions and perusing the entire records of this appeal, I observe and hold as follows:

5.1 In the present case the appellant is alleged to have failed to comply with provisions of Para 2 of import policy note. Hence four Mercedes Benz cars imported by appellant are alleged to have become restricted goods and thus are ordered confiscation. To adjudicate as to whether these findings are correct, it is necessary need to look into the said provision. As per Para 2(II)(b) and (c) of Import Licensing Note of Chapter 87:

> *"(b) the vehicle shall confirm that the provisions of the Motor Vehicles Act, 1988 and the rules made thereunder, as applicable, on the date of import*
>
> *(c) whoever being an importer or dealer in motor vehicles who imports or offers to import a new vehicle into India shall-*
>
> *(i) at the time of importation have valid certificate of compliance as per the provisions of rule 126 of Central Motor Vehicle Rules (CMVR), 1989, for the vehicle model being imported, issued by any of the testing agencies, specified in the said rule;*

(ii) be responsible for all the provisions assigned to the manufacturer as per Rules 122 & 138 of CMVR, 1989 and for issuing form 22, as per provisions of CMVR, 1989; and

(iii) give an undertaking in writing that the proof of compliance to conformity of production as per rule 126A of CMVR shall be submitted within six months of the imports. In case of failure to do so, no further import of new vehicle of that model shall be allowed thereafter."

5.2 Hon'ble Kerala High Court in the case of **Ankineedu Manganti (supra)** held that:

"…….In our view type approval certificate is mainly required to ensure that the vehicle is safe and road worthy for public use and it is to be considered by the registering authority while registering the vehicle and not by the Customs authority when it is imported. Besides this, the assumption of the department that the importer has imported the vehicle which is unfit for use on road is also absurd……."

5.3 However, it is also clear from the said provision that the certificate as required in terms of Rule 126 CMVR is a mandatory requirement as the word used therein is 'shall'. Hence I hold that the decision of this Tribunal in **Polixel Security System Pvt. Ltd. (supra),** as relied upon by appellant, is not applicable to the present case. In the said case exemption from duty was denied invoking such procedural compliance which was not mandatory.

5.4 I further observe it to be an admitted fact that the imported vehicles have been registered and have got certified by the Transport Department of Government of NCT of Delhi as complying with all the provisions of CMVR. Not only this, All India Tourist Permit & Certificates of Fitness have been issued by Delhi Government stating that the vehicle complies with all provision of

CMV Act and Rules including Rule 126A of CMVR. To our opinion these certificates by Government authorities of importer's country amounts to substantive compliance of the impugned Import Licensing Note 2. The Note is therefore held to have been wrongly invoked and so is wrongly invoked the provisions of Foreign Trade Policy for ordering confiscation of imported cars. I draw my support from the decision of this Tribunal, Mumbai bench in the case of **Modern Trading & Logistics LLP (supra),** wherein it is held that once a vehicle has been registered with the competent authority under Motor Vehicles Act, it is evident that it complies with all stipulations for operation and running on Indian road and thus a Certificate is redundant and superfluous. The relevant portion is reproduced as follows:

> *"7……Furthermore, it is on record that the vehicle has already been registered with the competent authority under the Motor Vehicles Act, 1988. Provisions under the Foreign Trade Policy including licensing norms relevant to chapter 87 in ITC (HS) classification are intended to ensure that the import of any goods, post-clearance, would not be in breach of the essential requirements of law subject to which motor vehicles may be registered for operation on roads. The policy condition is not one incorporated merely for the sake of regulating imports and exports of the country but to ensure that the imported goods are compliant with the regulatory measures, other than that relating to imports and exports, under the municipal laws of the country. As the impugned vehicle has already been registered with the authorities concerned, it would appear that the vehicle complies with all the stipulations for operation and running on Indian roads. This, in effect, is the sum and substance of the ruling of the Hon'ble High Court of Kerala in re Ankineedu Manganti holding that*
>
> > *'The appeal is filed against the order of the Customs, Excise and Service Tax Appellate Tribunal [2010 (262) ELT 484 (Tribunal)] holding that the confiscation of respondent's vehicle for non*

production of type approval certificate is untenable. The learned standing counsel appearing for the appellant contended that Import policy requires production of type approval certificate in respect of every model of vehicle imported. However, we notice from the Tribunal's order that the vehicle imported is produced by the world renowned vehicle manufacturer Toyota. It is the further finding that same types of vehicles are imported to India on earlier occasions. In our view type approval certificate is mainly required to ensure that the vehicle is safe and road worthy for public use and it is to be considered by the registering authority while registering the vehicle and not by the Customs authority when it is imported. Besides this, the assumption of the department that the importer has imported the vehicle which is unfit for use on road is also absurd. In fact, in a similar case, the Delhi High Court has upheld the view of the Tribunal because the importer cannot be expected to get what is not possible to obtain. We therefore do not find any merit in the appeal filed by the department. Consequently the appeal is dismissed.'

8. Accordingly, we hold that the inclusion of this condition as necessary for provisional release is redundant and superfluous and we allow this appeal by expunging the said condition as requirement of provisional release."

5.5 I also observe that it has been acknowledged in the Order-in-Original itself that there is no mis-declaration neither of description nor of classification nor even of quantity and value except the violation of procedural condition of policy. Confiscation of imported vehicle is ordered only because said violation is admitted. But I am of the opinion that substantial benefit of duty exemption shall not be denied on account of mere procedural lapse. As already discussed above the intent of the policy condition as is held to have been violated stands fulfilled in view of the certificate issued by Transport Authority. This particular fact of certificate issued by Delhi Transport Authority distinguishes present case from the case

of **DEPE Global Shipping Agencies Pvt. Ltd. (supra)** as relied upon by learned Department Representative.

6. Hence in the light of the above discussion, I hold that the order under challenge is not sustainable. Same is hereby set aside. Consequently, the appeal stands allowed.

[Order pronounced in the open court on **08.04.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

HK

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Custom Appeal No. 50013 of 2020

(Arising out of Order-in-Appeal No. CC(A)/Customs/D-1 EXP-NCH/319/2019 dated 05.09.2019 passed by the Commissioner of Customs (Appeals), New Delhi)

M/s. Yadav Agro Industries .... Appellant
New Mandi, Farrukhabad Road,
Etawah-206001 (UP)

VERSUS

The Commissioner of Customs,
Air Cargo Export, New Delhi ....Respondent
New Customs House, New Delhi

APPEARANCE:
Shri Ashish Kumar Shukla, Advocate for the Appellant
Shri Rakesh Kumar, Authorized Representative of the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V.SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/ Decision: January 13, 2023

FINAL ORDER NO. 50052/2023

JUSTICE DILIP GUPTA

This appeal seeks the quashing of the order dated September 05, 2019 passed by the Commissioner of Customs (Appeals)[1], by which the order dated November 17, 2016 passed by the Additional Commissioner confirming the demand of customs duty in respect of a licence issued under the Export Promotion Capital Goods[2] Scheme has been confirmed.

2. It transpires from the records that the appellant had imported and cleared capital goods under a licence dated December 06, 2006 issued under the EPCG Scheme at concessional rate of customs duty of 5% under the notification

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1. **the Commissioner (Appeals)**
2. **the EPCG**

dated September 17, 2004. The exemption under the said notification is subject to certain conditions and the relevant portion is reproduced below:

> "2. The exemption under this notification shall be subject to the fallowing conditions, namely :-
>
> (1) that the goods imported are covered by a valid licence issued under the Export Promotion Capital Goods Scheme in terms of Chapter 5 of the Foreign Trade Policy permitting import of goods at the rate of five percent duty and the said licence is produced for debit by the proper officer of customs at the time of clearance:
>
> **Provided** that for import of spare parts specified at S. No. 4 of the said Table, the validity period of the licence shall be deemed to be the period permitted for fulfillment of the export obligation in full;
>
> (2) that the importer executes a bond in such form and for such sum and with such surety or security as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs binding himself to fulfil export obligation on FOB basis equivalent to eight times the duty saved on the goods imported as may be specified on the licence, or for such higher sum as may be fixed by the Licensing Authority, within a period of eight years from the date of issue of licence, in the following proportions, namely:-

S.No.	Period from the date of issue of licence	Proportion of total export obligation
(1)	(2)	(3)
1.	Block of 1st to 6th year	50%
2.	Block of 7th to 8th year	50%

> Provided that where the duty saved is not less than Rs. 100 crores or where the licence is issued to units in the agri export zone as may be notified by the licensing authority, the export obligation shall be fulfilled within a period of twelve years from the date of issue of licence in the following proportions, namely:-

S.No.	Period from the date of licence	Proportion of total export obligation
(1)	(2)	(3)
1.	Block of 1st to 10th year	50%
2.	Block of 7th to 8th year	50%

3. The appellant has enclosed a copy of the license dated December 06, 2006, which clearly shows that the export obligation period is twelve years.

4. A perusal of the aforesaid notification indicates that where the export obligation period is twelve years, 50% of the

proportion of total export obligation has to be fulfilled in block of first to tenth year. The appellant had, therefore, to fulfill 50% of the total export obligation by December 05, 2016.

5. A show cause notice dated October 14, 2015 was, however, issued to the appellant by the Additional Commissioner of Customs mentioning therein that the appellant had failed to fulfill the conditions of the Notification as he failed to submit the Export Obligation Discharge Certificate[3] within the stipulated time. The relevant portion of the show cause notice is reproduced below:

> " Whereas it appears that M/s. Yadav Agro Industries, New Mandi, Farrukhabad Road, Etawah-206001 (U.P.) (having IC No. 0606002588) (hereinafter referred to as the notice) had imported and cleared capital goods under EPCG Licence No.0630000774 dt. 06.12.2006 at concessional rate of 5% under Notification No. 97/2004-Cus dt. 17.09.2004 as amended subject to the condition that the importer fulfills Export Obligation as prescribed in the said Notification.
>
> 2. And whereas the notice was required to fulfill the conditions of the said Notification including condition to produce within 30 days of the expiry of each block year from the date of issue of licence, evidence showing the extent of Export Obligation fulfilled, and where Export Obligation of any particular block is not fulfilled, the importer shall within 3 months from the expiry of said block pay duties of Customs of an amount equal to that portion of the duties leviable on the goods, but for the said exemption, which bears the same proportion as the unfulfilled portion of the Export Obligation bears to the total Export Obligation together with interest at the rate applicable from the date of clearance of the goods.
>
> 3. Whereas the notice has failed to fulfill the conditions of the said Notification and submit the requisite evidence within the prescribed period regarding fulfillment of export obligation. It, therefore, appears that the total Customs duty foregone in respect of import made by them amounting to Rs. 5,31,762/- (Rs. Five Lakh Thirty One Thousand Seven Hundred Sixty Two Only) is liable to be recovered under the proviso of Section 143(3) of the Customs Act, 1962 read with Section 28 and interest under Section 28AA of the Customs Act, 1962."

6. The appellant filed a reply to the aforesaid show cause notice stating therein that it had written a letter dated September 26, 2016 mentioning that it had applied for issue of the EODC to

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3. the EODC

the Joint Director General of Foreign Trade, Kanpur and so sometime may be given to submit the certificate.

7. The Additional Commissioner, however, by order dated November 17, 2016 confirmed the demand of customs duty for violation of the conditions of the exemption notification. The Additional Commissioner noticed that though sufficient time had been given to the appellant to submit the EODC, but it was not certain in how much time the said certificate would be produced and therefore, no purpose would be served by keeping the adjudication proceedings pending. The Additional Commissioner, therefore, observed that the appellant failed to comply with the conditions of the notification as it had not submitted the Export EODC within the stipulated period. The relevant portion of the order passed by the Commissioner is reproduced:

> "8. The issue involved in the instant case is that the notice had imported and cleared capital goods under ECG Licence No. 0630000774 dated 06.12.2006 at concessional rate of Custom duty of 5% under Notification No. 97/2004-Cus dated 17.09.2004 as amended subject to the condition that the importer fulfills Export Obligation as prescribed in the said Notification. The notice was required to fulfill the condition to produce, within 30 days of the expiry of each block year from the date of issue of license, evidence showing the extent of Export Obligation fulfilled, and where Export Obligation of any particular block is not fulfilled and where Export Obligation of any particular block is not fulfilled, the importer shall within 3 months from the expiry of said block pay duties of Customs of an amount equal to that portion of the duties leviable on the goods but for the said exemption, which bears the same proportion as the unfulfilled portion of the Export Obligation bears to the total Export Obligation together with interest at the rate applicable from the date of clearance of the goods**. I observe that the noticee has not submitted export obligation discharge certificates within the stipulated period so far, hence he has failed to fulfill the condition of the notification. The notice failed to meet with their legal obligations**.
>
> 9. **The matter was taken up with concerned office of DGFT vide this office letters dated 18.05.2016 and 15.06.2016 informing therein that Government revenue was locked up due to non issuance of the required EODC. It was also informed to the DGFT that the case is**

> **pending adjudication in this office owing to decisions pronounced by the higher courts to the effect that principles of natural justice should be maintained while deciding the cases where issuance of EODC is involved, Meetings were also held with officials of DGFT to obtain pending EODC but subject EODC has not been submitted till date. It is not understood as to how such a vital legal requirement can be kept pending for years. I find that the notice has been given. sufficient time and opportunity to produce the EODC. However, as stated before, the notice has not submitted any proof/evidence with regard to fulfillment of export obligations in respect of aforesaid authorization and for want of any information it is also. not ascertainable whether the noticee has filed an applications with DGFT in this regard**. It appears that the notice is least concerned regarding their case."
>
> **(emphasis supplied)**

8. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals), who by order dated September 05, 2019 dismissed the appeal and confirmed the order passed by the Additional Commissioner. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below:

> "5.2 **I also find that the Adjudicating Authority was in touch with the DGFT and the DGFT had intimated the status as pertaining to Kanpur. It was not clear as to how much time would lapse by the time the EODC was obtained by the appellant. In the interest of revenue and in the interest of Justice, enough opportunity was already granted. The submission of EODC cannot be kept pending for an indefinite period.** Order passed by the adjudicating authority is correct, as the EODC was not submitted at that point of time and the order strictly adheres to the principles of natural justice.
>
> 5.3 Revenue matters pertaining to Customs Duty or benefits arising out of these Schemes are to boost exports. These facilities shall not be misused. There has to be a deterrent for effective measures to be taken to safeguard the revenue. I have gone through the other case laws submitted by the appellant and find that the facts and circumstances of the case laws are different from that of the facts and circumstances in the instant case, hence, the same have no bearing on the present proceedings and therefore, are distinguishable. In the light of these findings, I don't find any reason to interfere with the decision in the Order in Original and hence pass the following order."
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> **(emphasis supplied)**

9. Shri Ashish Kumar Shukla, learned counsel appearing for the appellant submitted that the adjudicating authority and the Commissioner (Appeals) both failed to appreciate that in a case where the export obligation period is twelve years, 50% of the total export obligation was required to be fulfilled by the December 05, 2016 and therefore, the show cause notice could not have been issued prior to this date on October 14, 2015 alleging violation of the conditions of the notification. Learned counsel also pointed out that in this case the entire export obligation had been fulfilled within ten years and the appellant had sent a letter dated November 09, 2016 to the DGFT for issuing of the EODC, which Certificate was ultimately provided to the appellant on December 09, 2016. Learned counsel also pointed out the delay on the part of the DGFT in issuing the Certificate cannot be attributed to the appellant. In this connection, learned counsel placed reliance upon the decision of the Delhi High Court in **Smiiel vs. Deputy Commissioner of Customs**[4].

10. Shri Rakesh Kumar, learned authorized representative appearing for the Department has stated that though the license does mention that the export obligation period is twelve years, but it should have been eight years and the total export obligation was required to be fulfilled by the appellant at the end of the sixth year and since this was not done, the show cause notice was issued to the appellant. It is, therefore, his contention that as the appellant has not fulfilled the export obligation, the Commissioner (Appeals) was justified in dismissing the appeal filed by the

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4. 2017 (347) E.L.T 20(Del.)

appellant to challenge the order passed by the Additional Commissioner.

11. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

12. It is not in dispute that the license that was issued to the appellant under the EPCG Scheme mentions the export obligation period is twelve years. This fact has neither been disputed in the show cause notice nor in the two orders passed by the Additional Commissioner and the Commissioner (Appeals). The show cause notice, in fact, does not even mention the obligation period and only makes a general allegation that the appellant had failed to fulfill the conditions of the notification and submit the requisite evidence within the prescribed period regarding fulfillment of export obligation. It is non-submission of the Certificate of fulfillment of export obligation that has been stressed by the Additional Commissioner since the order holds that despite time having been granted to the appellant to submit the Certificate it was not submitted.

13. Though it was the contention of the appellant that it had applied for issue the Certificate in time and the application was pending before the Director General of Foreign Trade, but still as the export obligation period has been mentioned to be twelve years in the license granted to the appellant and the conditions prescribed in the notification for fulfillment of export obligation is 50% at the end of the tenth year, which period expired on December 05, 2016, the show cause notice for non-fulfillment of the export obligation could not have been issued prior to

December 05, 2016. In the instant case, it was issued on October 14, 2015. It appears that show cause notice was issued to the appellant treating the total export obligation period to be eight years from the date of issuance of the license.

14. It is also not disputed that the appellant had applied for the issuance of the Certificate on November 09, 2016 before the expiry of ten years but it was issued to the appellant by the DGFT only on December 09, 2016. The appellant cannot be blamed for delay of three days since the appellant had admittedly applied for issuance of the certificate on November 09, 2016.

15. This issue was also examined by the Delhi High Court in **Smiiel** and it was observed that when there is a delay on the part of the DGFT in issuing the certificate, the appellant cannot be blamed.

16. Such being the position, it cannot be said that the appellant had violated any of the conditions of the notification.

17. The order dated September 05, 2019 passed by the Commissioner (Appeals), therefore, deserves to be set aside and is set aside. The appeal is, accordingly allowed with consequential relief(s).

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Archana

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Stay Application No. 50396 of 2022
(On Behalf of Department)
in
Customs Appeal No. 51608 of 2022 [DB]

[Arising out of Order-in-Appeal No. CC(A) CUS/D-I/Import/NCH/4212-4217/2021-22 dated 09.03.2022 passed by the Commissioner of Customs (Appeals), New Delhi]

Principal Commissioner of Customs,
New Delhi (ACC Import) **...Appellant**
New Customs House,
Near IGI Airport,
New Delhi - 110037

VERSUS

M/s. Micromax Informatics Limited, **...Respondent**
Plot No. 21/4, Block A,
Naraina Industrial Areas, Phase – II,
New Delhi - 110028

WITH

Customs Stay Application No. 50397 of 2022
(On Behalf of Department)
in
Customs Appeal No. 51609 of 2022 [DB]

[Arising out of Order-in-Appeal No. CC(A) CUS/D-I/Import/NCH/4212-4217/2021-22 dated 09.03.2022 passed by the Commissioner of Customs (Appeals), New Delhi]

Principal Commissioner of Customs,
New Delhi (ACC Import) **...Appellant**
New Customs House,
Near IGI Airport,
New Delhi - 110037

VERSUS

M/s. Micromax Informatics Limited, **...Respondent**
Plot No. 21/4, Block A,
Naraina Industrial Areas, Phase – II,
New Delhi - 110028

WITH

Customs Stay Application No. 50398 of 2022
(On Behalf of Department)

in

Customs Appeal No. 51610 of 2022 [DB]

[Arising out of Order-in-Appeal No. CC(A) CUS/D-I/Import/NCH/4212-4217/2021-22 dated 09.03.2022 passed by the Commissioner of Customs (Appeals), New Delhi]

Principal Commissioner of Customs,
New Delhi (ACC Import) **...Appellant**
New Customs House,
Near IGI Airport,
New Delhi - 110037

VERSUS

M/s. Micromax Informatics Limited, **...Respondent**
Plot No. 21/4, Block A,
Naraina Industrial Areas, Phase – II,
New Delhi - 110028

WITH

Customs Stay Application No. 50399 of 2022
(On Behalf of Department)
in
Customs Appeal No. 51611 of 2022 [DB]

[Arising out of Order-in-Appeal No. CC(A) CUS/D-I/Import/NCH/4212-4217/2021-22 dated 09.03.2022 passed by the Commissioner of Customs (Appeals), New Delhi]

Principal Commissioner of Customs,
New Delhi (ACC Import) **...Appellant**
New Customs House,
Near IGI Airport,
New Delhi - 110037

VERSUS

M/s. Micromax Informatics Limited, **...Respondent**
Plot No. 21/4, Block A,
Naraina Industrial Areas, Phase – II,
New Delhi - 110028

AND

Customs Stay Application No. 50400 of 2022
(On Behalf of Department)
in
Customs Appeal No. 51612 of 2022 [DB]

[Arising out of Order-in-Appeal No. CC(A) CUS/D-I/Import/NCH/4212-4217/2021-22 dated 09.03.2022 passed by the Commissioner of Customs (Appeals), New Delhi]

Principal Commissioner of Customs,
New Delhi (ACC Import) **...Appellant**
New Customs House,
Near IGI Airport,
New Delhi - 110037

VERSUS

M/s. Micromax Informatics Limited, **...Respondent**
Plot No. 21/4, Block A,
Naraina Industrial Areas, Phase – II,
New Delhi - 110028

APPEARANCE:

Shri Dhanashekharan, Special Counsel for the Department

Ms. Malvika Kalra, Shri Pranav Sarthi and Ms. Tanwangi Shukla, Advocates for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

DATE OF HEARING: 03.07.2023
DATE OF DECISION: **26.09.2023**

FINAL ORDER No. 51358-51362/2023

DR. RACHNA GUPTA

Present order disposes of five appeals filed by the appellants. They being arising out of the common Order-in-Appeal bearing No. 4212-4217/2021-22 dated 09.03.2022. The said order had adjudicated 5 separate Orders-in-Originals.

2. The brief facts are as follows:

Appellant was importing mobile handsets during the period 2014-15. Appellant had paid Countervailing Duty (CVD) at a higher rate without claiming exemption. It resulted in excess payment of Rs.203,14,84,231/- as being paid over and above 1% of CVD.

Consequent to the judgment of Hon'ble Supreme Court in the case of **M/s. SRF Ltd. Vs. Commissioner of Customs, Chennai reported as 2015 (318) E.L.T. 607 (S.C.)**, the appellant filed five refund applications. The details are tabulated as follows:

Date of refund application	Period involved	Amount of refund	Order-in-Original
14.08.2015	September 2014	22,48,35,292/-	2846/DS/2016 dated 23.01.2017
17.09.2015	October 2014	33,91,47,955/-	2845/DS/2016 dated 23.01.2017
17.09.2015	November 2014 to January 2015	68,11,45,947/-	2844/VKJ/2016 Dated 23.01.2017
27.10.2015	February 2015 and March 2015	50,15,32,437/-	2847/RK/2016 dated 23.01.2017
30.06.2015	June 2014 to March 2015	28,48,22,600/-	234/2016 dated 23.01.2017

3. We further observe that no action initially was taken on those application, where after the appellant filed a Writ Petition No. 11958/2016 before the Hon'ble High Court of Delhi. The interim directions were given to the department vide interim order dated 21.12.2016 to process the refund claims which were the subject

matter of the said writ petition and to pass the orders therein to be followed by release of additional duty. The matter however was listed for compliance. Pursuant to those directions that the aforementioned 5 Order-in-Originals were passed holding the assessee-respondent, M/s. Micromax Informatics Limited, eligible to refund on the basis of the aforementioned M/s. SRF Ltd. judgment. Accordingly, the refund was sanctioned, however, the same was directed towards the Consumer Welfare Fund on the ground that the M/s. Micromax Informatics Limited has failed to discharge the burden of unjust enrichment. The relief of interest was also granted to the assessee vide the said order.

3.1 Still aggrieved of the said outcome, the assessee-respondent amended its pending Writ Petition No. 11958/2016 for challenging the aforesaid order. The department also filed an appeal before Commissioner (Appeals), however with respect to the amount of interest only. M/s. Micromax Informatics Limited also preferred separate appeal against each Order-in-Original before Commissioner (Appeals). Those appeals have been decided vide the impugned order under challenge vide which Commissioner (Appeals) has modified the Order-in-Original to the extent that the refund amount is ordered to be paid to M/s. Micromax Informatics Limited instead of crediting it to Consumer Welfare Fund. The interest for delayed payment of refund claim is also directed to be paid as per law to M/s. Micromax Informatics Limited. Being aggrieved of the said order and pursuant to Review Order No. 09/2022 dated 13.06.2022 that department has filed present five appeals.

4. We have heard Shri Dhanashekharan, learned Special Counsel for the department and Ms. Malvika Kalra, Shri Pranav Sarthi and Ms. Tanwangi Shukla, learned Advocates for the assessee.

5. Learned DR while submitting in furtherance of their appeal has mentioned that Commissioner of Customs (Appeals) has committed an error while ignoring the decision of earlier proceedings by Commissioner (Appeals) vide Order-in-Appeal No. 339-342/2019-20 dated 26.09.2019. It was held therein that no interest was liable to be credited to Consumer Welfare Fund which means that the sanction of refund to Consumer Welfare Fund was upheld. With the impugned order, there have come two diametrically opposite decisions of Commissioner of Customs (Appeals) in respect of the same Order-in-Original which is not acceptable in law. It is further submitted that without any strong evidence brought on record by M/s. Micromax Informatics Limited, Commissioner (Appeals) has wrongly held that the burden of impugned duty was not passed on by the assessee. The onus to prove that the refund amount has not been recovered from the buyers is always on the claimant. In the present case, claimant M/s. Micromax Informatics Limited has actually failed to discharge the said onus. Hence, the sanction of refund and disbursement thereof to M/s. Micromax Informatics Limited is a wrong order. He relied upon the decision of Hon'ble Supreme Court in the case of **Mafatlal Industries Limited Vs. Union of India reported as 1997 (89) ELT 247 (SC).**

5.1 It is further submitted that amount of refund claim in the form of CVD was already treated as cost/expenses. Accordingly, it was debited to profit and loss account for the Financial year 2014-15 which implies that the burden of customs duty was passed on to the buyer of the goods imported. Commissioner (Appeals) is alleged to have ignored this important fact. The decision of this Tribunal in the case of **M/s. Aamby Valley City Developers Ltd. Vs. Commissioner of Central Excise, Pune-I reported as 2021 (55) GSTL 43 (Tri.-Mum)** has been relied upon. It is further impressed upon that the original adjudicating authority though had sanctioned the impugned refund amount but had credited the same to Consumer Welfare Fund only on the ground that appellant has failed to satisfy the bar of unjust enrichment. It is submitted that merely Chartered Accountant Certificate is not sufficient to discharge the said burden. The decision of this Tribunal in the case of **Hindustan Petroleum Corporation Vs. Commissioner of Customs (Imports), Mumbai reported as 2015 (328) ELT 490 (Tri.-Mum.)** is relied upon. With these submissions, the order under challenge is prayed to be set aside and impugned Order-in-Originals are prayed to be restored.

6. While rebutting these submissions learned counsel for the assessee-respondent has submitted that Commissioner (Appeals) has rightly held that the sanctioned refund amounts have not been hit by the bar of unjust enrichment. Accordingly, there is no infirmity when the said amounts are ordered to be credited to the account of respondent-assessee. It is submitted that the assessee was entitled to claim the exemption from payment of excise duty in

excess of 1% on mobile phones subject to the fulfillment of condition of Notification No.12/2012-CE dated 17.03.2012. However, at the time of filing the Bills of Entry, the online portal (ICEGATE) did not allow to claim benefit of exemption notification in respect of the imported mobile handsets. Hence, the duty (CVD) at enhanced rate without claiming the exemption was deposited. Later, the issue as to the applicability of beneficial notifications issued under excise regime qua the payment of CVD on import of goods under the Customs Act was settled by Hon'ble Supreme Court in the case of **SRF Limited (supra),** holding that the benefit of exemption notification under the Central Excise Act shall be made applicable on the import of goods and the conditions mentioned therein shall be deemed to have been fulfilled in case of imported goods. Pursuant to said directions that the impugned refund claims were filed and due to the said decision only, these refunds were sanctioned even by the original adjudicating authority. The order of directing the sanctioned refund to Consumer Welfare Fund was wrong as there is no unjust enrichment of assessee-respondent. The same has clearly and rightly been explained in the impugned order. Hence, there is no infirmity.

6.1 Learned counsel further submitted that no doubt during the pendency of these proceedings there has been another decision of Hon'ble Supreme Court in the case of **ITC Ltd. Vs. Commissioner of Central Excise, Kolkata-IV reported as 2019 (368) E.L.T. 216 (S.C.),** wherein it has been held that a claim of refund could not be entertained unless the order of assessment or self-

assessment was modified in accordance with law by taking recourse to appropriate proceedings. Pursuant thereto M/s. Micromax Informatics Limited filed reassessment applications under Section 17(5) of the Customs Act, 1962 with respect to the relevant Bills of Entry on 26.02.2020. Though the reassessment request was initially rejected vide order dated 09.12.2021. However, Commissioner (Appeals) vide order dated 25.02.2022 has allowed the appeal for reassessment and it is thereafter that the present Commissioner (Appeals) has filed the impugned order. Hence, there is no apparent reason to falsify the said order. Appeals are accordingly prayed to be dismissed.

7. Having heard both the parties at length. We observe and hold as follows:

Despite several stages of litigation involved in the present proceedings the narrow scope of present five appeals is to check as to whether assessee M/s. Micromax Informatics Limited had passed on the burden of CVD paid at the enhanced rate and shall be unjustly enriched in case the refund is disbursed to the assesse's account. In order to determine whether incidence of duty or interest has in fact been passed on to the customers, it is essential to first analyse the provisions of law, as applicable to the facts of the present case.

> "***SECTION 28C****. Price of goods to indicate the amount of duty paid thereon - (1) Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to*

assessment, sale invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold."

*"**SECTION 28D.** Presumption that incidence of duty has been passed on to the buyer.- Every person, who has paid the duty on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."*

It is noted from the aforesaid provisions that under Section 28D of the Customs Act, there is a presumption as to the duty incidence having been passed to the customer. However, such a presumption is rebuttable and cannot be treated as absolute in the circumstances that the assessee produces sufficient documentary evidence to show that the incidence of duty has not, in fact, been passed on to the customer.

8. We observe that to show that the incidence of tax has not been passed on, the assessee-respondent had submitted the following documents:

- Sale Invoices;
- Annual Audited Accounts of the Respondent-Assessee company for the Financial Year 2014-15 & Financial Year 2015-16; and
- CA Certificate confirming that the duty has in fact been borne by the Respondent-Assessee and that the incidence of duty has not been passed on the buyer.

It is pertinent that invoices clearly evidence that CVD has in fact not been recovered from the buyers. As no other alternate

means of recovery of CVD is available, in the event the same is not reflected on the sale invoice, it cannot be presumed that the incidence of duty has infact, been passed onto the buyers because the sale price before as well as after the reassessment remained the same. We draw our support from the decision of Hon'ble Gujarat High Court in the case of **Ashish Metal Rolling Mills Vs. Commissioner of Central Excise, Ahemdabad-I reported as 2014 (305) E.L.T. 510 (Guj.).**

9. We observe from the order under challenge that the Commissioner (Appeals) has held the ground false based whereupon the refund was sanctioned to Consumer Welfare Fund that the amount of refund claims were not been recognized as assets and thus were held to have formed the part of cost of products. He observed that Chartered Accountant's Certificate was also not accepted by original authority. The Commissioner (Appeals) rather appreciated the notes on the Balance Sheet. Note no. 47 of the statutory Auditor's Report in the balance sheet for the year 2014-15 and Note no. 44 in the Balance Sheet for the Financial year 2015-16 has duly been considered by the Commissioner (Appeals) and it has been concluded that merely because the excess CVD stood charged as expenditure, it does not lead to inevitable conclusion that burden has been passed to the buyers of the goods. The decision of this Tribunal in the case of **Elantas Beck India Ltd. Vs. Commissioner of C. Ex. & S.T., LTU reported as 2016 (339) E.L.T. 325 (Tri. - Mumbai)** has been relied upon. The sale invoices produced by the appellants

have rightly been considered. Once those were produced, the onus stands shifted upon the department to falsify those documents but there is no other document produced by the department. The findings of original adjudicating authority are therefore rightly held to be presumptive in nature in para 5.11 of the impugned order. In the light of documents and respective discussion, we find no reason to differ with the findings of Commissioner (Appeals). We also support the observation of Commissioner (Appeals) that Chartered Accountant's/Auditor's certificate has wrongly been ignored by the original adjudicating authority. We rely upon the decision of Hon'ble High Court of Delhi in the case of **YU Televentures Pvt. Ltd. Vs. Union of India reported as 2017 (358) E.L.T. 81 (Del.),** Wherein it was held that once the Chartered Accountant's certificate certifies that the incidence of CVD duty on import was not passed on to customers, it is sufficient to rebut the presumption of unjust enrichment. This Tribunal also in the case of **Zenith Ltd. Vs. CCE, Mumbai reported as 2005 (187) ELT 23 (Tri. Mum.)** has held as follows:

> *"The bar of unjust enrichment is rebuttable presumption and has been effectively rebutted. The lower authorities rejection of CAs certificate on ground of not supported by Cost Certificates for the final products & therefore not accepted cannot be upheld. The Costs Certificates could be sought for and obtained. Rejecting the CAs certificate lightly without any evidence cannot be upheld. The reliance placed by the Revenue on the case of CC v. ELTECH Enterprises [1999 (112) E.L.T. 877 (Tribunal)] will not be applicable as the same was a decision based only on Chartered Accountants certificate. Present case is on facts of the amounts claimed as excess duty paid shown as balance and not used in cost of manufacture. In the present case the ratio of that case cannot be applied. If the department wants to not to rely on the*

CA's certificate, they can get their Cost Accountant appointed & get the costing verified. We cannot upheld the rejection of the refund the reasons as arrived."

Thus, the Chartered Accountant's Certificate which is issued after the analysis of final records of the assessee, once certify that the incidence of duty has not been passed on to the buyers, the same cannot be rejected unless the department provides relevant documents and necessary reasoning justifying the rejection. As observed by Commissioner (Appeals), we also do not find any such document nor any such reasoning on record. Even Board's Circular No. 18/2010 dated 08.07.2010 instructed the departmental authorities to accept the Chartered Accountant's certificate for the purpose satisfying the condition that the burden of CVD has not been passed on by an importer to any other person.

10. Though the department has laid emphasis upon the decision of Hon'ble Apex Court in Mafatlal Supra case but we observe that Hon'ble Apex Court has laid down that the person claiming 'refund' or 'restitute' has to establish "loss or injury" to him i.e. if person claiming refund has passed on the burden of duty to another and has not really suffered any loss or injury, question of reimbursing him does not arise. He even cannot successfully sustain an action of restitution even under Section 72 of Indian Contract Act. In the present case, as observed above, the appellant has proved that burden of excess CVD paid has not been included in sale price, question of passing the amount claimed does not arise. Hence the said decision is not applicable to the facts of present case.

11. With these observations, we do find any infirmity in the order of Commissioner (Appeals). The refund claims were sanctioned by the original adjudicating authority itself. Those were diverted to the Consumer Welfare Fund solely on the presumptive ground of unjust enrichment. The order under challenge has reasonably well explained that the assessee has not at all been enriched unreasonably as no burden of enhanced CVD paid was found to have been passed on to the buyers of imported goods. We do not find anything to differ from those findings. Consequent thereto, the order under challenge is hereby upheld. Resultantly, all the appeals by the department stands dismissed. Applications for stay as were filed by department-appellant are also disposed of.

[Order pronounced in the open Court on **26.09.2023**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(RAJEEV TANDON)
MEMBER (TECHNICAL)

HK

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Cross Application No. 50292 of 2020
And
Customs Miscellaneous Application No. 50081 of 2022
In
Customs Appeal No. 50719 of 2020 [DB]

[Arising out of Order-in-Original No. 04/VKP(04)ADG(Adj.)/DRI/N.Delhi/2019-20 dated 28.11.2019 passed by the Additional Directorate General (Adjudication), Directorate of Revenue Intelligence, New Delhi]

Principal Commissioner of Customs (Import), New Delhi **...Appellant**
Air Cargo New Customs House,
Near I.G.I. Airport,
New Delhi - 110037

VERSUS

M/s. Go IP Global Services Pvt. Ltd. **...Respondent**
H-68, Sector-63,
Noida, U.P.- 201307

APPEARANCE:
Shri Nagendra Yadav, Authorized Representative for the Department
Shri A.K. Prasad and Ms. Surbhi Sinha, Advocates for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 04.09.2023
DATE OF DECISION: **03.01.2024**

FINAL ORDER No. 50009/2024

DR. RACHNA GUPTA

Department has filed present appeal to assail the Order-in-Original No. 04/ADG/DRI/2019-20 dated 28.11.2019/02.12.2019. Cross objections have also been filed by the assessee-respondent. Facts relevant for the purpose are as follows:

1.1 The respondents are engaged in providing end to end technology solutions and services within the infrastructure domain to Telecom Operators, Services Providers, Government, Large and

SME Customers. The Officers of Directorate of Revenue Intelligence, Bangalore (hereinafter referred as DRI) received an information that the appellants were importing Ubiquity Access Points/MIMO products (products having Multiple Input / Multiple Output Technology) and are wrongly claiming Basic Customs Duty (hereinafter referred as BCD) exemption under Notification No. 24/2005-Cus. dated 01.03.2005 as was amended vide subsequent notification and thereby are evading payment of appropriate customs duties. As per the amended Notification No. 11/2014-Cus., following products falling under CTH 8517 were not exempted from BCD payment:

(i) soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers;

(ii) optical transport equipments, combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS), Optical Transport Network (OTN) products, and IP Radios;

(iii) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products;

(iv) Multiple Input / Multiple Output (MIMO) and Long Term Evolution (LTE) Products.

All the above products are telecommunication or Information & Communication Technology products. Those are the medium for communication / transfer of data, signs, signals, images or sounds

by wire, radio, optical or other electromagnetic systems by using standard protocols.

1.2 As per the department there is difference between MIMO technology and LTE standards as has been reproduced in the show cause notice in the table as reproduced below:

Sl.No.	MIMO	LTE
1.	**MIMO** is a radio communications technology or RF technology, that uses multiple antennas to enable a variety of signal paths to carry the data, to provide gains in channel robustness and throughput.	**LTE** (both radio and core network evolution) is a standard for the next generation cellular network technologies. LTE is the latest standard while older standards are GSM/CDMA & 3G.
2.	MIMO is an independent technology and can be used as an add-on wireless technology to existing wireless networks like Wireless Data Communication (wifi) within campus/building/floor, Cellular Networks – Wimax/3F/4G – **LTE (Long Term Evolution)** etc.	**LTE** was designed using MIMO, so as to take advantage of multiple data streams feature which enables for better user experience.
3.	While **MIMO** is an optional & not mandatory feature for **LTE**	If device does not support MIMO, then LTE operators in non-MIMO modes
4.	The **MIMO technology** was introduced in wi-fi in **802.11n** standard and	**LTE standard** was developed and introduced by **3GPP** in Release 8

	approved/certified by IEEE.	
5.	**MIMO** technology operates on unlicensed frequency bands i.e. 2.4GHz & 5/5.8 GHz	**LTE** standard operates only in frequencies which are regulated by governments and some of the popular frequencies in India are 850 MHz, 1800 MHz & 2300 MHz
6.	MIMO the maximum data rate can be as high as 6.93 GBps	In **LTE** the highest theoretical peak data rate on the transport channel in the downlink, can be as high as 300 Mbps
7.	**MIMO** operates in the channel bandwidth range of 20 to 80/160 MHz	Bandwidth available in LTE standards are starting with 1.4 MHz up to 20 MHz.
8.	MIMO is a technology used to increase the throughput between the transmitter and receiver	LTE is a standard used in cellular/Telecom network for enhanced cellular communication
9.	MIMO is one of the subset technology used in 802.11n/802.11ac Standards	The products supporting MIMO technology and products working on LTE standards are different, however the MIMO technology can be a subset technology in LTE products
	Since MIMO technology can be adopted in LTE standards, some features may be similar in both.	

1.3 Department formed the opinion that as per the notification, the products of MIMO technology whether or not those products have LTE technology and the LTE technology products whether or not those have MIMO technology, are not eligible for duty exemption. Both these kind of products were excluded from the scope of exemption from payment of duty given to the products/goods of Chapter heading 8517. With these observations Show Cause Notice No. 38/2018 dated 08.10.2018 was served

upon the appellants alleging that the products imported by the appellants fall under the exclusion to exemption of duty. Resultantly, the following total amount of duty was proposed to be recovered from the appellants along with interest and the proportional penalties:

Name of the place of import	Value of the imported APs (Rs.)	Differential Duty payable (Rs.)
ICD, Tuglakabad, New Delhi	411608582	48488057
Customs ACC, New Delhi	23053375	2567594
Nhava Sheva Port, Mumbai	7130873	813796
Customs ACC, Sahar Andheri (E), Mumbai	3288597	369967
Total	**445081427**	**52239414**

The said proposal has not been confirmed by the original adjudicating authority. Hence the department is in appeal pursuant to the Review Order No. 135/2019-20 dated 28.02.2020.

2. We have heard Shri Nagendra Yadav, learned Authorized Representative for the department-appellant and Shri A.K. Prasad and Ms. Surbhi Singh, learned Advocates for the respondent-assessee.

3. Learned Authorized Representative for the department has relied upon Board's Circular issued in the context of the Notification No. 57/2017-Cus. dated 30.06.2017 which was further amended vide Notification No. 02/2019 dated 29.01.2019, the entry at Sl. No. 13 of the said No. 57/2017 has been discussed in the said circular. The circular clarifies that the machines and apparatus covered under these categories i.e. MIMO and LTE products 'include' 4G and 5G products and its elements, 4G and 5G enabled NB IoT devices and equipment incorporating technologies beyond 5G. The relevant portion of the circular is as under:-

(h)	Multiple Input/Multiple Output (MIMO) and Long-Term Evolution (LTE) products	The Machines/apparatus covered under these categories include- i. 4G(LTE) products and their Elements, namely- eNode B, RRH, CU, DU, RU, BBU, EPC, MME, SGW, PGW, HSS, IMS, Network In a Box (NIB), 4G CPE, etc.; ii. 5G products and its Elements, namely- gNodeB, RRH, CU, DU, RU, BBU, 5GC, IMS, Network In a Box (NIB), 5G CPE, etc.; iii. 4G and 5G enabled NB IoT devices; iv. Equipment incorporating technologies beyond 5G.

3.1 It is trite law that the usage of the word "include" enlarges the meaning of the expression defined. When the word 'include' is used, it must be construed as comprehending not only such things

as they signify but also those things which the interpretation clause declares they shall include. Learned Authorized Representative submitted that in this case, the description of (h) in Sl. No. 20 of amending Notification No. 02/2019-Cus reads as "Multiple Input/Multiple Output (MIMO) and LTE products. Therefore, the products and equipment covered under (h) will include all products which use MIMO technology. Use of the word "include" in the Circular in the column for identification of products/equipment covered, implies that not only the products listed there will be covered but all products which have MIMO technology will also be covered under the said clause. It is evident from the technical specifications of the Access Points imported by M/s. Go IP Global Services and the *admissions made by the personnel of M/s. Go IP Global Services that, the Access Points imported by them are only MIMO products as they support 802.11n/802.11ac standards specified in IEEE which is specifically for MIMO/MU-MIMO products.* Therefore, these products will be covered under clause (h). The Importer is misrepresenting the clause (e) of Annexure 1 of the Circular 08/2023 wherein it is mentioned that Wi-Fi Access Point Equipment will be covered under the category Internet Protocol Radios to misguide the Tribunal despite having submitted during investigation that said devices are MIMO technology products.

3.2 It is submitted that Board has also accepted about the impugned goods be MIMO only and not LTE products. The claim of the Respondent appears to stem from a misinterpretation of the Board's Circular. The products covered under clause (e) “Internet Protocol (IP) Radios” are not products having MIMO technology

because they have been mentioned separately under clause (e) in the Circular. All MIMO technology products are covered under clause (h) and not under clause (e). There is no dispute that the impugned goods imported by M/s. Go IP Global Services are MIMO products i.e. the Access Points imported have the presence of MIMO technology. Therefore, by virtue of the usage of the word "include" while describing the products in Column 3 of clause (h), it is to be construed that the Access Points imported by the Respondent which are admittedly MIMO products, will get covered under clause (h) and not under clause (e). It is also to be noted that the clause (h) of Sl.No. 20 was further amended vide Notification No. 03/2021-Customs dated 01-02-2021 as follows:

> *(xii) against S.No. 20, in column (3), for item (h), the following items shall be substituted, namely:-*
>
> *"(h) Multiple Input/Multiple Output (MIMO) products;*
>
> *(i) Long Term Evolution (LTE) products";*

Therefore, it is evident that the intention of the Legislature has always been to include all MIMO products and LTE products having or not vice-versa technology, within the purview of the clause (h) of Sl.No 20 of Notification No. 57/2017-Cus dated 30.06.2017 as amended by Notification No. 02/2019-Cus dated 29.01.2019.

3.3 It is mentioned that the original adjudicating authority has failed to take into consideration several amendments to the impugned entry and the intent of legislature behind the same. Hence, the findings that, ‘the BCD exemption claimed on import of access points with MIMO technology but without LTE standards are

admissible', is liable to be set aside. A strict interpretation was supposed to be given to the language of the notification. The order under challenge is accordingly prayed to be set aside and appeal is prayed to be allowed.

4. Per contra learned counsel for the respondent has submitted that the respondents had imported a number of networking products such as routers, switches, Wireless Access Points, controllers, fiber optic products etc. The issue in the present case is with reference to classification of Wireless Access Points and whether these were eligible for exemption under Notification No. 24/2005-Cus dated 01.03.2005, as amended by Notification No. 11/2014-Cus dated 11.07.2014. Wireless Access Point is a networking device used for wireless communication within the LAN and extending the LAN. It helps in connecting wireless enabled devices such as laptops, smart phones, tablets and other network products at remote places to a wired network. It is different from products having LTE technology.

4.1 During the course of adjudication the respondents sought cross-examination of Shri Adesh Vashisht, Shri Brijesh Shah and Shri Raj Malik. Cross-examination was also sought of Shri Anoop Kumar Kujur, SIO, DRI, who had conducted the investigation including recording of statements. The request for cross-examination was allowed by ADG (Adj.), DRI, New Delhi, the adjudicating authority. Shri Adesh Vashisht and Shri Brijesh Shah were cross-examined on 04.04.19 but the other two persons did not appear despite being summoned twice by the adjudicating

authority. The respondents furnished a reply dated 31.05.2019 to the show cause notice and raised a number of issues before the adjudicating authority on classification, eligibility to the exemption notification as also of time bar. Technical opinion from an expert was also filed before the adjudicating authority to substantiate the claim that the imported access points could not be considered as MIMO products. A plea was also raised in the reply to the show cause notice that the exclusion from exemption under Notification No. 24/2005-Cus dated 01.03.2005, as amended, was in respect of products based on MIMO and LTE, both the technology. Thus the access points were based on MIMO technology and those were not LTE products, those cannot be excluded from the exemption.

4.2 The said plea has rightly been accepted by the original adjudicating authority. The demand has rightly been dropped. There is no infirmity when no goods are held liable for confiscation and no penalty has been imposed either on the respondents or on the two employees of the respondent company. While relying upon the technical report submitted by the respondent's expert Shri Ravindra Kumar Mishra, it is mentioned that he was also offered for being cross-examined by the department but the department opted to not to cross-examine him and also could not bring on record any evidence contrary to the said technical opinion. Finally it is impressed upon that word 'and' used in entry no. 20 of the impugned notification has to be read as conjunctive as has been rightly been done by the original adjudicating authority. Impressing upon no infirmity in the order under challenge, appeal is prayed to be dismissed.

5. Having heard the rival contentions and perusing the entire records, we observe and hold as follows:

5.1 The respondent-assessee while importing the access points/MIMO products has availed the duty exemption of Notification No. 24/2005-Cus dated 01.03.2005 as amended on the ground that the product imported by them is merely a MIMO product as different from MIMO products and LTE products which are mentioned to be excluded from the benefit of duty exemption. The department was however of the view that the MIMO products irrespective they do not have LTE technology and LTE products irrespective they do not have MIMO technology, both are excluded from the duty exemption benefit given under entry no. 20 of the said notification.

5.2 In view thereof, what need to be observed in the present appeal is about the availability of the exemption from the whole of customs duty under Notification No. 24/2005-Cus. dated 01.03.2005 as amended vide Notification No. 132/2006-Cus. dated 30.12.2006, 11/2014-Cus. dated 11.07.2014, 58/2017-Cus. dated 30.06.2017, 38/2018-Cus. dated 02.04.2018, 76/2018-Cus. dated 11.10.2018, 36/2019-Cus. datd 30.12.2019, 5/2021-Cus. dated 01.02.2021 and 57/2021-Cus. dated 29.12.2021. Hence the question to be adjudicated is:

> **"Whether the exclusion from duty exemption clause of the said notification, as amended, also covers products having only MIMO technology and not working on LTE**

standard and vice-versa or just the products having both the technologies?

5.3 To decide the same, we observe that the Central Government, by the said notification, exempted the goods described in column (3) of the Table when imported into India, from the whole of the duty of customs leviable thereon. Serial No. 13 of heading 8517 exempts all goods, except those mentioned in (i), (ii), (iii) and (iv). Ingram Micro had claimed exemption under Serial No. 13 (iv) which is:

> "(iv) Multiple Input/Multiple Output (MIMO) **and** Long Term Evolution (LTE) Products."

5.4 A bare perusal of the exclusion clause (iv) under Sl. No. 13 of notification shows that it covers MIMO and LTE products. Said exclusion Clause uses the conjunction **'and'** and, therefore, it can be urged that the scope of clause (iv) can be restricted to those products that have MIMO and LTE both and that the product that only has MIMO technology may, therefore, may not be excluded from the scope of duty exemption benefit given at Serial No. 13 of the impugned notification as amended.

5.5 The contention of the Department is that **'and'** in clause (iv) should be read as 'or' so that it would cover MIMO products or LTE products as well. The contention advanced on behalf of Ingram Micro is that since the exclusion clause (iv) uses the conjunction **'and'** its scope would be restricted to those products that have both MIMO as well as LTE technology. Thus, a product that has only MIMO technology would be out of the scope of the exclusion clause

and at Serial No. 13 (iv) of the impugned notification and should be available with the customs duty exemption benefit given under said notification.

5.6 Thus we need to first interpret the meaning of word **'and'** used between MIMO products/LTE products in the impugned entry of the notification. For the purpose, we first look into the Rules of Interpretation:

> *RULES OF INTERPRETATION*
>
> *While interpreting a statutory provision, it is to be considered that the legislature chose every word deliberately and intended that every word to be legally binding, no other words can be added or used. No modifications can be made while interpreting the statute. It was stated in Nand Prakash Vohra v. State of H.P* ***AIR 2000 HP 65***
>
> *If there is nothing to modify and the meaning of the statute is clear then ordinary meaning should be assigned to the words of the statute else the literal meaning of the words therein is to be observed. Literal construction should be applied only if there is any ambiguity or inconsistency in the statute otherwise the plain meaning is sufficient.* ***In Tata Consultancy Services vs State Of Andhra Pradesh of 5 November, 2004 In Appeal (civil) 2582 of 1998*** *it was held that literal construction should be applied only if there is any ambiguity or inconsistency in the statute otherwise the plain meaning is sufficient. However, The court cannot apply its own bias. This rule assumes that words used in law have a fixed meaning. Words, in fact, are imprecise and their meaning can change over time. It was clarified by Hon'ble Supreme Court that if the literal meaning of the law defeats the purpose of the statute, the law should be understood keeping in mind the intention with which it was drafted. The judges should give that interpretation to the law which gives effect to the intention of the legislature.*
>
> *In Tirath Singh v. Bachittar Singh,* ***1955 SCR (2) 457*** *the court stated that if the language of the statute leads to absurdity or injustice then a construction may be put upon it which modifies the meaning of the words used in the statute.*
>
> *The most fair and rational method for interpreting a statute is by exploring the intention of the legislature through texts, the subject matter, the effect and consequences or the spirit and reason of law.*

If it doesn't work than process of construction is to be employed. Construction, in strict sense, is the process by which the court assign the meaning to the ambiguous provision which is beyond the letter of law for the purpose to resolve the inconsistency. The judges after taking into consideration the factual circumstances before the court give a particular meaning to the expression or word or phrase in question. Although, such meaning must be within the ambit of the objective of statute and could not be directly explained by the statute.
The word interpretation and construction are used interchangeably but there is thin line of difference between both the concepts.

Interpretation is the art of finding out the true sense of any form of words and enabling others to drive from them the same meaning which the author intended to convey, whereas, construction is the process of drawing conclusions, respecting subjects that lie beyond the direct expression of the text, which are in the spirit though not within the letter of law.[3] Basically, interpretation is a process of discovering, from permissible data, the meaning and intension of the legislature and if interpretation discloses clear meaning and intention of the legislature it will be directly applied to factual circumstances but if interpretation doesn't disclose clearly the meaning in context of factual circumstances, then construction will undergoes to seek to assign meaning or intention to the words used by the legislature.[4] It is clearly drawn that construction is more concerned with applying the meaning to the factual circumstances than mere ascertaining the meaning of the words of provision. It was clarified that the difference between "and" and "or" is usually explained by saying that "and" stands for the conjunctive, connective, or additive and "or" for the disjunctive or alternative. The former connotes "togetherness" and the latter tells you to "take your pick". So much is clear. that there is a corresponding, though less frequent, uncertainty in the use of "and". Thus, it is not always clear whether the writer intends the several "and" (A and B, jointly or severally) or the joint "and" (A and B, jointly but not scvcrally). This uncertainty will surprise some, because "and" is normally used in the former sense.

5.7 From the perusal of above rules, we are of the opinion that since legislature has used word **'and'** instead of **'or'**, it being conjunctive appears to be used to connect and join. We also look into the dictionary meaning of word **'and'.** Oxford Dictionary defines **'and'** as a word which is used to connect words of the same parts of speech, clauses or sentences, that are to be taken jointly,

for example:- 'Bread and Butter' whereas word **'or'** is used to link the alternatives.

As per Cambridge Dictionary word **'and'** is used to join two words, phrases, parts of sentences or related statements together whereas **'or'** mean either one of the two things.

5.8 The meaning of word **'and'** has also been considered by Hon'ble High Court of Punjab & Haryana in the case of **Commissioner of Central Excise, Panchkula Vs. Kulcip Medicines (P) Ltd. reported as 2009 (14) S.T.R 608 (P&H),** wherein it was observed as follows:

> *"**11. The question which falls for consideration is whether word 'and' used after the word 'clearing' but before the word 'forwarding' at two places in clause (j) be considered in a conjunctive sense or disinjunctive sense.** It appears to be fairly well settled that 17 C/51093/2020 the context and intention of legislature are the guiding principles. In that regard reliance may be placed on the judgment of Hon'ble the Supreme Court in the case of Mazagaon Dock Ltd. v. CIT (1958) 34 ITR 368. **By necessary intendment the expression 'a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner' contemplates only one person rendering service as 'clearing and forwarding agent' in relation to 'clearing and forwarding operations'. To say that if, one person has rendered service as 'forwarding agent' without rendering any service as 'clearing agent' and he be deemed to have rendered both services would amount to replacing the conjunctive 'and' by a disjunctive which is not possible."***

5.9 We also observe that in the Serial no. 13(iv) of the Notification No. 57/2017-Cus. as amended the word 'products' is

used only once. It is not used with Multiple Input/Multiple Output (MIMO) as well as Long Term Evolution (LTE). Whereas it is used once after both the products are being mentioned, same is not true for the other entries of the same notification. 'Products' being the common factor for both, MIMO technology and LTE standard, again corroborates that expression **'and'** as used in the impugned entry has been used in a conjunctive way. From the above discussion we hold that **'and'** used between Multiple Input/Multiple Output (MIMO); Long Term Evolution (LTE) is a conjunctive joining of both the said terms (MIMO/LTE). Hence it can reasonably be interpreted that the word **'and'** in the impugned entry means that those products which contain both MIMO technology and LTE standards are excluded from the benefit of exemption of duty given to the goods classifiable under Chapter 8517 in view of the said entry no. 13 of Notification No. 57/2017-Cus.

5.10 We also place reliance upon decision of Hon'ble Supreme Court in the case titled as **Pappu Sweets & Biscuits Vs. Commissioner of Trade Tax, Uttar Pradesh, Lucknow,** wherein it was held:

> *"Even though the word used in exclusionary part of an exemption notification has a wide dictionary meaning or connotation, only that meaning should be given to it which would achieve rather than frustrate the object of granting exemption and which does not lead to uncertainly or unintended results."*

5.11 From the entire above discussion, it becomes clear that in the clause (iv) of Sl. No. 13 of Notification No. 57/2017-Cus. which

amended clause (h) of Sl. No 20 of Notification 02/2019-Cus. **'and'** is a conjunctive. Hence the goods imported by the appellant since admittedly works on the MIMO technology only but do not support the LTE standard, they are held to be out of the scope of the impugned exclusion clause and thus are held eligible for the exemption from whole of the customs duty under Serial no. 13(iv) of the notification. The similar issue has earlier been deal with by this Tribunal vide Final Order No. 50831/2022 dated 12.09.2022 in the case titled as **Commissioner of Customs (Air) Chennai – VII Commissionerate, Chennai Vs. Ingram Micro India Pvt. Ltd. in Customs Appeal No. 51093 of 2020**.

6. In the light of above discussion, we do not find any infirmity in the order under challenge. The department appeal is therefore dismissed. Cross objection and miscellaneous application filed by the respondent are also disposed of accordingly.

[Order pronounced in the open court on **03.01.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

HK

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

COURT NO. II
Customs Stay Application No.50212 of 2020 with
Customs Appeal No.50903 of 2020 (SM)

[Arising out of Order-in-Appeal No.CC(A)/CUS/D-II/ICD/TKD/Exp/14/2020-21 dated 21.05.2020 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi.]

Commissioner of Customs, **Appellant**
ICD, Export,
Tughlakabad,
New Delhi-110 020.

VERSUS

M/s. S.S. Automotive Pvt.Ltd., **Respondent**
Gali No.3 (GF),
Shivaji Enclave,
New Delhi-110 027.

APPEARANCE:

Shri Gopi Raman, Departmental Representative for the appellant.
Ms. Kanika Malhotra, Advocate for the respondent.

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.50276/2022

DATE OF HEARING/DECISION:14.03.2022

ANIL CHOUDHARY:

Heard both the sides

2. The issue involved is whether the Commissioner (Appeals) vide impugned order-in-appeal dated 21.05.2020 has rightly directed to grant refund of Rs.18,68,000/-.

3. The brief facts are that M/s. S.S. Automotive Pvt. Ltd. (hereinafter called as Respondent) had filed six Shipping Bills No.4791153, 4791155, 4791165, 4791175, 4791194 and 4791217, all dated 3.4.2013 for export of

Horticulture & Agriculture Machinery parts under claim of drawback. Suspecting over-valuation, an investigation was initiated and goods were allowed to be exported provisionally on execution of bond and bank guarantee of Rs.1 crore. A show cause notice dated 06.11.2013 was issued to the respondent, which was adjudicated vide order-in-original no.101/2015/RR/JC/Exp/ICD/TKD dated 18.11.2015 by the Joint Commissioner of Customs, ICD Export, Tughlakabad, New Delhi, in which the declared value was rejected and the same was re-determined, the goods were confiscated and redemption fine and penalties were imposed on the appellant. Further, the Adjudication order dated 18.11.2015 also stated that Rs.18,68,000 of draw back had been deposited by the appellant.

4. Further, being aggrieved with the above aforesaid order-in-original, the respondent preferred appeal before the Commissioner (Appeals), New Delhi, who vide order-in-appeal dated 28.04.2016 allowed their appeal. Accordingly, the respondent filed a refund claim of Rs.18,68,000/- on 19.09.2017, which was rejected by the Adjudicating Authority vide the Adjudication Order dated 5.6.2018 on the following grounds:-

i) The respondent had not submitted any correspondence, wherein they were directed by the department to deposit the impugned amount or they communicated to the department about deposit of impugned amount. The respondent had also not sought any relief from a competent authority regarding the impugned amount.

ii) The case laws cited by the appellant did not apply in the case, as the respondent had failed to establish that this amount was deposited and no order was made by a competent authority for refund of the same.

iii) The respondent had cited Circular No.984/08/2014-CX, dated 16.09.2014 in support of their refund claim and stated that such amount be treated as pre-deposit and not duty amount. The said circular stipulates that any payment made during the course of investigation to the extent of 7.5% or 10% can be considered to be deposit made towards fulfillment of stipulation under Section 129 E of the Customs Act, 1962 and any amount paid over and above the stipulated amount shall not be treated as deposit under the said section. Even if the impugned amount was to be treated as payment made during the course of investigation, it could have been treated as pre-deposit only upto the extent of 7.5% of the total deposit made. The respondent was not entitled to refund of even 7.5% of impugned amount as it has failed to establish that the impugned amount was deposited in relation to the investigation and any competent authority has made any favourable order with respect to the impugned amount.

iv) The Respondent had submitted that they were claiming refund under Section 27(1)(b) of the Customs Act, 1962 and on the other hand, they were claiming that their refund claim did not fall under Section 27and therefore, the refund claim was not time barred. Thus, the respondent's contradictory submission prove that the refund claim had been filed on frivolous ground and without any basis of law, hence their claim was liable to be rejected.

5. Thereafter, the assessee had filed appeal before the Commissioner (Appeals), who vide impugned order-in-appeal observed that the Adjudicating Officer have erred in observing that there is no basis to claim refund of Rs.18,68,000/-, which was deposited by the appellant-exporter pursuant to directions of the Department vide letter dated 24.06.2013 and it was only thereafter that the appellant/assessee had deposited the amount of Rs.18,41,469/- plus Rs.26,531/- (interest) totaling Rs.18,68,000/- vide

TR-6 challan dated 6.7.2013. Further, held that the amount deposited is in the nature of pre-deposit and the appellant is entitled to consequential refund and accordingly, granted to refund to be disbursed within a period of 4 weeks from the date of receipt of this order.

6. Being aggrieved, the Revenue is in appeal before this Tribunal on the ground that the claim is barred by limitation, as the appellant had become entitled to refund pursuant to order-in-appeal dated 21.05.2016, wherein the directions were issued for finalization of the provisional assessment, accepting the declared value with consequential relief. It is further contented that exporter filed refund claim only on 9.9.2017, which is more than one year and 4 months from 21.05.2016. Further, it appears that the said amount was not paid by way of pre-deposit, as per provisions of Section 129 E of the Customs Act.

7. The respondent-assessee supports the impugned order.

8. Having considered the rival contentions, I find that there was an existing dispute with regard to valuation of the exported goods, which is relevant for the purpose of calculation of draw back. The export was allowed under provisional 'Let Export Order'. Hence, there was an existing dispute (subjudice) between the parties, when the amount of Rs.18,68,000 was deposited in July, 2013. Accordingly, such deposit *ipso facto* is in the nature of pre-deposit, which is subject to outcome of the Adjudication Order. Such amount of pre-deposit never becomes time barred, under the provisions of the Act and the same has to be refunded. Accordingly, I uphold the impugned order-in-appeal and direct the Revenue to disburse the said amount of Rs.18,68,000/- forthwith within a period of 4 weeks, with interest @ 12% p.a. from the date of deposit till the date of refund (in view

of the ruling of the Hon'ble Supreme Court in the case of **Sandvik Asia Ltd.** read with Division Bench ruling of this Tribunal in **Parle Agro Ltd.)**

9. This appeal by the Revenue is dismissed. The stay application also stands disposed of.

[Order dictated & pronounced in open court]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 88657 of 2014

(Arising out of Order-in-Appeal No. 2685(Gr.V)/2014(JNCH)/IMP-2554 dated 07.07.2014 passed by Commissioner of Customs (Appeals), Mumbai-II, JNCH, Nhava Sheva)

The National Sport Club of India **.....Appellant**
Mathura Road,
New Delhi -110001.

VERSUS

Commissioner ofCustoms (Imports),
JNCH, Nhava Sheva **.....Respondent**
Jawaharlal Nehru Custom House, Nhava Sheva,
Raigad, Maharashtra – 400 707.

Appearance:

Shri V.K. Singh, Consultant for the Appellant

Shri Krishna Murari Azad, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85865/2024

Date of Hearing:29.08.2024
Date of Decision: 29.08.2024

PER : S.K. MOHANTY

Briefly stated, the facts of the case are that the appellants have filed the Bill of Entry before the Customs authorities, for clearance of the goods declared therein as SVPS Chillers. The appellants had classified the said goods under CTH 84198940 and

claimed the benefit of Notification No.21/2012-Cus dated 17.03.2012. The Bill of Entry filed by the appellants was self-assessed in terms of sub-section (1) of Section 17 of the Customs Act, 1962. On verification of the goods by the Shed Staff of the Customs department, it was observed that the benefit of notification dated 17.03.2012 claimed by the appellants should not be available to them, in view of the fact that the exemption provided therein is available only to the packaged commodities meant for retail sale, as per the Legal Metrology (Packaged Commodities) Rules, 2011. On the basis of such understanding, the Bill of Entry was re-assessed by the proper officer, in passing the adjudication order dated 22.01.2014. In the said order, the original authority had confiscated the imported goods under Section 111(m) *ibid*, with the option to redeem the said goods on payment of redemption fine of Rs.10,00,000/-(Rupees ten lakhs only). The original order has also imposed penalty of Rs.5,00,000/- (Rupees five lakhs only) on the appellants under Section 112(a) *ibid*. On appeal against the said adjudication order dated 22.01.2014, the learned Commissioner (Appeals) vide the impugned order dated 07.07.2014 has upheld the adjudication order and dismissed the appeal filed by the appellants. In the impugned order, the Learned Commissioner (Appeals) has held that the goods are liable for confiscation both under Section 111(m) *ibid* and 111(o) *ibid*. Feeling aggrieved with the impugned order, the appellants have preferred this appeal before the Tribunal.

2. Learned Consultant appearing for the appellants submitted that due to inadvertence, the benefit of notification dated 17.03.2012 was claimed by the appellants and upon detection of such mistake, the appellants had immediately deposited the duty attributable to the imported goods. He further submitted that since there is no mis-declaration with regard to the importation of the goods, the provisions of Section 111(m) *ibid* shall not be invoked for

confiscation of goods, imposition of redemption fine and penalty under Section 112(a) *ibid*. Furthermore, he also submitted that the original authority had not invoked the provisions of Section 111(o) *ibid*, which was invoked by the learned Commissioner (Appeals) for the first time, while passing the impugned order dated 07.07.2014. In this context, he submitted that since the re-assessment order was passed by the proper officer, ordering confiscation of goods under Section 111(m) *ibid*, the learned Commissioner (Appeals) is not competent to invoke the provisions contained in Section 111(o) *ibid*, while entertaining the appeal filed in terms of Section 128 *ibid*. To support his stand that the goods are not liable for confiscation and penalty cannot be imposed on the appellants, Learned Consultant has relied upon the following orders passed by the Tribunal:

(*i*) *J.K. Industries Ltd. Vs. Commissioner of Customs, New Delhi – 1996 (99) E.L.T. 41 (Tribunal),*

(ii) Lewek Altair Shipping Pvt. Ltd. Vs. Commissioner of Customs, Vijayawada – 2019 (366) E.L.T. 318 (Tri,-Hyd.),

(iii) SirthaiSuperware India Ltd. Vs. Commr. Of Customs, Nhava Sheva-III-2020 (371) E.L.T.324 (Tri-Mumbai).

3. On the other hand, the learned Authorized Representative appearing for the Revenue reiterated the findings recorded in the impugned order.

4. Heard both sides and perused the case records.

5. The provisions for confiscation of improperly importation of the goods are contained in Section 111 *ibid*. The goods which do

not correspond in respect of the value or in any other particulars are liable for confiscation under Clause (m) of Section 111 *ibid*. In the present case, the appellants had filed the Bill of Entry on the basis of the import documents such as commercial invoice, packing list etc. They have also claimed the correct classification of the imported goods. Claiming of wrong exemption notification is not a condition precedent for invocation of clause (m) in Section 111 *ibid,* for confiscation of the goods. We find that this Tribunal, in an identical matter, in the case of Sirthai Superware India Ltd. (supra) has set aside confiscation of goods and also imposition of penalty under Section 112(a) *ibid*, holding as under:

> *"4.8 Section 111(m) and 111(o) of the Customs Act, 1962 which have been invoked by the Commissioner for holding that the goods are liable for confiscation read as follows:*
>
> *(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 transhipment, with the declaration for transhipment 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;*
>
> *4.9 From plain reading of the said clauses of Section 111, we do not find that these sub clauses, are applicable to cases where the classification of claim of exemption is found to be erroneous. The fact that the goods correspond to declaration in respect of the description and value is sufficient to take the imported goods away from the application of these two clauses. Hence the order holding goods liable for confiscation and imposition of penalty under Section 112(a) cannot be sustained."*

Further, this Tribunal in the case of J.K. Industries Ltd.(supra) has also held that claim for exemption is not a declaration for the

purpose of Section 111(m) *ibid* and hence, confiscation of goods and imposition of penalty are liable to be set aside.

6. In view of the fact that the appellant herein had not contravened clauses (m) and (o) of Section 111 *ibid* at the time of importation of goods, in our considered view, the confiscation of goods, imposition of redemption fine and penalty by the authorities below are not in conformity with the statutory provisions. Therefore, we do not find any merits in the impugned order, insofar as it has upheld the confirmation of the adjudged demands on the appellants. Accordingly, the impugned order is set aside and the appeal is allowed in favour of the appellant.

(Dictated and pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(M. M. Parthiban)
Member (Technical)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
AHMEDABAD
REGIONAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 10717 OF 2023 -DB

(Arising out of 010-AHM-CUSTM-000-COM-11-23-24 dated 27/07/2023 passed by Commissioner of CUSTOMS, Central Excise & Service Tax (Appeals)-Ahmedabad)

AMNS PORTS HAZIRA LIMITED **Appellant**

Formaly Known As Essar Bulk Terminal Pvt Ltd. AMNS
House, AMNS Township, 27th K.M. Surat,
Hazira Road, Hazira, Surat, Gujarat- 394270

Vs.

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD **Respondent**

Office of the Pr. Commissioner of Customs,
1th Floor, Customs House, Opp. Old High Court,
Navrangpura, Ahmedabad, Gujarat- 380009

WITH

CUSTOMS APPEAL NO. 10734 OF 2023 -DB

(Arising out of 010-AHM-CUSTM-000-COM-11-23-24 dated 27/07/2023 passed by Commissioner of CUSTOMS, Central Excise & Service Tax (Appeals)-Ahmedabad)

KAUSHIK HOTHI **Appellant**

B-701, Neelkanth
Residency Near Galaxy Circle
Green City Road Pal Surat – 335009

Vs.

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD

Office of the Pr. Commissioner of Customs, **Respondent**
1th Floor, Customs House, Opp. Old High Court,
Navrangpura, Ahmedabad, Gujarat- 380009

Appearance:
Present for the Appellant :Shri Vishal Agrawal, Advocate and Ms. Dimple Gohil, Advocate
Present for the Respondent: Shri Tara Prakash, Deputy Commissioner (AR)

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

Final Order No. 11633-11634/2024

DATE OF HEARING: **24/04/2024**
DATE OF DECISION: **24.07.2024**

RAMESH NAIR

These appeals lie against proceedings initiated against M/s. AMNS Ports Hazira Ltd. and its employee, Shri Kaushik Hothi, in relation to the Ship Unloader, Barge, and Railmount goods imported against Bill of Entry No. 2215226 dtd. 27.02.2019 by availing the benefit of Customs Notification No. 16/2015-Cus. dtd. 01.04.2015, as amended by Customs Notification No. 79/2017-Cus. dtd. 13.10.2017. Vide impugned Order-in-Original No. AHM-CUSTM-000-COM-11-23-24 dtd. 27.07.2023 the Ld. Commissioner has rejected the IGST exemption availed by the Appellant under EPCG Scheme as per Notification No. 16/2015-Cus. dtd. 01.04.2015, as amended by Notification No. 79/2018-Cus. dtd. 13.10.2017. By the impugned order demand of custom duty in liew of IGST of Rs.12,12,48,161/- was confirmed, the capital goods imported by the Appellant have been held to be liable for confiscation under Section 111(m) and 111(0) of the Act; Penalty of Rs, 12,12,48,161/- alongwith penalty equal to the applicable interest has been imposed on the appellant under Section 114A of the Act, in addition, penalty of 10,00,000/- was imposed on Shri Kaushik Hothi under Section 112(a) and (b)(iii) of the of Customs Act, 1962 and penalty of 5,00,000 under Section 114AA of the Act. Aggrieved from the impugned order passed by the learned Commissioner, the appellants have filed these appeals.

2. Shri Vishal Agarwal, learned counsel with Ms. Dimple Gohil Ld. Advocate appearing for the appellants submits that Appellant is provider of 'port services' and for providing such services, it had imported capital goods viz, Ship Unloader, Barge and Railmount under EPCG Authorization No. 5230026626 dtd. 21.01.2019 by filing Bill of Entry No. 2215226 dtd. 27.02.2019 and claimed exemption from Basic Customs Duty and IGST under Notification No. 16/2015-Cus dtd. 01.04.2015, as amended. Under the terms of the said Authorization, the appellant was required to fulfil an export obligation equivalent to 6 times the duty saved on import of capital goods of FOB basis within a period of 6 years i.e. by 20.01.2025.

3. He further submits that the gravamen of the case of the Revenue is that the Appellant had allegedly availed the exemption of IGST in terms of above Notification despite being aware that, as per Explanation C(II) in the said Notification, payment received in rupee terms towards export of services could be counted towards fulfilment of export obligation only if exemption from payment of IGST had not been availed. However, under the terms of said authorization, the appellant was required to meet its export obligation within period of 6 years i.e by 20.01.2025. Accordingly, no proceedings could have been initiated in respect of the exports undertaken by the Appellant towards fulfilment of export obligation until the expiry of export obligation period.

4. Without prejudice he also submits that as per Para 5.04(a) of the Foreign Trade Policy, the Export Obligation can be fulfilled by an Authorisation holder through export of goods which are manufactured by him or his supporting manufacture/services rendered by him, for which the EPCG authorisation has been granted.

5. He further submits that under para 9.50 of the FTP, 'Services' include all tradable services covered under General Agreement on Trade in Services (GATS) and earning free foreign exchange. An authorization holder can fulfil its export obligation by rendering services i.e. all tradable services covered under GATS and thereby earning free foreign exchange. Further, to qualify as a service provider, the authorization holder has to be a supplier of service of any one of the modes prescribed in Para 9.51 pf the FTP.

6. He argued that it is an admitted fact that the Appellant is a provider of port service and has obtained the Authorization for the import of capital goods for providing such port services. Further, there is also no dispute on the status of the Appellant as a "Service provider" inasmuch as in terms of Para 9.5 of the FTP, the Appellant can render the services under any one of the modes prescribed therein and fulfil its export obligation. However, it is the department's case that for the services rendered, the Appellant has received payment in rupee terms and consequently, the Appellant is not eligible to claim the benefit of the Notification. Appellant is a provider of port services such as unloading of import cargo, loading of export cargo, provider of vessel related services such as hiring of

barges and tugs, berthing services etc. These services are inter alia provided to foreign vessels.

7. He also submits that during the Export Obligation (EO) period, it has provided vessel related services to foreign vessels which have carried cargo to/and from India and has fulfilled the Export Obligation by earning convertible foreign exchange. The Appellant has raised invoices on the Indian Agents of Foreign Vessels. The Indian Agents acting as intermediaries of the foreign vessels have paid the consideration to the Appellant in Indian Rupees, out of the total remittance receivable by them from foreign vessels. The Indian agents acting as intermediary has paid the Appellant out of such foreign remittances receivable by them in foreign exchange and has satisfied the required terms towards fulfilment of its Export Obligation. He placed reliance on the decision of Hon'ble Supreme Court in the case of J.B. Boda & Co. Pvt. Ltd. Vs. CBDT [(1997)1 SCC 719].

The appellants also filed written submissions dated 19 July, 2024 which is taken on record and considered.

8. Shri Tara Prakash, Ld. Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

9. We have carefully considered the submissions made by both the sides and perused the records. We find that the Appellant had imported capital goods i.e Ship Unloader, Barge and Railmount under EPCG Authorization dtd. 21.01.2019, availing benefit of Zero Duty Export Promotion Scheme (EPCG). The said consignment was cleared vide Bill of Entry No. 2215226 dtd. 27.02.2019 and Nil BCD and Nil IGST was paid availing the benefit of Customs Notification No. 16/2015-Cus. dtd. 01.04.2015, as amended by Customs Notification No. 79/2017-Cus. dtd. 13.10.2017. Also, as per the EPCG Authorization, the export obligation was to be fulfilled by providing the Port related services covered under Appendix 5D of the Foreign Trade Policy 2015-20 issued vide DGFT Public Notice No. 04/2015-2020 dtd. 03.05.2016. The allegation of the department in the present matter is that Customs Notification No. 16/2015-Cus. dtd. 01.04.2015 was amended by Customs Notification No. 79/2017-Cus. dtd. 13.10.2017 to the effect that after amendment, as per para 3(c)(II)(d) of the said amended Custom Notification, payment received

in Rupee terms (INR) for such services as notified in Appendix 5D shall also be counted towards discharge of export obligation under the EPCG, only in Authorization where exemption for Integrated Tax and Goods and Services (IGST) compensation cess is not availed.

10. We find that the EPCG License was issued to the Appellant on 21.01.2019 and under the terms of the said License, the Appellant was required to meet its export obligation within a period of 6 years, i.e by 20.01.2025. We also find that this fact has neither been disputed in the show cause notice nor in the impugned order passed by the Ld. Commissioner. The department has to initiate the proceedings only after the expiry of the licencing period. Therefore in our view any proceeding prior to this period is purely premature and the impugned order confirming demands before the expiry of the licencing period is not justified and correct in law. Such actions, therefore, cannot be sustained. In this regard we also find the support from the following judgments.

(i) *Oriental Granite Ltd.* v. *CC, Hyderabad* - 2001 (131) E.L.T. 430 (Tri.-Chennai)

(ii) *Semcon Devices Pvt. Ltd.* v. *CCE, Hyderabad* - 2007 (220) E.L.T. 267 (Tri.-Bang.)

(iii) *I.F.G. Ltd.* v. *CC & CE, Goa* - 2002 (145) E.L.T. 348 (Tri.-Mumbai)

(iv) *Bluegold Maritech (International) Ltd.* v. *CC, Guntur* - 2007 (207) E.L.T. 397 (Tri.-Bang.)

(v) *Transparent Technologies Pvt. Ltd.* v. *CCE, Belgaum* - 2006 (200) E.L.T. 118 (Tri.-Bang.)

(vi) *C.L.P Zippers (P) Ltd.* v. *CCE, Jalandhar* - 2005 (192) E.L.T. 730 (Tri.-Del.)

(vii) *Pashupati Fabrics Limited* v. *CCE, Lucknow* - 2005 (184) E.L.T. 41 (Tri.-Del.)

(viii) *Eon Polymers Ltd.* v. *CCE, Jaipur* - 2001 (135) E.L.T. 1316 (Tri.-Del.)

(ix) *T.V. Raja Reddy* v. *CE & C, Guntur* - 2001 (138) E.L.T. 793 (Tri.-Chennai)

(x) *Vishal Footwear Ltd.* v. *CC, New Delhi* - 1999 (114) E.L.T. 60 (Tribunal).

11. We also find that in the present matter, appellant vide letter dtd. 06.03.2020 and 23.09.2019 addressed to the Additional Commissioner and vide letter dtd. 04.08.2023 addressed to the Principle Commissioner requested reassessment/amendment of the said disputed Bill of Entry, to enable it make payment of IGST amount, as the entire situation was revenue neutral.

12. We find that Para 5.2 of Circular No. 16/2023-Cus dtd. 07.06.2023 state that as per the Hon'ble Supreme Court's judgment in the case of Union of India & Ors. Vs. Cosmo Films Ltd. 2023 (72) G.S.T.L. 417 (S.C.) / (2023) 5 Centax 286 (S.C.), importer of goods, who do not meet the pre-import conditions, are required to pay GST and Compensation Cess, as the case may be. However, the Hon'ble Court also permitted the assesses to claim refund or avail Input Tax Credit, while specifically stating that a Bill of Entry rather than a challan would be prescribed documents for this purpose.

13. We also noticed that in the present matter IGST amount paid by the Appellant on import of goods was available as ITC (Input Tax Credit) to the Appellant and hence there was a revenue –neutral situation. As per the submission of Appellant they have paid GST in cash of Rs. 6,77,32,906/- for the month of March 2019 and Rs.15,96,30,184/- for the month of April,2019. Thus against total liability of IGST of Rs. 12,12,48,161/-, the appellant have paid total GST of Rs.22,73,63,090/- in cash which is much more than the IGST payable which was available to the appellant as ITC. The revenue is at liberty to verify the above data. In such case the entire exercise of payment of IGST and availment of ITC of IGST amount is revenue neutral. The Tribunal and courts in number of cases held that in case of revenue neutral the demand does not exist, some of the judgments are referred below:

(a) Larsen & Toubro Ltd. v. CCE, Pondicherry - 2008 (227) E.L.T. 65 (Tri.-Chennai). It was found in that case that the differential amount of duty demanded from the assessee would be available to them as rebate and hence the demand was set aside on the ground of revenue neutrality.

(b) India Pistons Ltd. v. CCE, Chennai - 2008 (221) E.L.T. 295 (Tri.-Chennai). It was held in that case that the duty paid by the

assessee was available as MODVAT credit to their sister unit and hence there was a revenue-neutral situation. On this basis, the demand was set aside.

(c) CCE, Pune v. Coca-Cola India Pvt. Ltd. - 2007 (213) E.L.T. 490 (S.C.). In this case, it was found that the excise duty payable on beverage bases/concentrates by the assessee was available as MODVAT credit to the buyers (manufacturers of beverages and aerated waters) under Notification 5/94-C.E. (N.T.) and, therefore, the demand was set aside on the ground of revenue neutrality.

14. In view of the above judgments, it is clear that if IGST is paid by the Appellant, same shall be available as Input Tax credit to the Appellant and to that extent net liability of GST shall stand reduced while paying the GST by the Appellant. Therefore it is an exercise of revenue neutral for this reason demand does not exist. We therefore set aside the demand on the point of revenue neutrality also.

15. For these reasons, we hold that confiscation of the imported goods cannot sustain and it is hereby set aside. On the basis of discussions above, we also hold that penalty imposed on both the appellants is unwarranted. The impugned order is set aside. Appeals are allowed with consequential relief, if any, as per law.

(Pronounced in the open court on **24.07.2024** *)*

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH- COURT NO. I

CUSTOMS APPEAL NO. 50098 OF 2017

(Arising out of Order-in-Original No. 04/NKU(04-07)/ADG(Adj.)/DRI/N.DELHI/2016-17 dated 28.10.2016 passed by the Additional Director General (Adjudication), New Delhi)

M/s Sony India Private Ltd **....Appellant**
A-31, Mohan Co-operative Industrial Estate,
Mathura Road, New Delhi

versus

Additional Director General (Adjudication) **....Respondent**
Directorate of Revenue Intelligence
New Delhi 110037

WITH

CUSTOMS APPEAL NO. 50099 OF 2017

(Arising out of Order-in-Original No. 04/NKU(04-07)/ADG(Adj.)/DRI/N.DELHI/2016-17 dated 28.10.2016 passed by the Additional Director General (Adjudication), New Delhi)

M/s Canon India Private Ltd **....Appellant**
7th Floor, Tower B, Building#5 DLF Epitome,
DLF Phase III, Gurgaon, Haryana

versus

Additional Director General (Adjudication) **....Respondent**
Directorate of Revenue Intelligence
New Delhi 110037

WITH

CUSTOMS APPEAL NO. 50100 OF 2017

(Arising out of Order-in-Original No. 04/NKU(04-07)/ADG(Adj.)/DRI/N.DELHI/2016-17 dated 28.10.2016 passed by the Additional Director General (Adjudication), New Delhi)

M/s Nikon India Private Ltd **....Appellant**
Plot No. 71, Sector-32, Institutional Area,
Gurgaon, 122001, Haryana

versus

Additional Director General (Adjudication) **....Respondent**
Directorate of Revenue Intelligence
New Delhi 110037

AND

CUSTOMS APPEAL NO. 50280 OF 2017

(Arising out of Order-in-Original No. 04/NKU(04-07)/ADG(Adj.)/DRI/N.DELHI/2016-17 dated 28.10.2016 passed by the Additional Director General (Adjudication), New Delhi)

M/s Samsung India Electronics Private Limited ....Appellant
Plot No. 71, Sector-32, Institutional Area,
Gurgaon, 122001, Haryana

versus

Additional Director General (Adjudication) ....Respondent
Directorate of Revenue Intelligence
New Delhi 110037

APPEARANCE:

Shri V. Lakshmikumaran, Shri Dhruv Matta and Ms. Namrata Singhal, Advocates for the Appellant

Shri Ajay Jain, Special Counsel of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING/ DECISION: 09.04.2025

FINAL ORDER NO's. 50483-50486/2025

JUSTICE DILIP GUPTA:

All these four appeals have been placed for hearing in view of the order passed by the Supreme Court on 07.11.2024. The order is reproduced below:

> "1. Hon'ble Mr. Justice J B Pardiwala pronounced the judgment of the Bench comprising Hon'ble Dr Justice Dhananjaya Y Chandrachud, Chief Justice of India, His Lordship and Hon'ble Mr. Justice Manoj Misra.
>
> 2. In terms of the reportable judgment, the review petitions are disposed of. The Registry shall take steps to list the connected appeals and petitions before the appropriate Bench and they shall be disposed in terms of the observations made in terms of the judgment.

3. **After the pronouncement of the judgment in Review Petition (Civil) No. 400 of 2021, our attention was drawn by the learned counsel appearing for the respective parties vide a joint note for clarification, which reads as under:**

"JOINT NOTE FOR CLARIFICATION

Pursuant to pronouncement of judgment in the Review Petition and connected matters, the Ld. Counsel for the Assessee Respondents -Shri. V. Lakshmikumaran requested that the four Civil Appeals against which the Review Petition on the point of jurisdiction of DRI officers was filed be remanded back to the Customs, Excise and Service Tax Appellate Tribunal, Delhi for determination of the eligibility of the exemption notification within the limitation period of one year. This has the consent of the Ld. ASG. N. Venkatraman.

The details of the Civil Appeals are as under:

i. C.A. No. 1827/2018 - Canon India Private Limited

ii. C.A. No. 1832/2018 - Nikon India Private Limited

iii. C.A. No. 3213/2018 - Samsung India Electronics Private Limited

iv. C.A. No. 1875/2018-Sony India Private Limited"

4. **In view of the aforesaid, the show cause notices which were challenged in the Civil Appeal Nos. 1827, 1832, 1875 and 3213 of 2018 respectively, which were within the requisite period of limitation, are remanded to the CESTAT for adjudication on merits. We accordingly pass such order.**

5. Pending application, if any, stands disposed of.

2. It transpires from the records that all these four appeals were earlier dismissed by the Tribunal by an order dated 19.12.2017. It was held that the 'digital still image video cameras' imported by the appellant would not be entitled to basic customs duty exemption under the notification dated 01.03.2005, as amended by the notification dated 17.03.2012.

3. It is against the said order of the Tribunal that four Civil Appeals were filed by the department before the Supreme Court. These four Civil Appeals have been disposed of by the Supreme Court by the aforesaid order dated 07.11.2024 and the appeals have been remanded to the Tribunal for adjudication on merits only with regard to the normal period of limitation contemplated under section 28(1) of the Customs Act, 1962[1]. It needs to be noted that the Supreme Court had earlier, in the judgment pronounced on 09.03.2021, held that the extended period of limitation under section 28(4) of the Customs Act could not have been invoked.

4. Thus, what has to be examined by the Tribunal in all the four Customs Appeals is whether the adjudicating authority was justified in confirming the demand proposed in the show cause notice for the normal period of limitation. In other words, what has to be examined is whether the demand confirmed for the normal period of limitation contemplated under section 28(1) of the Customs Act for the reason that 'digital still image video cameras' imported by the appellant would not be entitled to basic customs duty exemption under the notification dated 01.03.2005, as amended by the notification dated 17.03.2012 is justified or not.

5. During the course of hearing of Customs Appeal No. 52218 of 2019 (M/s. Nikon India Pvt. Ltd. vs. Commissioner of Customs (Import), New Customs House, New Delhi), a Division Bench of the Tribunal doubted the correctness of the view taken by the Tribunal in the aforesaid decision dated 19.12.2017 of a Division Bench of the Tribunal and, therefore referred the matter to a Larger Bench of the Tribunal to decide the following two issues:

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1. the Customs Act

> "(i) Whether the 'digital still image video cameras' imported by the appellant would be entitled to BCD exemption under the notification dated 01.03.2005, as amended by the notification dated 17.03.2012, whereby an 'Explanation' was added;
>
> (ii) Whether the Tribunal, in the decision rendered on 19.12.2017, has correctly interpreted the scope of 'Explanation'."

6. A Larger Bench of the Tribunal, by an interim order dated 14.06.2024, answered the reference in the following manner:

> "(i) The "digital still image video cameras" would be entitled to BCD exemption under NotificationNo.25/2005-Cus. dated 01.03.2005 as amended by Notification No.15/2012 dated 17.03.2012.
>
> (ii) The interpretation of the Explanation by the Division Bench of the Tribunal in Sony India Pvt.'s case denying the benefit of exemption is a result of incorrect interpretation of the Explanation of the said Notification."

7. Customs Appeal No. 52218 of 2019, thereafter came up for final decision before a Division Bench, and by order dated 09.09.2024 the Tribunal allowed the appeal and set aside the order dated 06.06.2019 that was impugned. The decision of the Tribunal is reproduced below:

> "M/s. Nikon India Private Limited[2] is aggrieved by the order dated 06.06.2019 passed by the Commissioner of Customs (Appeals)[3] by which the appeal that was filed by it to assail the order dated 13.05.2016 passed by the Assistant Commissioner of Customs, Group-VA[4] has been dismissed. **The Assistant Commissioner had held that NIKON brand "digital still image video cameras" imported by the appellant are not entitled to**

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2. the appellant
3. the Commissioner (Appeals)
4. the Assistant Commissioner

Basic Customs Duty[5] exemption under the notification dated 01.03.2005, as amended by the notification dated 17.03.2012.

2. When the matter was heard by this bench, a detailed order dated 08.03.2024 was passed. Paragraphs 64 to 65 of the order are reproduced below:

> "64. The view that we have taken, namely, that 'digital still image video cameras' imported by the appellant would be entitled to BCD exemption under the notification dated 01.03.2005, as amended on 17.03.2012, is contrary to the view taken by the Division Bench of the Tribunal on 19.12.2017 in the earlier round of proceedings arising out of the show cause notice dated 09.08.2014.
>
> 65. **It would, therefore, be appropriate to refer the matter to the President of the Tribunal for constituting a larger bench of the Tribunal for deciding the following issues:**
>
> "(i) Whether the 'digital still image video cameras' imported by the appellant would be entitled to BCD exemption under the notification dated 01.03.2005, as amended by the notification dated 17.03.2012, whereby an 'Explanation' was added;
>
> (ii) Whether the Tribunal, in the decision rendered on 19.12.2017, has correctly interpreted the scope of 'Explanation'."
>
> (emphasis supplied)

3. The matter has since been decided by the larger bench of the Tribunal by an order dated 14.06.2024. The larger bench held as follows:

> "34. The ratio laid down in the aforesaid judgment reveals that in case of ambiguity in a charging provision, the benefit must be given to the assessee and in case of an exemption Notification, the benefit of ambiguity is strictly interpreted in favour of the Revenue. This ratio has been laid down by the Constitutional Bench while overruling the earlier decision in Sun

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5. BCD

Export Corporation v. Collector23 case. To apply the said ratio to the facts of a case, presence of ambiguity in the subject for interpretation is a sine qua non. If there is no ambiguity in the interpretation of the exemption Notification, the same should be liberally interpreted adopting the tools of interpretation applicable to a Notification granting exemption from payment of duty. Also, it is essential that the burden lies on the claimant of the Exemption to establish that this case falls within the parameters of the exemption Notification. In the present case, there is no ambiguity in reading the Explanation of the Notification No.25/2003-Cus. dated 01.03.2005 as amended, in as much as, a literal interpretation of the said Explanation, as discussed above, reveals that all the three parameters/functions of a digital camera should be cumulatively read so as to ascertain whether all the characteristics are above the threshold limit; in that event, the digital camera would not be eligible to the exemption from BCD under the said Notification. In the event any one of the parameter/characteristic is below the threshold limit e.g. recording time is less than 30 minutes in a single sequence using the maximum storage (including expanded) capacity, then the cameras would be eligible to the benefit of the said Notification. Also, the Revenue has never claimed that there is ambiguity in the said Notification. On the contrary, the Learned Special Counsel in the written submission mentioned that there is no ambiguity in the wordings of the Notification and it should be literally interpreted within the legal frame work. The appellant in the present case also fairly established that their case falls within the four corners of the said Notification by adducing evidence discussed above.

35. **In view of above, it can fairly be inferred that the appellants are eligible to**

exemption from BCD under the said Notification 25/2005 CE dated 1.3.2005 as amended."

(emphasis supplied)

4. The appellant would, therefore, be eligible to claim exemption from Basic Customs Duty under notification dated 01.03.2005.

5. The impugned order dated 06.06.2019 passed by the Commissioner of Customs (Appeals) is, accordingly, set aside and the appeal is allowed with consequential relief."

(emphasis supplied)

8. It needs to be noted that Customs Appeal No. 52218 of 2019 that was filed by Nikon India was for a period subsequent to the period involved in Customs Appeal No. 50100 of 2017 that had been filed by Nikon India. This is one of the four Customs Appeals that are being heard.

9. Both Shri V. Lakshmikumaran, learned counsel appearing for the appellant and Shri Ajay Jain, learned special counsel appearing for the department have stated that the digital still image video cameras that were involved in Customs Appeal No. 52218 of 2019 that was finally decided by Tribunal on 09.09.2024 are also involved in the present four Customs Appeals. Thus, the issue as to whether digital still image video cameras would be entitled to basic customs duty exemption under Notification dated 01.03.2005, as amended by Notification No. 15/2012 dated 17.03.2012, is the issue that was involved in Customs Appeal No. 52218 of 2019 and is also the issue involved in the present four Customs Appeals.

10. Such being the position, the order dated 09.09.2024 passed in Customs Appeal No. 52218 of 2019, following the answer to the reference by the Larger Bench of the Tribunal on 14.06.2024, would govern the

issue involved in all the four Customs Appeals. The digital still image video cameras involved in the present Customs Appeals would, therefore, be entitled to exemption from basic customs duty in terms of the Notification dated 01.03.2005, as amended on 17.03.2012.

11. Thus, the order dated 28.10.2016 impugned in all the present four Customs Appeals deserves to be set aside and is set aside. All the four Customs Appeal No.'s 50098 of 2017, 50099 of 2017, 50100 of 2017 and 50280 of 2017 filed by Sony India, Canon India, Nikon India and Samsung India, respectively, are, accordingly, allowed with consequential relief(s), if any.

(Order dictated and pronounced in the Open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Shenaj, Shreya

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 77389 of 2019

(Arising out of Order-in-Appeal No. KOL/CUS/PORT/92/2019 dated 28.08.2019 passed by Commissioner of Central Excise & Central Tax, (Appeals), Kolkata)

Commr. of Customs (Port), Kolkata
(15/1, Strand Road, Kolkata-700001)

VERSUS

M/s. Sunrise International
(24, Strand Road, 2nd Floor, Kolkata 700001)

Respondent

APPEARANCE :
Mr. S. Debnath, Authorized Representative for the Appellant
Mr. B. N. Pal, Advocate for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.75846/2025

Date of Hearing : 4TH April 2025
Date of Decision : 4th April 2025

PER R. MURALIDHAR

The Revenue is in appeal against the impugned order No. KOL/CUS/PORT/92/2019 dated 28.08.2019.

2. The facts of the case are that the respondent imported several consignments of Power Tillers/Rotary Tillers with standard tools and accessories from China by claiming the benefit of Notification No.12/2012-Cus dated 17.03.2012 Sl. No.399(A). Initially, the benefit of Notification was given. Later on, the matter was re-assessed and the benefit of Notification was denied. The respondent paid duty under protest and sought speaking order holding that the benefit of the said Notification is entitled for rotary tiller and not power tiller. On appeal, the Ld. Commissioner (Appeals) allowed the benefit of the above cited Notification and the demand of duty was dropped. Against the said order, the Revenue is in appeal.

3. The Ld. A.R. for the Revenue, has relied on the decision of this Tribunal in the case of Commissioner of Customs (Port), Kolkata Vs. Chirag Corporation reported in 2020 (374) ELT 444 (Tri.- Kolkata), wherein it has been held that the benefit of the said Notification was denied.

4. We find that the issue has been settled by this Tribunal in the case of BTL EPC Limited & Chirag Corporation vide Final Order No.75478-75479/2022 dated 17th August 2022 wherein it has been held that the rotary tiller and the power tiller are the same and the assesse is entitled for the benefit of exemption Notification No.12/2012-Cus dated 17.03.2012 Sl.No.399(A).

5. We also find that the order of this Tribunal was challenged before the Hon'ble High Court and in remand in the case of Chirag Corporation (supra), this Tribunal has taken a view that power tiller and rotary tiller are the same goods.

6. As the issue has already been settled by this Tribunal holding that the rotary tiller and the power tiller are the same goods, therefore, we hold that the respondent is entitled for the benefit of Notification No.12/2012-Cus dated 17.03.2012 Sl.No.399(A).

7. In view of this, the impugned order is upheld and the appeal filed by the Revenue is dismissed.

(Dictated and pronounced in the open court.)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

Pooja

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. III

Customs Appeal No.40979 of 2015

(Arising out of Order-in-Original No.35419/2015 dated 27.02.2015 passed by Commissioner of Customs, Chennai-VI, Custom House, No.60, Rajaji Salai, Chennai 600 001)

M/s.Tamilnadu Cricket Association .... Appellant
M.A. Chidambaram Stadium,
Victoria Hostel Road,
Chepauk,
Chennai 600 005.

VERSUS

The Commissioner of Customs (Chennai-VI) ... Respondent
Custom House,
No.60, Rajaji Salai,
Chennai 600 001.

APPEARANCE :

Ms. S. Sridevi, Advocate, for the Appellant
Ms. O.M. Reena, Authorized Representative for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No.41086/2024

DATE OF HEARING : 13.08.2024
DATE OF DECISION :19.08.2024

Per: Ms. Sulekha Beevi. C.S

Brief facts are that the appellant M/s.Tamilnadu Cricket Association (TNCA for short), affiliated to the Board of Control for Cricket in India (BCCI) having its office at M.A. Chidambaram Stadium, Chennai imported Ground Light Equipments, Flood Light Luminaries Lamps and accessories (for installation of Flood Lighting Systems in the Stadium) etc. under 5 Bills of Entry covering the total value of Rs.2,85,19,880/- and cleared them at Nil rate of Customs duty as per Adhoc Exemption Order No.338/95 dt. 21.12.1995 issued by Govt. of India, Ministry of Finance, Department of Revenue, vide F.No.463/93/95. Cus.-V.

2. The said goods were allowed for clearance at Nil rate of Customs duty as well as Additional duty subject to the conditions available in Adhoc Exemption Order as below and also on execution of undertaking to the effect that the importers would abide to the conditions of the Adhoc Exemption Order :

(i) *Shall be used only for the purpose for which it is imported;*

(ii) Shall not be used for any commercial purpose whatsoever;

(iii) Shall not be sold, disposed of, gifted, loaned, exchanged or parted away without prior permissions of the Department of Revenue, Ministry of Finance, New Delhi;

(iv) Shall be open for inspection by the Customs Officer.

3. It came to the knowledge of the Department on the basis of documents received from TNCA that, they had conducted one day matches under flood lighting system in the Chidarambaram Stadium, Chennai. The documents proved that more than three one day matches were played using the flood lighting system which has been imported in CKD condition and assembled and erected in the Chidambaram stadium. From the above, it appeared that the materials / equipments imported under the cover of Adhoc

Exemption Order No.338/95 dt. 21.12.1995 and cleared at Nil rate of duty filing the undertaking that the same will not be used for commercial purposes has been used by the appellant for commercial purposes in respect of three one day matches, which is violation of the condition (ii) of the adhoc exemption order.

4. Show Cause Notice dt. 16.12.2002 was issued to the appellant raising the above allegation and proposing to demand duty of Rs.2,28,15,874/- under Section 28 (1) of the Customs Act, 1962 along with interest and for imposing penalty under Section 112 (a) of the Act ibid. The notice also proposed confiscation of the goods imported under 5 Bills of Entry.

5. After due process of law, the original authority held that the appellant has violated condition No. (ii) of the Adhoc Exemption Order and ordered for confiscation of the goods giving an option to redeem the same on payment of redemption fine of Rs.28 lakhs. The duty demand proposed in the SCN was confirmed and penalty of Rs.22 lakhs was imposed under Section 112 (a) of Customs Act, 1962. Aggrieved by such order, the appellant is now before the Tribunal.

6. The Ld. Counsel Ms. S. Sridevi appeared and argued for the appellant. It is submitted that the appellant is an affiliation of the Board of Control for Cricket in India (BCCI) and are promoting the game of Cricket in Tamil Nadu. BCCI is the Government body conducting cricket matches domestically in India and also organizing International Cricket matches in India. BCCI conducts matches all over India by way of rotation as per allocation. When matches are allotted to the appellant, such matches are usually conducted by appellant at M.A. Chidambaram Stadium, Chepauk, Chennai.

6.1 The TNCA during the month of October 1995 had written to the Ministry of Youth Affairs and Sports, and Revenue Secretary, Government of India, New Delhi seeking exemption from import duty for import of 4 nos. of High Hot Dip Galvanized Steel Mast with

Polygonal cross-section and tilted head frame with flood lights, luminaries with accessories, for the purpose of erecting the same in M.A. Chidambaram Stadium in order to meet out international standards for conducting matches, including World Cup match (quarter-finals) to be held during March 1996. The purpose of import was to uplift the stadium to International Standards so that our cricketers would be able to adapt themselves to the ever-increasing day/night one day cricket match that has become common for any cricket competition these days.

6.2 The request of the TNCA was considered favourably and an exemption vide Adhoc Exemption Order No.338/95 dt. 21.12.1995 was issued by the Government of India, Ministry of Finance subject to certain conditions.

6.3 Subsequently, in the month of December 2022, i.e. after a lapse of 7 years from the date of first import, the department issued the present SCN alleging that the appellant has violated condition No. (ii) of the Adhoc Exemption Order. As per the said condition, the goods imported shall not be used for commercial purpose whatsoever. It is alleged in the SCN that the appellants have to pay the customs duty foregone at the time of import as they have violated this condition.

6.4 The Ld. Counsel argued that the purpose of import of the flood light equipments for the M.A. Chidambaram Stadium was to make it a world-class stadium and to meet the technical requirements of television broadcasting. The exemption is granted for import of flood lights for the stadium which is used for conducting matches. The exemption was not given for conducting only World Cup tournaments. The Department has erroneously interpreted the condition that the goods have been imported only for the use in World Cup tournaments and cannot be used for any other matches.

6.5 It is argued by the counsel that once the flood lights are installed, embedded to earth it cannot be easily removed and

refixed. The facility of flood light can be used for all matches conducted in the stadium and these lights have become a functional part of the stadium. There is nothing in the order that the use of flood light has to be restricted only for the world cup.

6.6 The department has denied the exemption stating that the floodlight facility has been used for other matches which would tantamount to 'use for commercial purpose'. The stand taken by the department is contrary to the conditions imposed in the Adhoc Exemption Order. If such interpretation is adopted, then the whole purpose for which the goods were imported and installed in the stadium would be defeated. The TNCA neither engages in any commercial activity nor the objective or the memorandum of TNCA promotes any commercial activity. It only promotes sports, particularly cricket and activities connected thereto.

6.7 The Ld. Counsel put forward arguments on the ground of limitation also. It is argued that the SCN has been issued under Section 25 (2) and the duty demand has been raised under proviso to Section 28 (1). However, the SCN does not allege that the appellant has suppressed facts with intention to evade payment of customs duty. There is no evidence adduced by the department as to suppression of facts for invoking the extended period. The SCN issued after a lapse of 7 years is barred by time. Ld. Counsel prayed that the appeal may be allowed.

7. The Ld. A.R Ms. O.M. Reena appeared and argued for the Department. The findings in the impugned order was reiterated. It is submitted that the appellant had imported the flood light luminaries and connected materials at the time of conduct of the world cup match. The adhoc exemption order was issued with certain conditions. The second condition of the order states that the goods shall not be used for commercial purpose. In the present case, the appellant has used the flood light during the conduct of 3 one day matches in 1996, 1997 as well as 1998. The conduct of

one day matches is commercial in nature. The appellant having violated the adhoc exemption order, the demand of duty is proper. The discussions in paras 16, 17 & 18 of the impugned order were referred to by the Ld. A.R to submit that, as the imported flood lights were used for conduct of one day international matches there is clear violation of condition of the adhoc exemption order.

7.1 In regard to the arguments put forward on the ground of limitation, the Ld. A.R submitted that the SCN has invoked the proviso to Section 28 (1) of Customs Act, 1962. As the violation is of continuing nature, the demand raised invoking the extended period is in order. It is prayed that the appeal may be dismissed.

8. Heard both sides.

9. The issue that arises for consideration is whether confiscation of the goods, imposition of redemption fine and penalty as well as the demand of customs duty alleging that the appellant has violated condition (ii) of the Adhoc Exemption Order No.338/95 dt. 21.12.1995 is legal and proper. The second issue is whether the demand is hit by limitation.

10. The conditions of the adhoc exemption order have already been reproduced in para-2 above. The said condition states that the flood lighting goods shall not be used for commercial purposes. The exemption order does not explain the meaning of 'commercial purpose' used in the condition. The facts narrated above shows that the appellant had requested to the Government for exemption from Customs duty for import of impugned goods during preparation for the World Cup, 1996. Letter of October, 1995 issued by TNCA to Secretary (Revenue), Govt. of India, New Delhi reads as under :

> "……TNCA has in right earnest started preparation for staging the World Cup cricket matches proposed to be played at the M.A Chidambaram Stadium and while the ground maintenance and other infrastructure facilities are of routine nature, the floodlighting of the stadium is a project by itself which would involve a big capital expenditure. While TNCA is making arrangements to meet the above

expenditure, we would like to bring to your kind attention that while floodlighting to International Standards, it is necessary for TNCA to import 4 Nos. 61.7 Metres high hot dip galvanised Steel Mast with Polygonal cross section and tilted head frame which are essential to ensure a glare free playing condition. As the Masts are an essential to hold the floodlighting, we would be grateful if this could be classified as a sporting accessory thereby enabling us to import at zero customs duty and other associated duties.

We understand that a similar exemption for import of luminaires was granted to Cricket Association of Bengal when the Eden Garden Cricket Stadium was provided with illumination by flood lights. This would enable TNCA to effectively lower the cost of the project and in turn help TNCA to install the floodlighting in the stadium from its limited funds. May we therefore request your good office to recommend our availing zero customs duty for import of complete luminaires with accessories as described in Annexure I required for floodlighting the M.A Chidambaram Stadium. Your support to this would go a long way in enabling TNCA make available a truly first class floodlight cricket stadium to the cricket fraternity as well as make available an international cricket stadium for day / night matches for the World Cup 1996."

11. The department has construed condition (ii) to mean that the appellant can use the flood lights only for the conduct of world cup matches. The adhoc exemption order does not say that the flood lights can be used only for world cup matches. Though the request was made during the preparation for the world cup matches, the intention was to uplift the infrastructure standards of the stadium. When the Government has granted exemption from Customs duty, the department has sought to deny the exemption by alleging that the flood lights have been used for cricket matches other than the world cup. It is thus assumed by the department that the conduct of world cup international matches is for non-commercial purpose and that the conduct of one day international matches is for commercial purpose. We do not understand what is the criteria to hold that the world cup international match is for non-commercial purpose and that the conduct of one day international matches is for a commercial purpose. The adhoc exemption order does not make any

such distinction. The entire SCN has been issued on assumptions and presumptions. We do not find any factual or legal basis to hold that there is a violation of condition (ii) as alleged by the department. The issue on merits is answered in favour of the appellant and against the Revenue.

12. The Ld. Counsel has argued on the ground of limitation also. The SCN has been issued under Section 25 (1) and also demanding duty under proviso to Section 28 (1) of the Customs Act, 1962. On perusal of the SCN, we do not find any whisper alleging that there is suppression of facts with intention to evade customs duty on the part of the appellant. So also, there is no evidence adduced by the department to show that the appellant has suppressed facts. In fact, the department has issued the SCN after collecting the documents from the appellant that they have conducted 3 one day international matches during the years 1996, 1997 and 1998. The SCN has been issued after a lapse of more than 7 years. In our view, the ingredients of proviso to Section 28 (1) are not present in the case on hand. The demand raised is therefore time-barred. The issue on limitation is also answered in favour of appellant and against the Revenue.

13. In the result, the impugned order is set aside. The appeal is allowed with consequential relief, if any.

(Order pronounced in the open court on 19.08.2024)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI. C.S)
Member (Judicial)

gs

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI.

COURT NO. II

Customs Appeal No.51287 of 2022 (SM)

[Arising out of Order-in-Appeal No.D-II/ICD/PPG/2070/2020-2021 dated 19.03.2021 passed by Commissioner of Customs (Appeals), New Customs House, New Delhi]

M/s. Indulge Sign and Graphics **Appellant**
D-96, Okhla Industrial Area,
Phase-I,
New Delhi-110 020.

VERSUS

Commissioner of Customs (Appeals), **Respondent**
NCH, IGI Airport,
New Delhi.

APPEARANCE:

Shri Awneet Singh, Advocate for the appellant.
Shri Gopi Raman, Authorised Representative for the respondent.

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.51047/2022

DATE OF HEARING/DECISION:18.10.2022

ANIL CHOUDHARY:

Heard the parties.

2. The issue involved in this appeal is whether the imported goods – LED Module Lights "Brand Samsung" have been rightly confiscated under Section 111(d) and penalty of Rs.1 lakh is imposed under Section 112(a) (i) of the Act.

3. The brief facts are that the appellant filed a Bill of Entry (BE) No.8911201 dated 16.03.2017 for clearance of "LED Module Light" imported from China. The goods were assessed under CTH 94051090

and valued Rs.7,46, 752.95. During the assessment, the Appraising Group asked the appellant to submit catalogue of the imported items. After perusal, it was decided to conduct 100% examination of the goods. During examination, the imported goods were found to be LED Module Lights of brand "SAMSUNG". From the examination report, it prima facie appeared to be import of counterfeit goods violating IPR Enforcement Rules, 2007 (hereinafter referred to as IPR Rules).

4. In accordance with the IPR Rules the matter was taken up with the right holder, M/s. Samsung Electronics Co. Ltd., Gurgaon, Haryana, information to this effect was also communicated to the appellant. The goods were examined by the authorized representative of M/s. Samsung and on the basis of a sample taken out from the import consignment, the right holder vide-e-mail dated 19.04.2017 confirmed that the imported goods were counterfeit. Accordingly, a show cause notice dated 15.05.2017 was issued to the appellant proposing confiscation and destruction of the imported goods due to violation of IPR Enforcement Rules, 2007. Penalty under Section 112(a)(i)of Customs Act, 1962 was also proposed against the appellant for the said violation. M/s. React India Pvt. Ltd., Gurgaon, the authorized representative of the Right Holders i.e. M/s. Samsung Electronics Co. Ltd. vide letter dated 14.07.2017 requested for complete confiscation and destruction of the said counterfeit goods and had executed Bond for Rs.8,21,428/- and submitted FDR of Rs.2,05,357/- in relation to the above said shipment. After due adjudication proceedings, the Adjudicating Authority vide the impugned order-in-original ordered absolute confiscation of the imported goods under Section 111(d) of the Customs Act, their disposal at the cost of M/s. React India Pvt. Ltd.

and imposed penalty of Rs.1,00,000/- upon the appellant under Section 112(a)(i) of the Act ibid.

5. Being aggrieved, the appellant filed appeal before the Commissioner (Appeals), who vide impugned order-in-appeal was pleased to dismiss the appeal upholding the order of confiscation and penalty.

6. Being aggrieved, the appellant is before this Tribunal.

7. Ld. Counsel for the appellant states that the dates of imports etc. as per admitted facts are as follows:-

Sr. No.	Event	Date
1.	BE Filed	16.03.2017
2.	Examination of goods	22.03.2017
3.	Customs intimated Rights Holder	11.04.2017
4.	Rights Holder Joins Proceedings	13.04.2017
5.	Rights Holder confirms violation of IPR	19.04.2017
6.	Rights Holder writes to Customs	13.05.2017
7.	SCN issued against appellant	15.05.2017
8.	Bond of Rights Holder-in- File C.No.VIII/6/ICD/PPG/IPR/Bond/B.G./03/193/201	24.05.2018

8. It is further urged that the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 lays down a detailed procedure to be followed by the right holders or their authorized representative as also by the Customs, for seeking suspension of release of suspect imported goods. That in the present case the Right holder's trademark registration dates back to 2001 and at that point of time usage of LED was not very common for lighting purposes in India, hence, LED Lighting Module has not been explicitly mentioned in the said registration. That, therefore, it is immaterial if Samsung does or does

not manufacture LED's. That M/s. Samsung do not have a valid registration in respect of Light Emitting Diodes with the Indian Customs and hence IPR Enforcement Rules are not at all attracted in the present case and as such the goods should have been cleared on payment of duty by the appellant.

9. Further urged that the Rules provides that in case of suspension of clearance of goods by Customs on its own initiative, the right holder is required to give notice as laid down under Rule 3 of the said Rules and to execute the bonds as specified in Rule 5 of the said rules within five days from the date of suspension of clearance. That in the present case, the bond of the right holders was accepted by the Customs on 24.05.2018.

10. That upon closely examining the provisions Rule 7 of IPR Rules, 2007, it can be concluded that when non-perishable goods have been interdicted by the Customs on its own volition, then the right holder must satisfy the requirements of Rules 3 & 5 within 5 days, and thereafter, the right holder must join the proceeding in a maximum 10 days, extendable by another 10 days, by an order from the Commissioner or an officer duly authorized by him. That in the present case, the timeline followed by the Customs clearly shows that the prescribed procedures have been violated by Customs itself. Therefore, the confiscation and penalty imposed upon the appellant are void.

11. That enforcement of the seizure is subject to the right holder joining the proceeding within the prescribed time limit. Thus, it is important to make sure that the right holder participates in the Customs proceedings. In case the right holder abstains, the customs

have no obligation to continue with the detention and the goods shall be released forthwith, if otherwise in order. That the prescribed time limit of 10 days is binding on the department and any extension, it could only done by the Commissioner. In the instant case, no such extension is on record as the appellant has not received any order to this effect from the department. Hence, the entire proceedings have been vitiated due to the blatant violation of the strict timeline prescribed in the Rules and therefore, the provisions of IPR Rules, 2007 are not applicable in the present case. That the judgement in Commissioner of Customs, Chennai-V, Himachal Exim [2017(352) ELT 34 (Tribunal-Chennai) is squarely applicable in the instant case.

12. That the penalty of Rs.1,00,000/- under Section 112 is not sustainable as the appellant had never called for or ordered goods bearing Samsung brand name. The supplier has already accepted that 'Samsung' bearing goods were sent by mistake at his end, as they were freely available in Korean market. Further, penalty is unsustainable when the goods have been confiscated absolutely as has been routinely held by various courts. Following case laws relied upon by the appellant:-

(i) Jai International Vs. CC, New Delhi [2017(352)ELT 96(T-Delhi)

(ii) Commissioner of Customs, Tuticorin Vs. Tushar Impex [2013(295)ELT 610 (Tribunal-Chennai)]

(iii) SRK Enterprises Vs. Commissioner of Customs (Imp.), Nhava Sheva – [2012(280) ELT 264 (Tribunal-Mumbai).

13. It is further urged that this Tribunal in the case of **SRK Enterprises VS. Commissioner of Customs - 2012 (280) ELT**

264 has held that once it is found that time limit, which has not been followed nor Rule 3 of Intellectual Property Right (Imported Goods) Enforcement Rules, 2007 has been complied with. Accordingly, ld. Counsel prays for allowing the appeal with consequential benefits.

14. Ld. Authorised Representative for the respondent/Department relies on the impugned order and further urges that the court below have specifically observed that the Right Holder, Samsung Electronics had been given registration by the Department for their three patents vide separate UPRN nos. The release of the consignment was suspended for infringing the patent rights of the right holder consequent to the examination of the goods and on the basis of the findings in the examination.

15. The appellant have neither furnished any documentary evidence in support of their contention that the right holder has no valid registration for LED nor they have raised this issue before the court below. So far the prescribed time line is concerned, it is urged that substantial compliance of the time limitation has been prescribed.

16. Having considered the rival contentions, I find that the first time line prescribed that the Customs is, required to immediately inform the right holder on suspension of clearance. Such suspension was made on 22.03.2017 pursuant to examination of the goods. However, the Customs have given intimation to the right holder - Samsung Electronics Co. on 11.04.2017 i.e. after about 20 days and thus, have violated the time line. Secondly, the right holder is required to furnish the bond within a period of 5 days and was required to furnish such bond /bank guarantee by 17.4.2017. Whereas the Bond has been filed

on 24.5.2018 and thus, there is breach of time limit at this stage also.

17. In view of the aforementioned findings and observations, I hold that the impugned order for confiscation and penalty is bad and against the provisions of the law. Further, the impugned order is bad for violation of the prescribed conditions and limitation prescribed under the Intellectual Property Rights; Customs Authorities prescribed by the Board and further also is in violation of Notification No.47 of 2007-Customs and the instructions dated 29.10.2007 prescribed by the Board vide F.No.305/96/2004-FTT(Part-I) read with F.No.305/1/2008-FTT dated 24.02.2011. Further, it is noticed that on the date of suspension of clearance of the imported goods, the right holder did not have registration under the provisions of IPR with the Customs Department for LED Modules/Lights. Thus, the impugned order is frustrated on this score also. Accordingly, this appeal is allowed and the impugned order is set aside. Respondent /Commissioner is directed to release the goods forthwith. It is also ordered that the appellant shall not be liable to any demurrage charges etc. of the consignment. The goods shall be returned or released forthwith within a period of two weeks from the date of receipt of copy of this order. Appeal allowed.

(Order dictated & pronounced in open court).

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COURT NO. 4

Customs Appeal No. 50195 of 2020

(Arising out of Order-in-Original No. 07/2019-20/UG/Principle Commissioner dated 13.11.2019 passed by the Pr. Commissioner of Customs House (Import), New Delhi)

Arun Kumar Agarwal **Appellant**

Partner of M/s Venus Industries
C-24, Lawrence Road,
Industrial Area, Delhi-110035

Presently at:

B-1/74, Safdarjang Enclave
New Delhi-110029

Vs.

The Principal Commissioner of Customs (Import), New Customs House, Near IGI Airport New Delhi-110037 **Respondent**

And

Customs Appeal No. 50196 of 2020

(Arising out of Order-in-Original No. 07/2019-20/UG/Principal Commissioner dated 13.11.2019 passed by the Pr. Commissioner of Customs House (Import), New Delhi)

M/s Venus Industries **Appellant**

C-24, Lawrence Road,
Industrial Area, Delhi-110035

Presently at:

B-1/74, Safdarjang Enclave
New Delhi-110029

Vs.

The Principal Commissioner of Customs (Import), New Customs House, Near IGI Airport New Delhi-110037 **Respondent**

Appearance
Present for the Appellant : Shri Rakesh Chibber, Advocate
Present for the Respondent: Shri Rakesh Kumar, Authorised Representative

CORAM: HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing : 07/12/2021
Date of Decision: 04/01/2022

FINAL ORDER NO. 50005-50006/2022

PER: P V SUBBA RAO

1. Both these appeals assail the same Order-in-Original[1] dated 13.11.2019 passed by the Principal Commissioner of Customs (Airport), New Customs House, AGI Airport New Delhi, the operative part of which is as follows:

(i) I confirm the customs duty of Rs. 3,68,10,660/- (Rupees Three crore sixty Eight Lakh Ten Thousand Six Hundred and Sixty Only) against M/s State Trading Corporation of India Ltd., Jawahar Vyapar Bhavan, Tolstoy Marg, New Delhi-110001 leviable on import of 133 kgs of gold issued to M/s Venus Industries, C-24, Lawrence Raod, Industrial Area, Delhi-110035 under replenishment scheme, in terms of Section 28(4) of the Customs Act, 1962 read with Circular No. 27/2016-Cus as amended and order the recovery of the same.

(ii) I order for recovery of interest, as applicable in terms of Section 28AA of the Customs Act, 1962 on the Customs duties mentioned at (i) above.

(iii) I impose penalty of Rs. 3,68,10,660 (Rupees Three Crore Sixty Eight Lakh Ten Thousand Six Hundred and Sixty only) on M/s State Trading Corporation of India Ltd. Jawahar Vyapar Bhavan, Tolstoy Marg, New Delhi-110001 under Section 114 A of the Customs Act, 1962.

(iv) I refrain from imposing penalty on Shri Rajendra Rawat, Chief Manager (Marketing), Bullion Division. M/s State Trading Corporation of India Limited, Jawahar Vyapar Bhavan Tolstoy Marg, New Delhi-110001 under Section 114 AA of the Customs Act, 1962.

(v) I confiscate the articles of jewellery already exported, as detailed in worksheet-A1 to the Show Cause Notice , totally valued at Rs. 37,10,75,770/-(Rupees Thirty Seven Crore Ten Lakh Seventy Five

1 Impugned order

Thousand Seven Hundred and Seventy Only) under section 113 (d) and 113(i) of the customs act, 1962. Since, the goods have already been cleared & were never seized, therefore, I refrain myself from imposing any redemption fine Section 125(1) of the Customs Act, 1962.

(vi) I impose a penalty of Rs. 36,81,066/- (Rupees Thirty Six Lakh Eighty One Thousand and Sixty Six only) on M/s Venus Industries, C-24, Lawrence Road, Industrial Area, Delhi-110035 under Section 114 of the Customs Act, 1962.

(vii) I impose a penalty of Rs. 25,00,0000/-(Rupees Twenty Five Lakh Only) on Shri Arun Kumar Agarwal, Parnter , M/s Venus Industries, C-24, Lawrence Raod, Industrial Area, Delhi-110035 under section 114 AA of the Customs Act, 1962.

2. The impugned order was assailed on several grounds in the two appeals. An application for out of turn hearing was also filed. On 05.11.2021 Miscellaneous Order No. 50154 /2021 was passed in appeal No. 50195 of 2020 whereby appellants' prayer for early hearing on the ground that the case involved is covered by the judgment of the Hon'ble Supreme Court in case of **Canon India Pvt. Ltd. vs. Commissioner of Customs**[2] was allowed. Accordingly, both appeals were listed for final disposal today.

3. Learned Counsel for the appellants submits that in this matter the show cause notice[3] was issued by Additional Director General of DRI, Hyderabad Zonal unit demanding duty under section 28(4) along with interest. Consequently, it was also proposed in the SCN to confiscate goods under section 113 and impose penalties under section 114, 114A. The SCN was adjudicated by the learned Principal Commissioner confirming the demand of customs duty as

2. 2021 (376) ELT 3 (SC)
3. SCN

proposed along with interest and imposing penalty under section 114A upon M/s Venus Industries and penalty under section 114AA upon Arun Kumar Agarwal. It has been held by the Hon'ble Supreme Court in **Canon India** that the officers of DRI are not "proper officers" to issue a show cause notice demanding duty under section 28(4). Therefore, the SCN itself is issued without authority of law and the consequential impugned order in these two appeals cannot be sustained. He, therefore, prays that both appeals may be allowed and the impugned order may be set aside.

4. Learned Departmental Representative supports the impugned order.

5. We have considered the arguments in these two appeals and perused the records. We find that in the present case the show cause notice was issued by the Additional Director General of DRI under section 28(4). In **Canon India** the Hon'ble Supreme Course has held as follows:

> "23. We, therefore, hold that entire proceedings in the present case initiated by the Additional Director General of the DRI by issuing show cause notice in all the matters before us are invalid without any authority of law and liable to be set aside and the issuing demands are also set aside."

6. This judgement of the Supreme Court was followed by various high Courts and this Tribunal in several cases. The Larger Bench of Supreme Court has, on 29/31.8.2021, in the matter of **Agarwal Metals**[4] followed the ratio of the judgment of **Cannon India Ltd.** and dismissed Revenue's appeals holding as follows:

"Delay condoned.

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4 Commissioner of Customs Kandla vs. M/s. Agrawal Metals and Alloys [Civil Appeal No. 3411/2020]

> In view of decision dated 09.03.2021 of three judge Bench of this Court in Civil Appeal No. 1827 of 2018 titled as "M/s. Canon India Private Ltd. vs. Commissioner of Customs reported in 2021 (3) SCALE 748. These appeals must fail as the show cause notice(s) in the present cases was also issued by Additional Director General (ADG), Directorate of Revenue Intelligence (DRI), who is not a proper officer within the meaning of Section 28 (4) read with Section 2(34) of the Customs Act, 1962.
>
> Hence, these appeals stand dismissed."

7. High Court of Karnataka has also followed the judgment of **Cannon India Ltd.** in the case of **Guvidivan**[5] and allowed the writ petition and quashed the impugned order as the show cause notice issued by officer of DRI demanding duty under section 28. The Madurai Bench of Madras High Court in the case of **Quantum coal**[6]**,** likewise, followed **Cannon India Ltd.** and quashed the impugned order passed by the Commissioner since the Show Cause Notice was issued by the DRI. In view of above we find that the present case and the impugned order cannot be sustained because the show cause notice was issued by the ADG DRI who is not the competent authority to issue show cause notice under section 28(4).

8. We have also considered the fact that penalties were imposed under section 114, 114A and 114 AA in the impugned order and the SCN for confiscation of goods or imposition of penalties is issued under section 124 of the Customs and not under Section 28. The SCN under Section 124 need not be issued by 'the proper officer'. However, in the present case the basis for the proposed confiscation of goods and imposition of penalties in the SCN has been the re-

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5 Givaudan India Pvt Ltd. vs Principal Commissioner of Customs, Bangalore (Writ Petition no. 10773/2018 and 4628/2018)

6 Quantum Coal Energy (P) Ltd. vs The Commissioner [Writ Petition (MD) 10186 10817/2014]

assessment of the goods and demand of the duty under Section 28(4). The basis for re-assessment being unsustainable in view of **Canon India,** the proposals for confiscation and of goods and imposition of penalties cannot service either. Therefore, the impugned order cannot be sustained. The impugned order is set aside and the appeals are allowed with consequential relief, if any.

(Order pronounced on **04.01.2022)**

(P V Subba Rao)
Member (Technical)

(Rachna Gupta)
Member (Judicial)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

Customs Appeal No. 50948 of 2020

(Arising out of Order-in-Original No. 19/2020/U.G./Principal Commissioner dated 29.05.2020 passed by the Principal Commissioner of Customs (Import), New Delhi)

Toyota Material Handling India Private Limited **Appellant**
#43 Mile Stone, NH-8,
Delhi – Jaipur Highway,
Gurugram, Haryana-122 004

VERSUS

Principal Commissioner of Customs (Import) New Delhi **Respondent**
New Customs House, New Delhi

With

Customs Appeal No. 50949 of 2020

(Arising out of Order-in-Original No. 19/2020/U.G./Principal Commissioner dated 29.05.2020 passed by the Principal Commissioner of Customs (Import), New Delhi)

Sunil Kumar Sharma **Appellant**
Senior Manager-Finance And Accounts
Toyota Material Handling India Private Limited
#43 Mile Stone, NH-8,
Delhi – Jaipur Highway,
Gurugram, Haryana-122 004

VERSUS

Principal Commissioner of Customs (Import) New Delhi **Respondent**
New Customs House, New Delhi

Appearance

Shri B.L. Narasimhan, Advocate – for the appellant

Shri Sunil Kumar, Authorized Representative – for the Respondent

And

Customs Appeal No. 51136 of 2020

(Arising out of Order-in-Original No. 19/2020/U.G./Principal Commissioner dated 29.05.2020 passed by the Principal Commissioner of Customs (Import), New Delhi)

Principal Commissioner of Customs ACC (Import), New Delhi
New Customs House, New Delhi-122004. **Appellant**

VERSUS

M/s Toyota Material Handling India Private Limited
No. 43 Mile Stone, NH-8,
Delhi – Jaipur Highway,
Gurugram, Haryana-122 004 **Respondent**

Appearance

Shri Sunil Kumar, Authorized Representative – for the Department

Shri B.L. Narasimhan, Advocate – for the Respondent

CORAM : **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION : 24.01.2022

Final Order Nos. 50061-50063/2022

Justice Dilip Gupta

Customs Appeal No. 50948 of 2020 has been filed by Toyota Material Handling India Private Limited to assail the order dated May 29, 2020 passed by the Principal Commissioner of Customs, ACC (import) [1] by which part of demand has been confirmed and part of demand has been dropped.

2. **Customs Appeal No. 50949 of 2020** has been filed by Sunil Kumar Sharma, Senior Manager- Finance and Accounts of M/s Toyota Material Handling India Private Limited against the imposition of penalty by the aforesaid order dated May 29, 2020.

[1] Principal Commissioner

3. **Customs Appeal No. 51136 of 2020** has been filed by the Principal Commissioner of Customs against that part of the order by which demand has been dropped.

4. It has been submitted by Shri B.L. Narasimhan, learned counsel appearing for the appellant that the Principal Additional Director General, DRI did not have the jurisdiction to issue the show cause notice as he was not **the proper officer** under section 28 of the Customs Act to issue the notice and in support of this contention learned counsel placed reliance upon decisions of the Supreme Court in **Canon India Pvt. Ltd.** vs. **Commissioner of Customs**[2] and **Commissioner of Customs, Kandla** vs. **M/s. Agarwal Metals and Alloys**[3]**.**

5. Shri Sunil Kumar, learned authorised representative appearing for the Department, however submitted that the Additional Director General, DRI had the jurisdiction to issue the show cause notice and also submitted that the Department has filed a review petition against the judgment of the Supreme Court in **Canon India** on 07.04.2021 and it is pending. Learned authorised representative, therefore, submitted that the hearing of this appeal may be deferred.

6. The submissions advanced by learned counsel for the appellant and the learned Authorised Representative of the Department has been considered.

7. The issue that arises for consideration is whether the Principal Additional Director General, DRI had the jurisdiction to issue the

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[2]. **2021 (376) E.L.T. 3 (S.C.)**
[3]. **2021 (9) TMI 316- Supreme Court**

notice. This precise issue was examined by the Supreme Court in **Canon India.** The Supreme Court observed that the nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import is a power that has been conferred to review the earlier decision for assessment. This power which has been conferred under section 28 of the Customs Act on **the proper officer,** must necessarily mean **the proper officer** who, in the first instance, assessed and cleared the goods. Thus, the Additional Director General, DRI did not have the jurisdiction to issue the show cause notice. The observations of the Supreme Court are as follows:

> "12. **The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions.** The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.
>
> 13. **Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case.** Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.
>
> 14. It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it

completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28 (4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. **The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake re-assessment [which is involved in Section 28 (4).**

15. It is obvious that the re-assessment and recovery of duties i.e. contemplated by Section 28(4) is by the same authority and not by any superior authority such as Appellate or Revisional Authority. **It is, therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside.**

16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the proper officer under Section 6 of the Customs Act. The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act.

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21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government. The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2 (34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise

> of powers under a section which does not confer any such power.
>
> xxxxxxxx
>
> 23. **We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set-aside and the ensuing demands are also set- aside."**
>
> **(emphasis supplied)**

8. It would thus be seen that the Supreme Court in **Canon India** held that the entire proceedings initiated by the Additional Director General, DRI by issuance of a show cause notice was without any authority of law and was, therefore, liable to be set aside.

9. The aforesaid decision of the Supreme Court in **Canon India** was subsequently followed by the Supreme Court in **Agarwal Metals and Alloys** and the judgment is reproduced below:

> "Delay condoned.
>
> In view of decision dated 09.03.2021 of three judge Bench of this Court in **Civil Appeal No. 1827 of 2018 titled as "M/s. Canon India Private Ltd. vs. Commissioner of Customs" reported in 2021(3) SCALE 748,** these appeals must fail as the show cause notice(s) in the present cases was also issued by Additional Director General (ADG), Directorate of Revenue Intelligence (DRI), who is not a proper officer within the meaning of Section 28(4) read with Section 2(34) of the Customs Act, 1962.
>
> Hence, these appeals stand dismissed.
>
> However, dismissal of these appeals will not come in the way of the competent authority to proceed in the matter in accordance with law.
>
> Pending application(s), if any, stand disposed of."

10. Apart from the aforesaid two decisions of the Supreme Court in **Canon India** and **Agarwal Metals and Alloys,** the High Courts have also set aside proceedings where show cause notices were issued by the Director of Revenue Intelligence.

11. The Bombay High Court in **Kitchen Essentials & Ors.** vs. **The Union of India & Ors.**[4] observed as follows:

> "10. Having gone through the decision of the Hon'ble Supreme Court in the case of M/s. Canon India Private Limited (supra), we find that the issue raised in the present writ petition is squarely covered by such decision. The show cause notice in the present case is also issued by the respondent No.2 - Joint Director, DRI, Mumbai, who is not a proper officer within the meaning of Section 28(4) read with Section 2 (34) of the said Act.
>
> xxxxxxxxx
>
> 12. In the light of the decisions of the Hon'ble Supreme Court referred to herein above, we have no hesitation in holding that the entire proceedings in the present case initiated by the respondent No. 2 - Joint Director, DRI, Mumbai, by issuing the show cause notice are invalid, without any authority of law and liable to be set aside and ensuing demands are also liable to be set aside."

12. The Madras High Court in **Quantum Coal Energy (P) Ltd.** vs. **The Commissioner, Office of the Commissioner of Customs, Custom House, Tuticorin**[5] observed as follows:

> "6. When the matter was taken up for hearing, the learned counsel appearing for the petitioner submitted that the issue is no longer res integra and that the Hon'ble Supreme Court in M/s. Canon India Private Limited V. Commissioner of Customs (2021-VIL-34-SC-CU) had held that the expression "the proper officer" occurring in Section 28 of the Customs Act will only refer to the assessing officer who passes the original order making assessment.
>
> xxxxxxxx
>
> 7. In the case also, the show cause notice was issued by the Additional Director General of DRI. The Hon'ble Supreme Court had held that he cannot be termed as "the proper officer". Since the entire proceedings were initiated by an authority who lacked the jurisdiction, applying the aforesaid decision of the Hon'ble Supreme Court the order impugned in these writ petitions is quashed."

13. The Karnataka High Court in **Shri Mohan C. Suvarna Director (Finance and Admin) M/s Givaudan India Pvt. Ltd.**

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[4]. **2021 (10) TMI 1267-Bombay High Court**
[5]. **2021 (3) TMI 1034- Madras High Court**

vs. **The Principal Commissioner of Customs, Additional Director General Directorate of Revenue Intelligence, Bangalore**[6] did not accept the plea of the Department that since the review petition had been filed by the Department in **Canon India,** the hearing should be adjourned and in view of the decision of the Supreme Court in **Canon India,** set aside the order for the reason that the show cause notice had not been issued by **the proper officer**.

14. The Punjab and Haryana High Court in **M/s. Steelman Industries** vs. **Union of India and Others**[7] also, in view of the decision of the Supreme Court in **Canon India,** allowed the Writ Petition and set aside the entire proceedings arising from the show cause notice as the Additional Director General, DRI was not the **proper officer**.

15. Various Benches of the Tribunal have also set aside the orders for the reason that the show cause notices were not issued by **the proper officer,** since they were issued by the Department of Revenue and Intelligence. The decisions are:

(i) **Principal Commissioner, Customs, Acc Import Commissionerate New Customs House** vs. **Dish TV India Limited, Rajeev Dalmia and Virender Targa (Vice-Versa)**[8]**;**

(ii) **C. Magudapathy** vs. **Commissioner of Customs (Seaport-Export)**[9]**;** and

(iii) **M/s. Modern Insecticides Limited vs. Commissioner of Customs, Ludhiana**[10]

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[6]. **2021 (8) TMI 178- Karnataka High Court**
[7]. **2021 (8) TMI 1236- Punjab and Haryana High Court**
[8]. **2021 (10) TMI 771- CESTAT New Delhi**
[9]. **2021 (9) TMI 636- CESTAT Chennai**
[10]. **2021 (10) TMI 598- CESTAT Chandigarh**

16. The show cause notice dated 30.01.2009 issued by the Principal Additional Director General, DRI under Section 28 of the Customs Act is, therefore, without jurisdiction as the said officer was not **the proper officer** and, therefore all proceedings undertaken by the Department on this show cause notice is, therefore, without jurisdiction. The order dated 29.05.2020 passed by the Principal Commissioner, therefore, cannot be sustained.

17. The submission advanced by the learned authorised representative appearing for the Department that the hearing of this appeal should be deferred till the review petition filed by the Department in **Canon India** is decided was considered by the Karnataka High Court in **Mohan C. Suvarna** and rejected.

18. In this view of the matter, it would not be necessary to examine the issues raised on the merits of the appeal.

19. Thus, Customs Appeal No. 50948 of 2020 and 50949 of 2020 filed by the assessee are allowed and Customs Appeal No. 51136 of 2020 filed by the Department is dismissed.

(Dictated & pronounced in open Court)

(Justice Dilip Gupta)
President

(P.V. Subba Rao)
Member (Technical)

RM

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA REGIONAL BENCH –
COURT NO.2

Customs Appeal No.75015 of 2015

(Arising out of Order-in-Original No.Kol./Cus/Port/43/2014 dated 14.07.2014 passed by Commissioner of Customs (Port), Kolkata)

M/s Beriwala Impex Pvt. Ltd. **Appellant**
No.D-108, Mansarover Garden,
1st Floor, New Delhi-110015

VERSUS

Commr. of Customs (Port), Kolkata **Respondent**
15/1 Strand Road, Kolkata-700001

APPEARANCE:

S/Shri Sourabh Bagaria & Indranil Banerjee, both Advocates for the Appellant
Shri M.P.Toppo, Authorized Representative for the Respondent

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)

DATE OF E-HEARING : 18.01.2022
DATE OF ORDER : 23.02.2022

FINAL ORDER NO.75125/2022

PER: P. V. SUBBA RAO

M/s. Beriwala Impex[1] filed this appeal assailing Order-in-Original[2] dated 14.7.2014 passed by the Commissioner of Customs, Kolkata (Port), whereby he adjudicated upon the Show Cause Notice[3] dated 3.4.2012 issued by the Additional Director General, Directorate of Revenue Intelligence[4], Chennai, to the appellant in respect of the goods imported by it through Kolkata port, Chennai port and Inland Container Depot (ICD), Tughlakabad, Delhi. The

[1] **Appellant**
[2] **Impugned order**
[3] **SCN**
[4] **DRI**

appellant was asked to submit its replies to the respective jurisdictional Commissioners. Since the same issues have to be decided with respect to three different customs locations, the Central Board of Excise and Customs[5] issued order dated 20.12.2013 from file No. 437/94/2013-Cus IV appointing Commissioner of Customs, Seaport- Import, Kolkata as the common adjudicating authority in the case. Therefore, the learned Commissioner has decided the case with respect to all the imports made through the three ports.

2. The appellant imported LDPE re-processed granules through Chennai and Kolkata ports and ICD Tughlakabad which were assessed by the proper officers and cleared for home consumption. DRI received information that the appellant had been resorting to undervaluation of the LDPE granules which resulted in short levy of duty and conducted searches, recorded statements and after completing investigation, came to the conclusion that the appellant had undervalued the imported goods. Additional Director General[6], DRI issued the SCN proposing recovery of differential duty under section 28 along with interest, confiscation of the impugned goods and imposition of penalties. Adjudicating upon the SCN, the learned Commissioner has, by the impugned order, confirmed a demand of differential duty of Rs. 96,42,062 and imposed a penalty of equal amount under section 112.

3. The impugned order was contested on several grounds in this appeal. A miscellaneous application was filed seeking permission to

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[5] CBEC
[6] ADG

raise an additional ground that the SCN was issued without authority because DRI officers were not proper officers to issue a demand under section 28 in view of the judgment of Hon'ble Supreme Court in the case **Canon India**[7]**.** The miscellaneous application was allowed.

4. Learned counsel for the appellant submitted that the impugned order needs to be set aside because it was passed in pursuance of SCN issued by the DRI demanding duty under section 28 and officers of DRI are not 'proper officers' to issue an SCN under that section as held by a three member bench of Hon'ble Supreme Court in the case of **Canon India.** He submits that this judgment was followed subsequently by Hon'ble Supreme Court, various High Courts and also various benches of this Tribunal and wherever the SCN demanding duty under section 28 was issued by DRI, all such orders were set aside on the ground of lack of jurisdiction. He prays that a similar decision may be taken and the impugned order may be set aside and their appeal may be allowed.

5. Learned Departmental Representative, on the other hand, submits that the judgment of Hon'ble Supreme Court in **Canon India** was that DRI officers were not proper officers as per section 2(34) of the Customs Act. However, there is another section- Section 28(11) according to which all Customs officers are proper officers for the purpose of assessment under section 17. Thus, there are two sections under which a Customs officer will be a proper officer- Section 2(34) and section 28(11)- which read as follows:

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[7] AIR 2021 SC 1699

> **Section 2 Definitions:**…..
>
> **(34) "proper officer",** in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs;
>
> **Section 28 Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.**
>
> (1)……(10)
>
> (11) Notwithstanding anything to the contrary contained in any judgement, decree or order of any court of law, tribunal or other authority, **all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section.**

6. He submits that while as per Section 2(34), an officer has to be notified to be a proper officer, section 28(11), itself defines that all persons appointed as officers of Customs under sub-section (1) of Section 4 before 6th July 2011, as proper officers and are deemed to have always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers under section 28. Thus, no notification is required in respect of the officers covered under section 28(11). Officers of DRI were appointed as Customs officers under sub-section (1) of Section 4 by Notification No.17/2002 - Customs (NT) dated 7.3.2002 as has been noted in **Canon India.** The relevant extract of the judgment is as follows:

> 16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the proper officer under Section 6 of the Customs Act. **The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act.**
>
> **17. Shri Sanjay Jain, learned Additional Solicitor General, relied on a Notification No.17/2002 - Customs (NT) dated 7.3.2002 to show all Additional Directors General of the DRI have been appointed as Commissioners of Customs. At the relevant time, the Central Government was the appropriate authority to issue such a**

> **notification. This notification shows that all Additional Directors General, mentioned in Column (2), are appointed as Commissioners of Customs.**
>
> **(emphasis supplied)**

7. Learned Departmental Representative submits that it is undisputed that DRI officers were appointed as Customs officers under section 4(1) prior to 6th July 2011. After the notification dated 7.3.2002 appointing DRI officers as Customs officers, another Notification No.40/2012-Customs (N.T.) New Delhi, dated the 2nd May, 2012 was issued by the Central Board of Excise and Customs under section 2(34), assigning various functions including functions under section 28 to officers of and above certain ranks. This notification has been struck down in **Canon India** as having been issued without authority.

8. He submits that from the judgment of Hon'ble Supreme Court in **Canon India,** it does not appear that section 28(11) was either under consideration or has been struck down by Hon'ble Supreme Court. Nor has this section been struck down by any High Court till date. Explaining the background to insertion of section 28(11) and its legislative intent, he submits that Hon'ble Supreme Court had, in **Commissioner vs. Sayed Ali[8],** held that officers of Customs (Preventive) were not proper officers to issue SCN under section 28. Thereafter, Parliament amended section 28 retrospectively inserting section 28(11) as above. The Statement of objects and reasons presented by the Hon'ble Finance Minister while introducing the bill clarifies the legislative intent of section 28(11). It reads as follows:

STATEMENT OF OBJECTS AND REASONS

[8] **2011(265) ELT 17(SC)**

The Customs Act, 1962 consolidates and amends the law relating to customs. Clause (34) of section 2 of the said Act defines the expression "proper officer" in relation to the functions under the said Act to mean the officer of customs who is assigned those functions by the Central Board of Excise and Customs or the Commissioner of Customs. Recently, a question has arisen as to whether the Commissioner of Customs (Preventive) is competent to exercise and discharge the powers of a proper officer for issue of a notice for the demand of duty. **The Hon'ble Supreme Court of India in Commissioner of Customs versus Sayed Ali and Anr. (Civil Appeal Nos. 4294-4295 of 2002) held that only a customs officer who has been specifically assigned the duties of assessment and re-assessment in the jurisdiction area is competent to issue a notice for the demand of duty as a proper officer.** As such the Commissioner of Customs (Preventive) who has not been assigned the function of a "proper officer" for the purposes of assessment or re-assessment of duty and issue of show cause Notice to demand Customs duty under Section 17 read with Section 28 of the Act in respect of goods entered for home consumption is not competent to function as a proper officer which has not been the legislative intent.

2. In view of the above the Show Cause Notices issued over the time by the Customs officers such as those of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence and others, who were not specifically assigned the functions of assessment and re-assessment of customs duty may be construed as invalid. The result would be huge loss of revenue to the exchequer and disruption in the revenue already mobilized in cases already adjudicated. However, having regard to the urgency of the matter, the Government issued notification on 6th July, 2011 specifically declaring certain officers as proper officers for the aforesaid purposes.

3. In the circumstances, it has become necessary to clarify the true legislative intent that Show Cause Notices issued by Customs officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. **It is, therefore, purposed to amend the Customs Act, 1962 retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the said Act at all material times irrespective of issuance of any specific assignment on 6th July, 2011.**

4. The Bill seeks to achieve the above objects.

9. He submits that the constitutional validity of section 28(11) was challenged before the Hon'ble High Court of Delhi in the case of **Mangáli Impex**[9]. The High Court held that the section is constitutionally valid but set aside its retrospective application. On an appeal by revenue, Hon'ble Supreme Court stayed[10] the operation of this judgment and order of Hon'ble Delhi High Court**.** The validity of Section 28(11) was also upheld by the Hon'ble High Court of Bombay in the case of **Sunil Gupta Vs. Union of India**[11]. **Thus, section 28(11) is operative in its full force**, **according to which, any person appointed as Customs officer under section 4(1) prior to 6th July 2011 is a proper officer both under section 17 and also under section 28**. Any notification under section 2(34) in respect of such officers assigning functions under section 17 or section 28 is redundant because the section itself designates them as proper officers.

10. He, therefore, submits that DRI officers, being proper officers both under section 17 and under section 28, the SCN issued in this case is valid and cannot be struck down.

11. We have considered the submissions made and case laws relied upon by both sides. Learned counsel for the appellant was correct in his assertion that DRI officers were held to be NOT proper officers under in **Canon India** and hence the order issued in pursuance of an SCN issued by DRI demanding duty was set aside. The ratio of **Canon India** was followed in the following cases and

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[9] 2016 (335) ELT 605 (Del)
[10] 2017 (349) ELT A 98 (SC)
[11] 2014-TIOL-1949-HC-MUM-CUS

the orders confirming demands in pursuance of SCN issued by DRI were set aside.

Supreme Court

1. Commissioner of Customs vs **Agarwal Metals and Alloys**[12]

Madras High Court- Madurai bench

2. **Quantum Coal Energy Pvt. Ltd** vs Commissioner of Customs[13]

Karnataka High Court

3. Givaudan India Pvt. Ltd. vs Commissioner of Customs[14]

Punjab and Haryana High Court

4. **Godrej & Boyce Manufacturing Co. Ltd.** vs UOI[15]

Tribunal

5. Principal Commissioner, Customs, ACC Import vs **Dish TV India Limited, Rajeev Dalmia and Virender Kumar Tagra**[16]
6. **Evershine Customs (C&F) Pvt. Ltd** vs Commissioner of Customs[17]

12. Learned Departmental Representative is correct in his submission that Section 28(11) itself defines all persons appointed as Customs officers under section 4(1) prior to 6th July 2011 as proper officers both for assessment under section 17 and for issuing demands under section 28 and Section 28(11) was not under consideration in **Canon India.** He is also correct in his submission that since officers of DRI were appointed as Customs officers under section 4(1) prior to 6th July 2011, as noted in **Canon India,** they are covered by section 28(11). He is also correct in his submission that the constitutional validity of section

[12] **2021(9) TMI316- Supreme Court**
[13] **2021 (3) TMI 1034- Madras High Court**
[14] **2021(8) TMI 178- Karnataka High Court**
[15] **Punjab & Haryana High Court Order dated 19.4.2021 in Civil Writ Petition No. 19871 of 2020**
[16] **2021 (10) TMI 771- CESTAT, New Delhi**
[17] **2021(8) TMI 906- CESTAT, New Delhi**

28(11) was upheld except to the extent of its retrospective application by Hon'ble High Court of Delhi in **Mangali Impex** and its validity was fully upheld by Hon'ble High Court of Bombay in **Sunil Gupta.** The judgment of Hon'ble High Court of Delhi setting aside the retrospective application of section 28(11) in **Mangali Impex** was stayed by the Hon'ble Supreme Court. There does not appear to be any judgment of Hon'ble Supreme Court or any High Court whereby Section 28(11) was held to be invalid. **Thus, section 28(11) is on the statute book and is valid. The case laws cited by both sides are binding on us and we proceed to examine and decide this case accordingly.** We proceed to discuss this issue in depth and examining all dimensions of the issue.

14. The Directorate of Revenue Intelligence was created by a notification by the Government of India dated 4 December 1957. Later, Customs Act, 1962 was enacted replacing its predecessor Customs laws such as Sea Customs Act, 1878. Section 3 of the Customs Act, 1962 defines various classes of officers of Customs which does NOT include DRI officers till date. Section 4 states that the Board may appoint such persons as it thinks fit to be officers of customs. Officers of DRI are not officers of Customs as per Section 3 itself but they were appointed through a notification under section 4. The Customs Act also does not mention DRI or Revenue Intelligence anywhere nor does it confer any powers on such officers. **Thus, officers of DRI and Customs officers were treated as distinct and separate by the legislature under the Customs Act**.

15. A perusal of some other enactments also shows that DRI and Customs officers were treated as separate by legislature. As per the Narcotic Drugs and Psychotropic Substances Act, 1985[18] the government can empower officers of various departments to conduct search, seizures and make arrests. It clearly mentions Customs officers and officers of Revenue Intelligence separately. Section 42 of this Act reads as follows:

> **42. Power of entry, search, seizure and arrest without warrant or authorisation**.—(l) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the **departments of central excise, narcotics, customs, revenue intelligence** or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, ……. may between sunrise and sunset:
>
> (a) enter into and search any such building, conveyance or place;
>
> (b) in case of resistance, break open any door and remove any obstacle to such entry;
>
> (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and
>
> (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act……"

16. If officers of Revenue Intelligence were also Customs officers, there would have been no need to mention them separately in section 42 of the NDPS Act.

17. The Right to Information Act, 2005 provided an exemption to certain organisations. Section 24 and Second Schedule of this Act read as follows:

> 24. (1) Nothing contained in this Act **shall apply to the intelligence and security organisations specified in the Second Schedule,** being

[18] **NDPS Act**

organisations established by the Central Government or any information furnished by such organisations to that Government:

……..

THE SECOND SCHEDULE (See section 24)
Intelligence and security organisation established by the Central Government
1. Intelligence Bureau.
2. Research and Analysis Wing of the Cabinet Secretariat.
3. Directorate of Revenue Intelligence.
4. Central Economic Intelligence Bureau.
5. Directorate of Enforcement.
6. Narcotics Control Bureau.
7. Aviation Research Centre.
8. Special Frontier Force.
9. Border Security Force.
10. Central Reserve Police Force.
11. Indo-Tibetan Border Police.
12. Central Industrial Security Force.
13. National Security Guards.
14. Assam Rifles.
15. Special Service Bureau
16. Special Branch (CID), Andaman and Nicobar.
17. The Crime Branch-C.I.D.-CB, Dadra and Nagar Haveli.
18. Special Branch, Lakshadweep Police.

18. It is evident from the RTI Act that DRI was treated by the legislature as **an intelligence and security organisation created by the Government and hence was granted immunity** under section 24. Such immunity was not given to the Customs officers. Like Customs Act and NDPS Act, RTI Act also treats officers of DRI as separate and distinct from the Customs officers. The nature of DRI also becomes clearer from its functions which, according to the website of DRI are as follows[19]:

- Collection of intelligence about smuggling of contraband goods, narcotics, under-invoicing etc. through sources of India and abroad, including secret sources.
- Analysis and dissemination of such intelligence to the field formations for action and working on such intelligence, where necessary.
- Keeping watch over important seizures and investigation cases. Associating or taking over the investigations which warrant specialized handling by the Directorate.
- Guiding important investigation/prosecution cases. Keeping liaison with foreign countries, Indian Missions and

[19] **https://dri.nic.in/main/charter accessed on 15 February 2022**

Enforcement agencies abroad on anti-smuggling matters.

- To keep liaison with C.B.I. and through them with the INTERPOL. To refer cases registered under the Customs Act to the Income Tax Department for action under the Income Tax Act.
- To keep statistics of seizures and prices/rates etc. for watching trends of smuggling and supply required material to the ministry of Finance and other Ministries.
- To study and suggest remedies for loopholes in law and procedures to combat smuggling.

19. Assessment of Bills of Entry or Shipping Bills or their re-assessment and demanding or recovering duty not levied, not paid, short levied, short paid or erroneously refunded under section 28 do not appear in the above listed functions of DRI.

20. In **Canon India,** Hon'ble Supreme Court noted that DRI officers were appointed as Customs officers by the Board under section 4(1). However, the notification issued by the Board under section 2(34) assigning functions was struck down. It was further held that both the officers of DRI (created by the notification dated 4 December 1957) and the Customs officers are appointed by the Government of India and functions under the Customs Act can be entrusted to other officers only by the Government under section 6. Thus, Hon'ble Supreme Court treated DRI officers as distinct from Customs officers as did the legislature in Customs Act, NDPS Act and RTI Act. The relevant portion of the judgment is as follows:

> 20. Section 6 is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:
>
> > ***"6. Entrustment of functions of Board and customs officers on certain other officers*** *– The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any 13 functions of the Board or any officer of customs under this Act."*

> 21. **If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government.** The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2 (34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.

21. After we had concluded hearing in this case, learned counsel for the appellant submitted another case law which removes any doubt about the law laid down in **Canon India**. It was held by the Hon'ble Supreme Court in **Commissioner of Customs Ahmedabad vs M/s. Suncity Strips and Tubes Pvt Ltd. [Dy. No. 7802/2020]** that in the absence of entrustment of functions under section 6 by the Government, officers of DRI will not have jurisdiction to exercise the functions under the Customs Act. The relevant portion of this judgment is as follows:

> " In **Canon India Pvt. Ltd. vs Commissioner of Customs, AIR 2021 SC 1699,** a three-judge bench of this court has held that in the absence of an entrustment under section 6 of the Customs Act, 1962, **an officer of the Directorate of Revenue Intelligence will not have jurisdiction to exercise the functions entrusted to Customs officers under various provisions of the Act**. As a consequence of the above elucidation, the court held that the **entire proceeding which was initiated by the Additional Director General, Directorate of Revenue Intelligence by issuing Show Cause Notices was invalid**."
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> **(emphasis supplied)**

22. Another important issue decided in **Canon India** is that the Show Cause Notice under section 28 can be issued only by **'the proper officer', i.e., the officer who had done the assessment in the first place and not by any other officer** who may have concurrent jurisdiction in the matter. The relevant extract of the judgment is as follows:

9. The question that arises is whether the Directorate of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted. It is necessary that the answer must flow from the power conferred by the statute i.e. under Section 28(4) of the Act. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in **Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore**2[20] has held:-

> "14. ...Secondly, and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'an agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."

In **Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd.3**[21] has held:-

> "9. ...'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person."

10. There are only two articles 'a (or an)' and 'the'. `A (or an)' is known as the Indefinite Article because it does not specifically refer to a particular person or thing. On the other hand, 'the' is called the Definite Article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28 (4), it could have used the word 'any'.

11. Parliament has employed the article "the" not accidently but with the intention to designate the proper officer who had assessed the goods at the time of clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2 (2) (c) of the Customs Act, 19624 .

12. The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. **The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group.** Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.

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[20] 2 (1980) 3 SCC 358
[21] 3 (2001) 3 SCC 609 6

> 13. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.
>
> 14. It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. **We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28 (4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake re-assessment [which is involved in Section 28 (4)]**
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> **[emphasis supplied]**

23. Thus, the law laid down in **Canon India** is that:

a) **DRI is an organisation created by a notification by the Government of India 4 December 1957. Both officers of DRI and Customs officers are appointed by the Government of India**.
b) The officers of DRI have been appointed as Customs officers under Section 4(1).
c) The notification dated 7th May 2012 issued by the Board under section 2(34) is not valid.
d) **Officers of DRI can only exercise the functions of Customs officers under various provisions of the Customs Act only if they are entrusted with such functions by the Government under section 6. In the absence of such entrustment, they cannot exercise functions under the Customs Act**.
e) The use of article 'the' has a particularizing effect and 'the proper officer' means only a particular officer and not any officer who may have jurisdiction. **A demand under section 28 can be issued by only that officer who has done the assessment in the first place, i.e., the officer of the Appraising Group or his successor in office and not by any other officer.**

24. Thus, even if there are more than one proper officer by virtue of section 28(11), the demand can be raised only by 'the proper officer' i.e., one who assessed the Bills of Entry in the first place or his successor in office and not by any other proper officer. In this case, since the Bills of Entry were not assessed by the officers of DRI, the SCN issued under Section 28 is without authority even if

section 28(11) is considered. Thus section 28(11) does not carry the case of Revenue any further. Further, the law laid down in **Canon India** further followed in **Suncity Strips (supra)** is that **in the absence of entrustment of functions to DRI by the Government under Section 6, not only the Show Cause Notices issued by DRI but also any functions performed by the DRI officers under the Customs Act are vitiated**. Thus, any other functions under the Act (for example, searches, seizures, arrests, recording of statements) by the officers of DRI also get vitiated because no functions have been entrusted to them under Section 6 by the Government. Evidently, in this case, the SCN itself is the culmination of investigation which involved several functions by the DRI under the Customs Act. Even on this ground, the impugned order cannot be sustained.

25. We note that after we concluded hearing in this case and reserved the order, Hon'ble Finance Minster presented the Finance Bill 2022 which proposed some retrospective amendments to the Customs Act. Although these are not yet enacted, if enacted as proposed in the bill, the proposed retrospective application may affect past cases. Among these are proposed amendments to section 2(34) [clause 85 of the Bill] and section 5 [clause 87] to empower the Board to assign functions to officers, substituting section 3 [clause 86] to include officers of DRI and audit as officers of Customs under the Act and a new Section 110AA [clause 93] providing that after investigation, the case should be transferred to the officer who had taken the original decision in the matter.

Retrospective application is proposed by clause 96. These clauses in the Finance Bill 2022 are as follows:

85. In the Customs Act, 1962 (hereinafter referred to as the Customs Act), in section 2, in clause (34), after the words "Principal Commissioner of Customs or Commissioner of Customs", the words and figure "under section 5" shall be inserted.

86. For section 3 of the Customs Act, the following section shall be substituted, namely:––

"3. There shall be the following classes of officers of customs, namely:––

(a) Principal Chief Commissioner of Customs or Principal Chief Commissioner of Customs (Preventive) or Principal Director General of Revenue Intelligence;

(b) Chief Commissioner of Customs or Chief Commissioner of Customs (Preventive) or Director General of Revenue Intelligence;

(c) Principal Commissioner of Customs or Principal Commissioner of Customs (Preventive) or Principal Additional Director General of Revenue Intelligence or Principal Commissioner of Customs (Audit);

(d) Commissioner of Customs or Commissioner of Customs (Preventive) or Additional Director General of Revenue Intelligence or Commissioner of Customs (Audit);

(e) Principal Commissioner of Customs (Appeals);

(f) Commissioner of Customs (Appeals);

(g) Additional Commissioner of Customs or Additional Commissioner of Customs (Preventive) or Additional Director of Revenue Intelligence or Additional Commissioner of Customs (Audit);

(h) Joint Commissioner of Customs or Joint Commissioner of Customs (Preventive) or Joint Director of Revenue Intelligence or Joint Commissioner of Customs (Audit);

(i) Deputy Commissioner of Customs or Deputy Commissioner of Customs (Preventive) or Deputy Director of Revenue Intelligence or Deputy Commissioner of Customs (Audit);

(j) Assistant Commissioner of Customs or Assistant Commissioner of Customs (Preventive) or Assistant Director of Revenue Intelligence or Assistant Commissioner of Customs (Audit);

(k) such other class of officers of customs as may be appointed for the purposes of this Act.".

87. In section 5 of the Customs Act,–– (a) after sub-section (1), the following sub-sections shall be inserted, namely:––

"(1A) Without prejudice to the provisions contained in sub-section (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.

(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an

officer of customs, who shall be the proper officer in relation to such functions.";

(b) after sub-section (3), the following sub-sections shall be inserted, namely:––

"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board may consider any one or more of the following criteria, including, but not limited to––

(a) territorial jurisdiction;
(b) persons or class of persons;
(c) goods or class of goods;
(d) cases or class of cases;
(e) computer assigned random assignment;
(f) any other criterion as the Board may, by notification, specify.

(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act.".

93. After section 110A of the Customs Act, the following section shall be inserted, namely:–– Action subsequent to inquiry, investigation or audit or any other specified purpose.

"110AA. Where in pursuance of any proceeding, in accordance with Chapter XIIA or this Chapter, if an officer of customs has reasons to believe that––

(a) any duty has been short-levied, not levied, short paid or not paid in a case where assessment has already been made;

(b) any duty has been erroneously refunded;

(c) any drawback has been erroneously allowed; or

(d) any interest has been short-levied, not levied, short-paid or not paid, or erroneously refunded,

then such officer of customs shall, after causing inquiry, investigation, or as the case may be, audit, transfer the relevant documents, along with a report in writing–

(a) to the proper officer having jurisdiction, as assigned under section 5 in respect of assessment of such duty, or to the officer who allowed such refund or drawback; or

(b) in case of multiple jurisdictions, to an officer of customs to whom such matter is assigned by the Board, in exercise of the powers conferred under section 5, and thereupon, power exercisable under sections 28, 28AAA or Chapter X, shall be exercised by such proper officer or by an officer to whom the proper officer is subordinate in accordance with sub-section (2) of section 5.".

96. Notwithstanding anything contained in any judgment, decree or order of any court, tribunal, or other authority, or in the provisions of the Customs Act, 1962 (hereinafter referred to as the Customs Act),–– 52 of 1962.

(i) anything done or any duty performed or any action taken or purported to have been taken or done under Chapters V, VAA, VI, IX, X, XI, XII, XIIA, XIII, XIV, XVI and XVII of the Customs Act, as it stood prior to its amendment by this Act, shall be deemed to have been validly done or performed or taken;

(ii) any notification issued under the Customs Act for appointing or assigning functions to any officer shall be deemed to have been validly issued for all purposes, including for the purposes of section 6;

(iii) for the purposes of this section, sections 2, 3 and 5 of the Customs Act, as amended by this Act, shall have and shall always be deemed to have effect for all purposes as if the provisions of the Customs Act, as amended by this Act, had been in force at all material times.

Explanation.–– For the purposes of this section, it is hereby clarified that any proceeding arising out of any action taken under this section and pending on the date of commencement of this Act shall be disposed of in accordance with the provisions of the Customs Act, as amended by this Act.

26. If the Finance Bill becomes the Act, DRI officers will be at par with Customs officers under the Customs Act by virtue of the substitution of section 3 and their various actions such as searches, seizures, arrests may not become void because of non-entrustment of those functions by the Government under Section 6. However, there is no proposal to amend section 28 and hence SCNs can be issued even after this Bill becomes the Act only **by 'the proper officer', i.e., the officer who has done the assessment in the first place.** In fact, this specific legal position as held by the Supreme Court in **Canon India** is likely to be reaffirmed by insertion of section 110AA in the Act. It would not be out of place to mention that the nature of powers under section 11A of the Central Excise Act and Section 73 of the Finance Act, 1994 are similar to the power under Section 28 of the Customs Act. However, this power has been conferred on '**the proper officer'** under the Customs Act and on '**the Central Excise officer'** in the other two Acts and this dissimilarity implies that the Central Excise officer need not be 'proper officer' but the similarity lies in the use of the definite article 'the' instead of 'a' or 'any' or 'any of the', etc. The meaning of the definite article 'the' when used in any law was

explained by the Supreme Court in **Consolidated Coffee Ltd. and others vs Coffee Board, Bangalore**[22] and it was held as follows:

> "14. Secondly, and more importantly, **the use of the definite article 'the' before the word 'agreement' is, in our view, very significant.** Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression **'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."**
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> 6. The scope of the article 'the' was again examined by the Supreme Court in **Shri Ishar Alloy Steels Ltd. vs Jayaswals Neco Ltd.**[23] and it was held as follows:
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> "9. 'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what a particular thing we are to assume to be meant. '**The' is always mentioned to denote particular thing or a person**."

27. Thus, the settled legal position is that when the legislature uses the definite article 'the' it refers to a particular thing or particular person. This brings certitude as to who can issue a Show Cause Notice to demand duty or tax not levied short levied, not paid, short paid, etc. in all these three Acts viz., Customs Act, Central Excise Act, and the Finance Act, 1994. We also find legislature has also used definite article in subsequent enactments. In the Central Goods and Services Tax Act, 2017 (CGST Act) section 73 deals with demands other than cases of fraud, wilful mis-statement or suppression of facts while section 74 deals with cases where these elements are present. In both sections, the notice can be issued by 'the proper officer'. These provisions of CGST Act, 2017 are also made applicable to Inter-state Goods and Services Tax Act. Similar provisions are also there in the State Goods and Services Tax Acts of various states. Section 156 of the Income Tax Act, 1961 also gives the power of issuing notice of

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[22] (1980) 3 SCC 358
[23] (2001) 3 SCC 609

demand on **the assessing officer. What is common in these provisions of various enactments is that the power to issue notice demanding tax or duty is always conferred on a particular officer which legislative intent is clarified by using definite article 'the' instead of 'a' or 'any' or 'any of the'.** The proposed Section 110AA in the Finance Bill 2022 is also consistent with the legislature conferring the powers of raising a demand on only one officer.

28. To sum up, section 28(11) of the Customs Act cannot sustain the SCN issued in this case by DRI officers because:

a) DRI officers have not been entrusted the functions under the Customs Act by the Government under section 6 and hence cannot perform such functions.
b) The SCN in this case was not issued by 'the proper officer', i.e., the officer who had assessed the Bills of Entry in the first place.

29. For all these reasons, the impugned order emanating from an SCN issued by DRI demanding duty under section 28 cannot be sustained. The appeal is allowed and the impugned order is set aside with consequential relief to the appellant.

(Order pronounced on **23 February 2022**)

Sd/
(P. K. Choudhary)
Member (Judicial)

Sd/
(P. V. Subba Rao)
Member (Technical)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 52789 of 2019 [DB]

[Arising out of Order-in-Original No.111/MK/POLICY/2019 dated13.11.2019 passed by the Commissioner of Customs (Airport & General), New Delhi)

M/s. ICS Cargo **...Appellant**
GH-9/129, Paschim Vihar,
New Delhi-110087

VERSUS

Commissioner of Customs (General), New Delhi **...Respondent**
New Custom House,
Near IGI Airport,
New Delhi-110037

APPEARANCE:
Mr. Prabhat Kumar and Mr. Karan Kanwal, Advocates for the Appellant
Mr. Rakesh Kumar, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 14.10.2022
DATE OF DECISION: **06.01.2023**

FINAL ORDER No. 50016/2023

DR. RACHNA GUPTA

Present is an appeal by a Customs House Agent (hereinafter referred as CHA) against the order of revocation of his customs broker license and an order of forfeiture of the whole amount of security deposit and imposition of penalty. The facts in brief for the present adjudication are as follows:

1.1 That the appellant was issued a Customs Broker License No. R-37/97 being valid up to 28.11.2026 by Commissioner of Customs, New Custom House, New Delhi. The appellant was also registered in Mumbai Customs, Ludhiana/Amritsar Customs, Visakhapatnam Customs, Noida Customs and Kandla Customs. A Show Cause

Notice No. 68/2018 dated 22.05.2019 was served upon the appellant and some importers by DRI, DZU, Delhi, alleging under valuation of imported goods i.e. power tools of Dongcheng brand and other Chinese brand through various ports by certain importers controlled by Shri Yusuf Pardawala and Shri Sidharth Sharma. The appellant was alleged to have facilitated the import clearance work for those imported goods. The said show cause notice was served pursuant to the search operation dated 12.04.2017 at the premises (residential/official/godowns) of certain Mumbai and Hyderabad based importers including importers like M/s. Yuri Impex Pvt. Ltd., M/s. Yuri International and M/s. Ray Exim India Pvt. Ltd. Those all were found to be operated by one Shri Yusuf Pardawala s/o Mohammad Hussain Pardawala. During search, electronic devices including threeiphone 7, one Coolpad, two Seagate Internal Hard Drives and one Apple Mcbook were resumed from the premises of Shri Yusuf Pardawala which were got forensically examined. The documents recovered from the e-mail of Shri Yusuf Pardawala were found containing actual invoices/packing lists/sales appendix forms in relation to certain other companies i.e. M/s. Maggie Marketing Pvt. Ltd., M/s. Safeboat Technologies Pvt. Ltd. and M/s. Honeywell Tradelinks Pvt. Ltd.

1.2 Pursuant to those investigations that alerts were issued upon said companies through Risk Management Division, Mumbai. It was found that five containers containing Power tools/Grinding Wheels/Cutting Wheels have been imported vide four Bills of EntryNo. 9423486 dated 24.04.2017, 9706617 dated 16.05.2017, 9709877 dated 16.05.2017 and 9709844 dated 16.05.2017, in the

company namely M/s. Maggie Marketing Pvt. Ltd., were pending clearance at Customs Port Nhava Sheva; and one consignment of Power Tools imported vide Bill of Entry No. 9851096 dated 26.05.2017 in name of M/s. Impex Steel & Bearing Co. was pending clearance at Sea Port, Kolkata. These 5 consignments were placed on hold as per alert from the DRI and were seized vide seizure memo dated 22.06.2017. Investigation could not complete within the stipulated time hence Show Cause Notice for time extension dated 06.10.2017 was issued under Section 110(2) of the Customs Act, 1962. The time for investigation was extended vide Order-in-Original dated 11.10.2017.

1.3 Statements of both Shri Yusuf Pardawala and Shri Sidharth Sharma dated 22.06.2017 and 08.11.2017/13.11.2017 respectively were recorded. Since Shri Sidharth Sharma had stated about all customs work with respect to the impugned consignments to have been dealt with by Shri Yusuf Pardawala himself or by the CHA M/s. ICS Cargo or by Shri Pankaj Singh, for CHA M/s. ICS Cargo that the statement of Shri Suresh K. Aggrawal, partner of M/s. ICS Cargo/the appellant was also recorded on 13.11.2017. After the investigation in respect of said 5 (five) seized consignments was completed that Show Cause Notice bearing No. 68/2018 dated 11.04.2018 was issued by DRI to M/s. Impex Steel & Co., M/s. Maggie Marketing Pvt Ltd., Shri Sidharth Sharma, Director of M/s Maggie Marketing Pvt. Ltd. and to Shri Yusuf Pardawala on 18.10.2017. This Show Cause Notice was forwarded by Customs Mumbai to Commissioner of Customs (Airport & General), Delhi vide letter dated 18.02.2019, received in Delhi on 25.02.2019.

1.4 Based on the entire investigation including the statements recorded during the investigation, Delhi Commissionerate alleged that the IEC of the importer firms viz M/s. Maggie marketing Pvt. Ltd., M/s. Safeboat Technologies, M/s. Honeywell Tradelinks Pvt. Ltd. and M/s. Emrick Distributors were used by the CHA/appellant for clearance of impugned consignments for some monetary consideration on commission basis. It was also alleged that despite being the CHA, appellant was required to verify the IEC used for clearance of imported consignments related to Shri Yusuf Pardawala. In spite of being well aware of the fact that the IEC of these firms was used for name sake only, the CB had facilitated the customs clearance for the imported consignments related to Shri Yusuf Pardawala thereby violating the provisions of Customs Broker Licensing Regulations, 2018. Accordingly, a Show Cause Notice No. 13/2019 dated 22.05.2019 was issued by Commissioner of Customs (Airport & General), Delhi to be served upon the appellant, proposing the revocation of his CB license for the said violation. The said proposal has been confirmed vide Order-in-Original No. 111/2019 dated 13.11.2019. Vide the said order the appellant's license has been revoked on the grounds of violation of Regulations 10(a), 10(d) and 10(n) of Customs Broker Licensing Regulations (hereinafter referred as CBLR), 2018. Being aggrieved the impugned appeal has been filed to assail the said order.

2. We have heard Shri Prabhat Kumar and Shri Karan Kanwal, learned Counsels for the appellant and Shri Rakesh Kumar, learned Authorized Representative for the department.

3. Learned Counsel for the appellant foremost has objected the impugned order as being barred by time. It is submitted that the impugned offence was detected on 12.04.2017, however, no offence report was submitted by DRI to the Commissioner of Customs who had issued the license till 11.04.2018. The show cause notice of 22.05.2019 is therefore beyond the period of 30 days from the date of detection of the offence. There is the delay of 1 Year and 12 days from the date of offence report and there has been a delay of 2 years and 11 days in conduct of the proceedings from the date of detection of offence. Hence the Show Cause Notice itself is alleged as barred by time. It is impressed upon that the failure to adopt the timeline for the procedure of investigation under CBLR, 2018 and under Circular No. 9/2010 dated 08.04.2010 is a definite ground to set aside the impugned adjudication. As per the aforesaid circular, the overall time limit of 9 months from the date of receipt of offence report has been fixed by prescribing the separate time limits at various stages of issue of show cause notice, submission of enquiry report by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, recording his findings on the issue of suspension of CHA license andfor passing of an order by the Commissioner of Customs. Learned Counsel submitted that the time limit neither of regulation 20(2) nor of regulation 22 of CBLR, 2004 which is Regulation 16 and 17 respectively of CBLR, 2018 has been followed by the department. The circular fixing the timeline was very much binding upon the adjudicating authority. The findings of original adjudicating authority are therefore highly barred by time and thus are liable to be set aside on this sole ground. Leaned Counsel has relied upon

the decisions of Hon'ble Supreme Court in the case of **M/s. RDB Textiles Ltd. Vs. Commissioner of C. Ex. & S.T., Kolkata-IV reported as 2018 (359) E.L.T. 433 (S.C.)**and **Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. reported as 2004 (165) E.L.T. 257 (S.C.)**

3.1 While submitting upon the merits, it is mentioned by learned Counsel for the appellant that the appellant has always conducted his business of being a customs broker by adhering to the provisions of customs act and the rules and regulation framed thereunder. He has fulfilled all requirements under CBLR and there is no case for revocation of his license. It is submitted that initially the license of the appellant was suspended in terms of Regulation 16 of CBLR, 2018. However, the said suspension was revoked vide Order-in-Original No. 56/2019 dated 24.04.2019. Learned Counsel emphasized that the grounds which led to the revocation of the suspension order are applicable to present show cause notice also. Those grounds were rather binding on the original adjudicating authority as well but the authority has ignored those grounds. The investigation has been held as barred by time vide the said order dated 24.04.2019 while revoking the order suspending the license of CHA. The CBEC Circular dated 08.04.2010 has been made the basis of the said order of revocation. It is further impressed upon that the proviso to Regulation 16(2), CBLR ousts the jurisdiction to proceed under regulation 17 once the suspension of Customs Broker License gets revoked. Otherwise also, the impugned order amounts to be double jeopardy as the appellant has been prosecuted twice for the same offence.

3.2 It is further submitted that the appellant otherwise had filed Bills of Entry based on the documents as were provided to him by the importers. The CB was not at all aware of any alleged manipulation of import invoices at any stage of clearance of the goods as such there is no violation under 10(a), 10(d) and 10(n) of CBLR, 2018 as is alleged against the appellant. The authorizations from each of the importers involved in the present case were duly obtained by the appellant. The same has not been denied except that some invoices are alleged to have not been received directly from the importing firms. The appellant had otherwise advised all the importers to comply with all customs acts and rules and regulations. It is not the case of the department that Importer Exporter Code (IEC) was incorrect. There is no evidence on record to prove that appellant had any personal or pecuniary interest in the impugned imports. It is further submitted that there was no role of the appellant in undervaluation of the goods as such the decision of revoking his CB license is highly unjustified and unreasonable. Learned Counsel also submitted that the cross-examination of Shri Sidharth Sharma has not been taken into consideration by the adjudicating authority below.Learned Counsel has relied upon the decisions of this Tribunal in the case of **M/s. Bharat Overseas Communicators Vs. Commr. Of Cus. (General), Mumbai reported as 2007 (209) E.L.T. (Tri.-Mumbai)** and **M/s. R.S. Kandalkar & Co. Vs. Commissioner of Central Excise, Mumbai reported as 2014 (299) E.L.T. 360 (Tri.-Mumbai).**The order under challenge is accordingly prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions, learned DR has impressed upon the correctness and genuineness of the findings in the order under challenge. It is submitted that the statement of Shri Sidharth Sharma and Shri Yusuf Pardawala are sufficient to prove the involvement of the appellant. The questions raised during cross-examination of Shri Sidharth Sharma are nothing but an afterthought to misguide as has been rightly observed by the adjudicating authority below. The impugned order is impressed upon to have been based on the meticulous evidence in the form of documents recovered during search, retrieved from the gadgets recovered during search and in the form of statement of all concerned acknowledging their involvement. It is mentioned that Show Cause Notice dated 23.05.2019 is well within 90 days of receiving offence report in Delhi Commissionerate on 25.02.2019. The action taken cannot be said to have been hit by time bar of Regulation 17 of CBLR, 2018. It is also mentioned that proceedings for revocation of license are independent of proceedings for suspension of license under Regulation 16 of CBLR, 2018. The procedure under Regulation 17 of CBLR, 2018 can still continue even if the order suspending CHA license has been revoked. Learned DR relied upon the decision of **M/s. Green View Logistics Vs. Commissioner of Customs (Airport & General), Delhi reported as 2021 (9) TMI 258 (Tri.-Del.).**

4.1 Learned DR further mentioned that there is sufficient evidence that Appellant/Customs Broker has failed to inform the authorities about unauthorized use of IEC despite it was in his

knowledge. Hence, there is violation of various clauses of Regulation 10 of CBLR, 2018. The order is therefore reasonable and justified. Appeal is accordingly prayed to be dismissed. To support his submissions learned DR has relied upon the following decisions:

(i) Commissioner of Customs Vs. K.M. Ganatra & Co. reported as 2016 (332) E.L.T 15 (S.C.)

(ii) M/s. Bhaskar LogisticServices Pvt. Ltd. Vs. Union of India reported as 2016 (340) E.L.T. 17 (Pat.)

(iii) M/s. Sriaanshu LogisticsVs. Commissioner of Customs, New Delhi reported as 2019 (369) E.L.T. 1431 (Tri. Delhi)

(iv) D.M. Mehta & Bros. Vs. Commissioner of Customs (General), Mumbai reported as 2017 (346) E.L.T 477 (Tri.-Mumbai)

(v) M/s. Welcome Air Express Pvt. Ltd. Vs. Commissioner of Cus. (Airport & Administration) reported as 2022 (380) E.L.T. 544 (Cal.)

(vi) K.V.Prabhakaran Vs. Commissioner of Customs, Chennai reported as 2019 (365) E.L.T. 877 (Mad.)

(vii) Jasjeet Singh Marwaha Vs. Union of India reported as 2009 (239) E.L.T 407 (Del.),

5. Having heard the rival contentions and perusing the entire records. Following are observed to be the questions of moot adjudication:

(i) Whether the timeline of Regulation 16 and 17 of Customs Broker License Regulations (CBLR), 2018 was mandatory to be followed while revoking the license and the order of

revocation of license of appellant, Customs Broker (CB) is barred by time as the same has not been followed.

(ii) Whether once the order suspending the license of CHA/appellant was revoked, the proceedings of revocation of license under Regulation 17 of CBLR, 2018 could not be initiated?

(iii) Whether the appellant has violated Regulation 10(a), 10(d) and 10(n) of CBLR, 2018?

6. **Findings with respect to the Issue No.1 framed as above:**

To adjudicate, foremost it is necessary to look into the Regulation 17 of CBLR, 2018, which reads as follows:

> ***17. Procedure for revoking license or imposing penalty****.— (1) The Principal Commissioner or Commissioner of Customs shall issue a notice in writing to the Customs Broker within a period of ninety days from the date of receipt of an offence report, stating the grounds on which it is proposed to revoke the license or impose penalty requiring the said Customs Broker to submit within thirty days to the Deputy Commissioner of Customs or Assistant Commissioner of Customs nominated by him, a written statement of defense and also to specify in the said statement whether the Customs Broker desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs.*
>
> *(2) The Commissioner of Customs may, on receipt of the written statement from the Customs Broker, or where no such statement has been received within the time-limit specified in the notice referred to in sub-regulation (1), direct the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, to inquire into the grounds which are not admitted by the Customs Broker.*

(3) The Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall, in the course of inquiry, consider such documentary evidence and take such oral evidence as may be relevant or material to the inquiry in regard to the grounds forming the basis of the proceedings, and he may also put any question to any person tendering evidence for or against the Customs Broker, for the purpose of ascertaining the correct position.

(4) The Customs Broker shall be entitled to cross-examine the persons examined in support of the grounds forming the basis of the proceedings, and where the Deputy Commissioner of Customs or Assistant Commissioner of Customs declines permission to examine any person on the grounds that his evidence is not relevant or material, he shall record his reasons in writing for so doing.

(5) At the conclusion of the inquiry, the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall prepare a report of the inquiry and after recording his findings thereon submit the report within a period of ninety days from the date of issue of a notice under sub-regulation (1).

(6) The Principal Commissioner or Commissioner of Customs shall furnish to the Customs Broker a copy of the report of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, and shall require the Customs Broker to submit, within the specified period not being less than thirty days, any representation that he may wish to make against the said report.

(7) The Principal Commissioner or Commissioner of Customs shall, after considering the report of the inquiry and the representation thereon, if any, made by the Customs Broker, pass such orders as he deems fit either revoking the suspension of the license or revoking the license of the Customs Broker within ninety days from the date of submission of

the report by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, under sub-regulation (5) :

Provided that no order for revoking the license shall be passed unless an opportunity is given to the Customs Broker to be heard in person by the Principal Commissioner of Customs or Commissioner of Customs, as the case may be.

(8) Where in the proceedings under these regulations, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, comes to a conclusion that the F card holder is guilty of grounds specified in regulation 14 or incapacitated in the meaning of the said regulation, then the Principal Commissioner of Customs or Commissioner of Customs may pass an order imposing penalty as provided in regulation 18:

Provided that where an order is passed against an F card holder, he shall surrender the photo identity card issued in Form F forthwith to the Deputy Commissioner of Customs or Assistant Commissioner of Customs.

(9) Where in an offence report, charges have been framed against an F card holder in addition to the Customs Broker who has been issued a license under regulation 7, then procedure prescribed in regulations 16 and 17 shall be followed mutatis mutandis in so far as the prescribed procedure is relevant to the F card holder:

Provided that where any action is contemplated against a G card holder alone under these regulations, then instead of authority referred to in sub-regulation (8), a Deputy Commissioner or Assistant Commissioner rank officer shall pass such order as mentioned in the said sub-regulation along with debarring such G card holder from transacting the business under these regulations for a period of six months from such order.

Provided further that where an order is passed against a G card holder, then he shall surrender the photo identity card issued in Form G

forthwith to the Deputy Commissioner of Customs or Assistant Commissioner of Customs.

6.1 Upon perusal of the above regulation, it can be seen that an independent right has been vested with the Commissioner of Customs to initiate action *de hors* the enquiry under Customs Broker License Regulations and the Customs Act against the Customs Broker (CB) licensed in his jurisdiction. The regulation does not only contemplate action against the erring Brokers but also contemplates a timely action. Hence, the action which has to be initiated against the erring brokers, the same has to be in strict compliance with the said provision as laid down by this Court in the case of **M/s. Kamatchi Agencies Vs. Commissioner of Customs, Chennai reported as 2001 (129) E.L.T. 29 (Mad.)**. The law of limitation is common to both the parties. The provision not only enables the Commissioner to levy penalty, but also empowers him to revoke the license of Customs Broker, which is an extreme step curtailing the right to carry on any trade or profession as guaranteed by the Constitution of India. To our opinion, the object behind such a provision can only imply the following:

(a) the truth must be culled out at the earliest point in the interest of not only the Customs Broker but of the department also,

(b) that such unlawful activities must be curbed at the earliest point by revoking the license,

(c) unless a time limit is prescribed, action would not be initiated.

6.2 We also opine that the purpose for which such time limit has been prescribed is to curb the smuggling of goods and associated illegal activities at the earliest and in the result to cancel the

licences of the brokers if they are involved and to impose penalty. Another purpose is that the proceedings which affect the lives, properties and business of Customs Broker/CHA should be decided without wastage of time out without the Customs Broker/CHA being at the whims of the departmental authorities. The interpretation of a statute must always be to give a logical meaning to the object of the legislation and the aim must be to implement the provisions rather than to defeat it. The Apex Court in the judgment of **Babu Verghese and others Vs. Bar Council of Kerala reported as AIR 1999 SC 1281,** has held as under:

> *"31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor (1875) 1 Ch.D 426 which was followed by Lord Roche in Nazir Ahmad v. King Emperor 63 Indian Appeals 372 = AIR 1936 PC 253 who stated as under:*
>
> *"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."*

6.3 Also, the use of the language "shall" in the regulation cannot be termed as "directory" as one of the consequence of the action is the revocation of the licence and it would also pave way for inaction by the officials breeding corruption. The law in this respect has been settled by Hon'ble Apex Court in **Sharif-Ud-Din Vs. Abdul Gani Lone [AIR 1980 SC 303]**, by holding that the question whether a provision of law is mandatory or not depends upon its language, the context in which it is enacted and its object. The Court made an important observation as follows:

> *"In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is*

to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non- compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty. such provision should be treated as a directory one."

Another simple test to determine whether a time limit stipulated in a rule is directory or mandatory, is to see whether there is any indication in the Rule itself about the consequences of non compliance with the same. If a statutory provision contains a prescription and also stipulates the consequences of non compliance with the condition, it would normally be taken to be mandatory. If the consequences of non compliance are not indicated, then, the provision has to be seen only as directory."

In an another decision cited as **1997 9 SCC 132 (Mohan Singh v. IAAI),** the Apex Court has held:-

"If the object of the enactment is defeated by holding the same directory, it should be construed as mandatory whereas if by holding it mandatory serious general inconvenience will be created to innocent persons of general public without much furthering the object of the enactment, the same should be considered as directory

As to whether a provision is mandatory, would in the ultimate analysis depend upon the intent of the law maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

The Hon'ble Supreme Court in the case of P.T. Rajan v. TPM Sahir and others (2003-8-SCC-498) categorically held that test of mandatory or Directory. Context, purport and object of the statute to be ascertained. Procedural provision if uses

"shall" may be construed as directory if no prejudice is cause. Provision requiring statutory functioning to perform a statutory function within the prescribed time to be considered as directory."

6.4 Thus we hold that the time limit prescribed in Regulation 17(1) has to be understood in the context of the strict time schedule prescribed in various portions of the Regulations. Regulations 17(1) prescribes a time limit of 90 days from the date of receipt of offence report within which action is to be initiated i.e. for issuance of Show Cause Notice to Customs Broker who has to file his defense within 30 days of receipt of said Show Cause Notice.

6.5 The appellants have also brought to the notice a circular bearing No.9/2010-Customs, dated 8-4-2010, issued by the Central Board of Excise and Customs, about clarification on procedures in issuance of notices to the CHAs and the time limit for completion of suspension proceedings against CHA/licensee in terms of Regulation 17 of CBLR, 2018 (the then Regulation 22) in para 7.1 thereof which reads as follows:

7.1 The present procedure prescribed for completion of regular suspension proceedings takes a long time since it involves inquiry proceedings, and there is no time limit prescribed for completion of such proceedings. Hence, it has been decided by the Board to prescribe an overall time limit of nine months from the date of receipt of offence report, by prescribing time limits at various stage of issue of show cause notice, submission of inquiry report by the Deputy Commissioner of Customs or Assistant Commissioner of Customs recording his findings on the issue of suspension of CHA license, and for passing of an order by the

Commissioner of Customs. Suitable changes have been made in the present time limit of forty five days for reply by CHA to the notice of suspension, sixty days time for representation against the report of AC/DC on the grounds not accepted by CHA, by reducing the time to thirty days in both the cases under the Regulations.

The Apex Court in decision reported as **[(1996) 10 SCC 387 = 1996 (87) E.L.T. 19 (S.C.)], in the case of Ranadey Micronutrients Vs. Collector of Central Excise**, held that the Board Circular is binding on the Revenue and there cannot be any challenge on the ground of inconsistency with the statutory provision and also taken note of. Yet another decision reported in **(2004) 3 SCC 488 = 2004 (165) E.L.T. 257 (S.C.). Commissioner of Customs, Calcutta and others Vs. Indian Oil Corporation Ltd. and Another,** also laid down the similar proposition.

6.6 In the light of the above discussed case law and the fact that the Customs House Licensing Regulations having statutory force, as also reiterated in the above cited circular, we are of the view that 90 days prescribed under Regulation 17(1) of CBLR, 2018, the erstwhile Regulation 22(1) of CBLR, 2004 is mandatory in nature which cannot be treated as directory and thus has to be fully enforced by the adjudicating authorities. We place reliance on the decision of the Hon'ble Supreme Court in the judgment reported in 2013 (10) SCC 765 while relying upon its earlier judgment in 1998 (7) SCC 123 = 2008 (228) E.L.T. 162 (S.C.) has held:-

"It is a settled legal proposition that law of limitation may harshly affect a particular party, but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular party but the Court has no choice, but to enforce it giving full effect to the same. The legal maxim "duralexsedlex" which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. "A result flowing from a statutory provision is never an evil. A Court has no power to ignore the provision to relieve what it considers a distress resulting from its operation." (See: The Martin Burn Ltd v. The Corporation of Calcutta, AIR 166 SC 529; and Rohitas Kumar & Ors. v. Om Prakash Sharma & Ors. AIR 2013 SC 30). In view of the above, we are of the candid view that none of the submissions advanced on behalf of the appellants is tenable."

6.7 Reverting to the facts of the present case, we observe that DRI proceeded based on the information about certain undervalued imports and conducted search at various premises of different importers based in Mumbai and Hyderabad on 12.04.2017. The goods recovered during those search were seized on 22.06.2017. But the requisite show cause notice could not be issued within six months, the time prescribed by the statute for the purpose. However, a show cause notice praying time extension under Section 110(2) of Customs Act, 1962 was issued on 06.10.2017 and the time was extended vide Order-in-Original dated 11.10.2017. It is thereafter that DRI issued a Show Cause Notice bearing No. 68/2018 dated 11.04.2018 to the Customs Broker/the present appellant. The said Show Cause Notice was sent to Delhi Commissionerate, the Licensing Commissionerate vide letter dated 25.02.2019. Pursuant thereto that the impugned Show Cause Notice dated 23.05.2019 was served upon the appellant within 90

days of the letter received in Delhi Commissionerate. But the prima facie framing of charges into the allegations against appellant was vide Show Cause Notice dated 11.04.2018 issued by DRI. What constitutes offence report was not earlier defined but Regulations 2018 in explanation to Regulation 17 of CBLR, 2018 defines offence report as follows:

> *Explanation.—Offence report for the purposes of this regulation means a summary of investigation and prima facie framing of charges into the allegation of acts of commission or omission of the Customs Broker or a F card holder or a G card holder, as the case may be, under these regulations thereunder which would render him unfit to transact business under these regulations.*

6.8 The bare perusal makes it clear that the offence report in the present case is of 11.04.2018. It is department's case that the show cause notice of 11.04.2018 / offence report was received in Delhi, the Commissionerate of competent jurisdiction, only on 25.02.2019 and as such the show cause notice dated 23.05.2019 is well within the period of 90 days. In view of entire above discussion and in view of Regulation 17(1) of CBLR, 2018 and that the timeline prescribed under Regulation 17 being mandatory in nature, it is held that the Commissioner of Customs who received the offence report dated 11.04.2018 on 25.02.2019 has issued the show cause notice to the CHA on 23.05.2019, while following strictly the timeline, well within 90 days of receiving the offence report. Thus, we hold that the show cause notice in question was within 90 days from the date when Delhi, Commissionerate received the intimation about alleged acts / omissions of Customs Broker / appellant and the period of 90

days has to reckon from the date of receipt of offence report by the Commissioner issuing show cause notice.

6.9 In the light of entire above discussion, we hold that findings about proceedings being barred by time have already attained finality. The statute i.e. CBLR, 2018 is prescribing the time limit which is otherwise mandatory unless there is a gross abuse of process of law by the alleged defaulter and there is utmost bona fide and diligence on the part of the officers proceeding against the said alleged defaulter.

Resultantly, the first issue as framed above is decided in affirmative holding that the timeline of Regulations is mandatory to be followed and Commissioner (Customs), Delhi has duly followed the same. Thus impugned show cause notice dated 23.05.2019 issued against the appellant is well within time.

7. **Findings with respect to the Issue No.2 as framed above:**

Learned Counsel for the appellant on this issue had submitted that once the suspension of Customs Broker License of the appellant was revoked vide order dated 22.04.2019 under Regulation 16(2) of CBLR, 2018, the Commissioner could not have proceeded under Regulation 17 of CBLR, 2018 for revocation of the

license. It is impressed upon that while following Regulation 16 of CBLR, 2018, the Commissioner could invoke Regulation 17 if and only if, instead of revoking the suspension of the license, he would had decided for license to remain suspended. These submissions have been rebutted by theLearned DR submitting that the proceedings under Regulation 17 of CBLR, 2018 are independent of the action taken under Regulation 16 thereof.

7.1 In order to appreciate the said contentions, it would be appropriate to reproduce Regulation 16 of CBLR, 2018 which talks about suspension of CB License and also Regulation 14 which talks about the revocation of the license. The provisions read as follows:

> ***16. Suspension of license****- (1) Notwithstanding anything contained in regulation 14, the Principal Commissioner or Commissioner of Customs may, in appropriate cases where immediate action is necessary, suspend the license of a Customs Broker where an enquiry against such Customs Broker is pending or contemplated:*
>
> *Provided that where the Principal Commissioner or Commissioner of Customs may deem fit for reasons to be recorded in writing, he may suspend the license for a specified number of Customs Stations. (2) Where a license is suspended under sub-regulation (1), the Principal Commissioner ofCustoms or Commissioner of Customs, as the case may be, shall, within fifteen days from the date of such suspension, give an opportunity of hearing to the Customs Broker whose license is suspended and may pass such order as he deems fit either revoking the suspension or continuing it, as the case may be, within fifteen days from the date of hearing granted to the Customs Brokers:*
>
> *Provided that in case the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, passes an order for continuing the suspension, further procedure thereafter shall be as provided in regulation 17.*

> ***14. Revocation of licence or imposition of penalty-*** *The Principal Commissioner or Commissioner of Customs may, subject to the provisions of regulation 17, revoke the license of a Customs Broker and order for forfeiture of part or whole of security, on any of the following grounds, namely:-*
>
> *(a) failure to comply with any of the conditions of the bond executed by him under regulation 8;*
>
> *(b) failure to comply with any of the provisions of these regulations, within his jurisdiction or anywhere else;*
>
> *(c) commits any misconduct, whether within his jurisdiction or anywhere else which in the opinion of the Principal Commissioner or Commissioner of Customs renders him unfit to transact any business in the Customs Station;*
>
> *(d) adjudicated as an insolvent;*
>
> *(e) of unsound mind; and*
>
> *(f) Convicted by a competent court for an offence involving moral turpitude or otherwise.*

7.2 The bare perusal of these regulations makes it clear that Regulation 14 of CBLR, 2018 deals with revocation of license or imposition of penalty. It provides that the Commissioner of Customs may, in accordance with the procedure as given in regulation 17, revoke the license of the Customs Broker and pass an order for forfeiture of part or whole of security on the grounds mentioned in the said regulation. Regulation 16 thereof deals with suspension of license. It provides that notwithstanding anything contained in regulation 14, the Commissioner of Customs, **where an inquiry against the Customs Broker is pending or contemplated,** may, in cases where immediate action is necessary, suspend the license of a Customs Broker. It also provides that in such a situation where the license has been

suspended, a notice of opportunity of hearing has to be provided to the Customs Broker, whereafter the Commissioner of Customs may either revoke the suspension or continue with it. In a case where the Commissioner of Customs passes an order for continuing the suspension, further procedure thereafter shall as provided in regulation 17, be followed.

7.3 We further observe that Regulation 17 as reproduced earlier in this order talks about a lengthy detailed and time taking procedure so as to curb all possibilities of any injustice to the CB and also to curb the possibility of any loss to the department either in terms of revenue or in terms of illegal activities being committed by the license holders. However, under Regulation 16, action of suspending this license of Customs Broker is taken immediately in certain cases depending upon the seriousness or gravity of alleged offence, however, for a short period of 30 days. At the expiry of this period of 30 days if the Commissioner still opines that during pendency of inquiry Customs Broker still not be allowed to work, he may order this license to remain suspended. But if there seems no more such necessity during the pending inquiry, the suspension may be revoked.

7.4 Regulation 16 itself provides that such immediate action can be taken either during pendency of the enquiry against CHA or even when enquiry is contemplated. It means that action taken either under Regulation 16(1) or under 16(2) is not a bar for inquiry against CHA to continue or to be initiated, irrespective of the order is of revocation of suspension or of continuation of suspension. The

pending enquiry has to proceed as per Regulation 17 and enquiry which is contemplated has to begun as per Regulation 14 followed by Regulation 17. Hence, action under Regulations 14 and 17 is independent of order passed under Regulation 16 and vice versa. Both can be invoked independently. Thus, it is clear that action under regulation 16 can be taken during the pendency of proceedings initiated under regulation 14 to revoke the license of the Customs Broker. It becomes abundantly clear that any order whether of continuation of suspension of CB's Lincese or of revocation thereof is not a bar for the inquiry as has already been initiated under Regulation 14 following the procedure prescribed under Regulation 17 of CBLR, 2018. Hence, the contention of appellant is not sustainable and we hold that irrespective of the order of revocation of suspension of appellants license the proceedings for revocation under Regulation 17 of CBLR, 2018 thereof have rightly been continued against him.

With these observations the Issue No. 2 is decided in negative holding that the findings recorded under Regulation 16(2) of CBLR, 2018 cannot in any manner have any bearing on the findings recorded under Regulation 17. We draw our support from the decision of the Principal Bench of this Tribunal in the case of M/s. Green View Logistics Vs. Commissioner, Customs (Airport & General)-New Delhi reported as 2021 (9) TMI 258 – CESTAT NEW DELHI.

8. **Findings with respect to the Issue No.3 framed as above:**

We observe that the basic allegation against the appellant/Customs Broker are that he was in connivance with Shri Yusuf Pardawala, the beneficiary of imported goods and Shri Sidharth Sharma, the Director of three importing firms and was very much aware that the Bills of Entry for clearanceof consignments were filed for the companies controlled by Shri Sidharth Sharma despite the consignments belonged to Shri Yusuf Pardawala. The appellant is specifically alleged to have used Import Export Code (hereinafter referred as IEC) of importer firms i.e. M/s. Maggie Marketing Pvt. Ltd., M/s. Safebot Technologies Pvt. Ltd., M/s. Honeywell Tradelinks Pvt. Ltd. and M/s. Emrick Distributors Pvt. Ltd. and facilitated customs clearance of consignments for Shri Yusuf Pardawala against some monetary consideration on commission basis. Being a Customs Broker, he was required to verify the IEC. Based on these allegations that violation of Regulation 10(a), 10(d) and 10(n) of CBLR, 2018 has been confirmed against appellant vide the impugned order under challenge. We proceed to adjudicate the alleged violations separately as follows:

8.1 **<u>Violation of Regulation 10(a).</u>**

Regulation 10(a) reads as follows:

> *Sec 10 (a) of the CBLR 2018 states that obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;*

8.1.1 We observe that the Bills of Entry as were filed by the appellant are in the names of such companies which are controlled

by Shri Sidharth Sharma and have a valid IEC. There is no denial of Shri Siddharth Sharma that the impugned goods have been imported in name of his companies. Though there is an admission of Shri Sidharth Sharma that with respect to the power tools as have been imported by his companies, Shri Yusuf Pardawala was the beneficial importer but he simultaneously has accepted that the shipment of power tools has been imported in the name of his firm M/s. Maggie Marketing Pvt. Ltd. and that he was dealing with the beneficial importer for getting a 2% commission for allowing him to use the name of his firm i.e. M/s. Maggie Marketing Pvt. Ltd. There is no denial of the owner of the importing companies, Shri Sidharth Sharma that he had not authorized M/s. ICS Cargo, the CHA, to facilitate the clearance of the imports made by those companies. It is not the case of the department that the appellant failed to produce the said authorization to the competent officer.

8.1.2 We further observe that Shri Yusuf Pardawala in his statement has acknowledged that Shri Sidharth Sharma offered his companies for import of various goods of Shri Yusuf Pardawala on commission basis. Shri Yusuf Pardawala had assured Shri Sidharth Sharma to give him continuous work in the form of future shipments of power tools/grinding wheels on 2% commission basis. Thus it is clear that appellant/Customs Broker has facilitated customs clearance in the name of such companies which were having valid IEC of goods imported by the owner of these companies. He had facilitated clearance of goods imported by companies, Shri Sidharth Sharma who only had duly authorized the appellant for the same. Hence, it is clear that appellant ha valit

authorization to act on behalf of the companies in whose names appellant filed the Bills of Entry. The alleged arrangement apparently and admittedly is between the importer and the beneficial importer for some commission to the importing firm, the appellant Customs Broker cannot be held liable for the same. However for alleged under valuation of imported goods the importer as well as the beneficial importer both can be prosecuted by the department. There is no evidence on record nor is the allegation that appellant was making any wrongful gain. Accordingly, we do not find any violation of regulation 10(a) as has been alleged against the appellant.

8.2 **The violation of Regulation 10(d).**

Regulation 10(a) reads as follows:

10(d) advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;

8.2.1 The department has alleged that Shri Yusuf Pardawala was engaged in import of the subject goods powertools/Grinding wheels etc. from Chinese based firm M/s. Dongcheng. Supplier sent the original invoice bearing actual value of the said goods directly to Sh. Yusuf Pardawala, however, he used to submit the undervalued invoices to the Indian Customs. In same modus operandi, he also had used IEC of other importer firms viz. M/s. Maggie Marketing Pvt. Ltd., M/s. Safebot Technologies, M/s. Honeywell Tradelinks Pvt. Ltd and M/s. Emrick Distributors (actually owned by Shri Sidharth

Sharma) to clear his imported consignments. It is alleged against the appellant that despite being aware of the facts of mis-utilisation of IEC, CHA Instead of intimating the same to the customs department, himself got connived with Shri Yusuf Pardawala to facilitate the customs clearance work for subject goods with malafide intention to evade customs duty. And also, after clearance of the consignments, the same were dispatched by him to the godowns of Mr. Yusuf Pardawala. Hence, it appeared that the CB had failed to bring the matter to the notice of the DC/AC of Customs, thereby violating Regulation 10(d) of CBLR, 2018 (read with erstwhile Regulation 11(d) of CBLR, 2013).

8.2.2 As already observed and held above that appellant was assisting the import clearance for those firms only in whose names the goods were imported. The Director of those firms has admittedly authorized the appellant to file the Bills of Entry in the names of his firms and to assist the clearance of imported goods. Though Shri Sidharth Sharma stated that appellant used to receive documents with respect to the import of power tools directly from Shri Yusuf Pardawala prior filing the Bills of Entry for the same, however, in the companies of Shri Sidharth Sharma and it has been relied upon by the adjudicating authority. But we observe that the cross-examination of Shri Sidharth Sharma and the statement of Shri Pankaj Singh has totally been ignored by the adjudicating authority.

8.2.3 Shri Sidharth Sharma, in his cross-examination dated 10.08.2019, has specifically stated that he used to send his staff

along with the import documents to ICS Cargo after informing the same telephonically to Shri Suresh K. Aggrawal/the appellant. This particular deposition falsifies the statement that the import documents used to be received by the appellant through Shri Yusuf Pardawala directly. Shri Sidharth Sharma has further deposed, while being cross-examined, that he only used to send his own transport for taking delivery of goods. This deposition falsifies that appellant used to directly deliver the imported goods to Shri Yusuf Pardawala premises. The subsequent deposition during cross-examination that all goods imported in his companies belong to him (Shri Sidharth Sharma) and that he only used to place orders on his foreign suppliers after importing those goods and he only used to sell the same to Shri Yusuf Pardawala, later being a big business entities falsify entire allegations and findings against the appellant.

8.2.4 Shri Sidharth Sharma has specifically acknowledged, while being cross-examined, that his earlier statements were taken under coercion hence stands rebutted in the light of his cross-examination. This deposition of Shri Sidharth Sharma help us to conclude that the confirmation of allegations against the appellant based merely on the statement in chief of Shri Sidharth Sharma which has been rebutted by him during his cross-examination is absolutely wrong. There appears nothing on record to prove that the appellant was in direct conversation with Shri Yusuf Pardawala and accordingly, there arises no reason with the appellant to advice Shri Sidharth Sharma to not to let his companies name be used by Shri Yusuf Pardawala while importing power tools. When the importing firms having valid IEC was making profit on commission

basis, under an arrangement with another big businessman while importing goods in their names.

8.2.5 We further observe that the above findings stands corroborated from the deposition of Shri Pankaj Singh alias Banti who has acknowledged that he was doing freight forwarding workfor all consignments filed in M/s. Yuri Impex Pvt. Ltd., M/s. Yuri International, M/s. Ray Exim India Pvt. Ltd., M/s. Maggie Marketing Pvt. Ltd., M/s. Impex Steel & Bearing Co., M/s. Safebot Technologies Pvt. Ltd. and M/s. Honeywell Tradelinks Pvt. Ltd. All the documents as that of bill of lading related to the consignments of power tools/cutting wheels filed in the above said companies were handed over to him by Shri Yusuf Pardawal himself and on the basis of that bill of lading he as a freight forwarder used to get a delivery order issued from shipping line and thereafter the consignment used to be handed over to Suresh K. Aggrawal who as Customs Broker, used to file Bills of Entry for the respective consignments. This particular statement demolishes the entire case of the department that it was Customs Broker who had connived with Shri Yusuf Pardawala and Shri Sidharth Sharma to facilitate the import clearance in the name of the companies owned by Shri Sidharth Sharma but for Shri Yusuf Pardawala.

8.2.6 In the given circumstance, we do not find any reason with the appellant to be aware of the arrangement between Shri Sidharth Sharma and Shri Yusuf Pardawala and Shri Pankaj Singh and as such he had no reason to advice in this respect to the importer about provisions of the applicable acts, rules and

regulations. Once nothing was to his notice there was no reason with the appellant to bring anything to the notice of the competent officer as was the requirement of regulation 10(d). Hence we hold that violation of 10(d) of CBLR, 2018 has wrongly been confirmed against the appellant.

8.3 **The violation of Regulation 10(n).**

Regulation 10(n) reads as follows:

10(n) verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;

8.3.1 We observe that there is no allegation of the department that the IEC (Importer Exporter Code) for the importers in whose name the Bills of Entry were filed by appellant/CHA were incorrect. The goods and service tax identification number GSTIN has also not been admitted to be the correct number of the said importers. Even the importers are not denied to be functioning at the declared addresses. Once the IEC and GSTIN is found to have been genuine even the importers were found existing at the declared addresses, mere allegation that some other person was importing goods in the name of the importers whose names were mentioned in the Bills of Entry does not render the identity of the importer as doubtful especially when there is an apparent arrangement, with mutual consent between the importer and the said other person, the beneficial owner of the imported goods.

8.3.2 There has been an amendment in Section 2(26) of the Customs Act, 1962 which defines importer. After the said amendment not only the owner of the imported goods is importer but even a beneficial owner of such goods is also defined as importer. From the facts and the circumstances above, we observe Shri Yusuf Pardawala would have been the beneficial owner of the goods. Hence, he equally is an importer but the goods owned by him have been imported by a validly existing importing firm. **The appellant herein was transacting the business of those validly existing firms that too under the authority of the owner of said companies for getting clearances of those goods.** Hence, we hold that the allegations about the wrong identity of the client of appellant are absolutely baseless. Thus, we hold that appellant/CHA had no reason to declare that Shri Sidharth Sharma was not the importer. Otherwise also when statute itself does not distinguish between the owner of the goods and person who is the importer, CHA has no reason nor any necessity to take a different position and to declare the same to the competent authority. As such we do not find any violation of Regulation 10(n) of CBLR, 2018 by the appellant.

8.3.3 We further observe that there is no evidence on record to prove that the appellant had any personal or pecuniary interest in the impugned imports or that the imports were for any other personal benefit of the appellant. From the above discussion about the documents and information of the importer, it is crystal clear that the CHA herein had played his role diligently. The only allegation otherwise about the imported goods is that of under

valuation thereof. Appellant is not a valuation expert and had played no role in the under valuation of the goods. To our opinion appellant acted purely on the basis of documents as that of invoice/purchase orders supplied by the importers. Sole allegation that the documents with respect to import of power tools were directly supplied by Shri Yusuf Pardawala to the appellant are highly insufficient to be a cogent evidence of alleged connivance of the appellant with either Shri Yusuf Pardawala or with Shri Sidharth Sharma or with both. Otherwise also, this allegation stand rebutted by the statement of Shri Pankaj Singh who acknowledged to have received the documents from Yusuf Pardawala and he delivered those to the appellant.

8.3.4 As already observed above that the cross examination of Shri Sidharth Sharma has not been taken into consideration by the adjudicating authority below. We hold that the Commissioner has wrongly concluded that there is no evidence to rebut the veracity the statement of Shri Sidharth Sharma. It is rather observed that Shri Sidharth Sharma had submitted a letter dated 25.10.2017 on behalf of M/s. Maggie Marketing Pvt. Ltd. retracting his earlier statements but the order under challenge is miserably silent to the same. Mention of said retraction is even found recorded in subsequent statement of Shri Sidharth Sharma dated 08.11.2017, wherein, he acknowledged his retraction and reiterated that his earlier statements were given under pressure. Thus, we hold that the statement which has been relied upon by the authorities to confirm allegations against appellant while revoking his license was actually a retracted version. As already observed above the cross-

examination of the said witness, fully supports the case of appellant. The silence to retraction and cross-examination of witness is sufficient to set aside the order of revoking license and imposing penalty. We found no evidence as that of placement of purchase order by the appellant and of foreign remittances in favour of the appellant etc. which might prove the alleged connivance of the appellant. Thus, the findings of adjudicating authority below are held to be based on presumptions and surmises only. Even the Show Cause Notice as served upon the appellant is based on third party evidence i.e. on the documents recovered from premises of Shri Yusuf Pardawala.

8.3.5 We also observe that Commissioner (Appeals) has committed an error while ignoring the most cogent part of the statement of Shri Siddharth Sharma, wherein, he has specifically acknowledged that payments and charges for clearance etc. were paid to the appellant from the accounts of the concerned companies in whose names the Bills of Entry were filed. The another cogent deposition absolving entire liability of the appellant is that the clearance work of the import consignments of power bills and other related items in his company was handled by Shri Pankaj Singh alias Banti who did not work for M/s. ICS Cargo rather was the Director of a freight forwarding company in the name of M/s. JMD Clearing and Forwarding Pvt. Ltd. The said deposition has been corroborated by Shri Pankaj Singh himself. We do not find any evidence on record to prove that transportation of the goods to the premises of Shri Yousuf Pardawala were facilitated by the appellant/CB. On the contrary, there is sufficient admission of Shri

Sidharth Sharma, while being cross-examined, that he only used to arrange his vehicles for transporting the imported goods to respective places. Shri Sidharth Sharma has willingly provided his IEC on M/s. Maggie Marketing Pvt. Ltd. for use of imports to Shri Yusuf Pardawala and in fact, till the date of imports no remittances used to be sent by Shri Yusuf Pardawala to Shri Sidharth Sharma because Shri Yusuf Pardawala actually used to purchase those shipments on credit basis and used to make the payments of those imported goods in favour of M/s. Maggie Marketing Pvt. Ltd. of Shri Sidharth Sharma and it was thereafter that Shri Siddharth Sharma used to make the remittances for those shipments. Apparently and admittedly, no Bill of Entry has been filed by appellant in name of any company of Shri Yusuf Pardawala.

8.3.6 These particular admissions which received due corroboration, are sufficient for us to hold that there was no role of appellant/CB in the mutual arrangement between Shri Sidharth Shama and Mr. Yusuf Pardawala. In fact it stands proved in record that the arrangement was never brought to the notice of appellant. Hence, there was nothing with appellant to hide from the department. Mere taking certain documents of importer from a person appearing on behalf of the importer who is otherwise validly existing at the declared address and having valid IEC and GSTIN. is highly insufficient to hold that CHA has failed in performing his duties of Customs House Agent deliberately.

With these discussions we decide the third issue of adjudication in favour of the appellant holding that the

Commissioner (Appeals) has wrongly confirmed the violation of Regulation 10(a), 10(d) and 10(n) of CBLR, 2018 against the appellant.

9. We further observe that learned DR has laid emphasis upon several case laws where the objective of Customs Broker License regulations has been appreciated and where Customs Brokers have been punished for the noticed fault. We have no reason to differ from the decision of Hon'ble Apex Court in the case of **Commissioner of Customs Vs. K.M. Ganatra & Co. reported as 2016 (332) E.L.T 15 (S.C.),** wherein, it was held that while acting as a Customs House Agent one should not be a cause for violation of the provisions of Customs Broker License Regulations and even of Customs Act, 1962. A CHA cannot be permitted to misuse his position as a CHA by taking advantage of his excess to the department. Any misuse of such position by the customs House Agent will have far reaching consequences in the transaction of business by the Customs House Officials. However, we observe that the relied case law is not applicable to the given facts and the circumstances for the reasons as mentioned below. The decision of **M/s. Bhaskar Logistic Services Pvt. Ltd. Vs. Union of India reported as 2016 (340) E.L.T. 17 (Pat.)** is not applicable because in that case CHA had stood surety for his client importer which was found to be a fictitious firm and the Customs Broker was found aware that the IEC holder and the person importing goods are different but still he failed to bring the said fact to the notice of the department. In the present case, the CB has facilitated the clearance of imported goods in the name of importers who were

validly existing and who only had imported the goods except that some of the goods imported were meant for someone else but for certain commission to the importer itself and there is no evidence of knowledge of this arrangement between the two with Customs Broker, the appellant.

10. In the case of **M/s. Sriaanshu LogisticsVs. Commissioner of Customs, New Delhi reported as 2019 (369) E.L.T. 1431 (Tri. Delhi)** there was an apparent admission of customs broker that he filled the Bill of Entry in respect of the consignments but had never met the IEC holder/owner of the importing firms. In the present case, it is not even the allegation of the department that appellant/CHA was not in touch with his importer client, Shri Siddharth Sharma for whose company appellant facilitated the customs clearance.

11. In the case of **D.M. Mehta & Bros. Vs. Commissioner of Customs (General), Mumbai reported as 2017 (346) E.L.T 477 (Tri.-Mumbai),** the persons employed by the CHA used to bring all papers such as invoice bill of lading, warehousing certificates etc. and used to give those documents to the CHA who himself had never met any of those importers and who failed to produce both of those persons during investigation even in his defense. Apparently the same is also not the fact of the present case. In the case **M/s. Welcome Air Express Pvt. Ltd. Vs. Commissioner of Cus. (Airport & Administration) reported as 2022 (380) E.L.T. 544 (Cal.),** the CHA there had failed to obtain the authorization from the importer who had employed him as CHA

and had failed to produce the said authorization before the customs authority when it was demanded. The appellant herein was duly authorized by the importing firm and provided all details of his importer client during investigation and all of those were found genuine.

12. In the case of **K.V.Prabhakaran Vs. Commissioner of Customs, Chennai reported as 2019 (365) E.L.T. 877 (Mad.),** the CHA therein had lent his CHA License to third party for usage without knowing the actual importer and goods to be imported and was just getting Rs.1000/- for each consignment. This also is not the fact of the present case. The appellant herein was in personal dealings with Shri Sidharth Sharma. All documents were being received from the importing firms only either through Shri Shidharth Sharma or through the freight forwarding company. In the case of **Jasjeet Singh Marwaha Vs. Union of India reported as 2009 (239) E.L.T 407 (Del.),** the CHA therein had refused excess to his records relating to the transactions as were objected by the officers of Central Intelligence Unit, in violation of Regulation 14(J) of CHALR, 1984 and they in fact had failed to maintain the requisite records. It is not even the department's case in the present appeal.

13. In the light of entire above discussion, we hold that though the revocation of suspension of appellant's license was not an impediment while proceeding with the inquiry under Regulation 14 in terms of Regulation 17 of CBLR, 2018 and that the department has strictly followed the mandatory timeline of this provision.

However, we hold that the appellant has not committed any alleged violation of Regulation 10(a), 10(d) and 10(n) of CBLR, 2018. Thus, we hold that the order of revoking the license of appellant and of imposing penalty upon the appellant is absolutely wrong, unreasonable and unjustified. Therefore, we hereby set aside the order under challenge. Consequent thereto, the appeal stands allowed with all consequential benefits to the appellant.

[Order pronounced in the open Court on **06.01.2023**]

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

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

HK

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

CUSTOMS APPEAL NO. 55801 OF 2023

[Arising out of the Order-in-Original No. 68/ZR/POLICY/2023 dated 16/10/2013 passed by Commissioner of Customs (Airport & General), New Delhi – 110 037.]

M/s Pushpanjali Logistics, **……Appellant**
Block M RZ – 81B, Chanakya Place,
Part – II, Opp. C-1, Janak Puri,
New Delhi – 110 059.

Versus

Commissioner of Customs (Airport & General) **….Respondent**
New Customs House, Near IGI Airport,
New Delhi – 110 037.

APPEARANCE:

Ms. Priyanka Goel, Advocate for the appellant.
Shri Munshi Ram Dhania, Authorized Representative for the Department

CORAM:
HON'BLE JUSTICE MR. DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 55892/2024

DATE OF HEARING : 29.04.2024
DATE OF DECISION: 04.06.2024

P.V. SUBBA RAO

We have heard Ms. Priyanka Goel, learned counsel for the appellant and Shri Munshi Ram Dhania, learned authorized representative appearing for the Revenue and perused the records of the case.

2. M/s Pushpanjali Logistics[1], a licensed Customs Broker, is aggrieved by the order-in-original[2] dated 16.10.2023 passed by the Commissioner of Customs (Airport and General), New Delhi revoking its Customs Broker Licence, under Regulations 14 & 18 read with Regulation 17(7) of Customs Brokers Licensing Regulations[3], 2018, forfeiting its security deposit and imposing a penalty of Rs. 50,000. The operative part of the impugned order is as follows:

> "25. Accordingly, I pass the following order:
>
> **ORDER**
>
> In exercise of the powers conferred in terms of Regulation 14 &18 read with Regulation 17(7) of CBLR, 2018
>
> (i) I hereby revoke CB License No. R-55/DEL.CUS/2006 (PAN AAHPC2938G) valid up to 31.05.2028 of M/s. Pushpanjali Logistics;
> (ii) I direct the CB to immediately surrender the original CB Licence No. R-55/DEL/CUS/2006 (PAN AAHPC2938G) valid up to 31.5.2028 along with all 'F/G/H cards issued thereunder;
> (iii) I order **for forfeiture of the amount of security deposit** furnished by them;
> (iv) I **impose penalty of Rs. 50,000/-** on M/s Pushpanjali Logistics (PAN AAHPC2938G) under Regulation 18 of CBLR 2018.
>
> 26. This order is being issued without prejudice to any other action that may be taken against the CB or any other persons(s)/firm(s) etc. under the provisions of the Customs Act, 1962 and Rules/Regulations framed there under or any other law for the time being in force for the present or any other past violations committed by them."
>
> **(emphasis supplied)**

3. The factual matrix which lead up to the issue of this order is that the Directorate General of Analytics and Risk

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1. **appellant**
2. **impugned order**
3. **CBLR**

Management[4] of the Central Board of Indirect taxes and Customs analysed data and identified risky exporters involved in frauds and got requisite verification done by the jurisdictional GST officers and identified exporters who could not be found at all physically at their registered premises. DGARM also found that exports by these exporters were handled by certain Customs Brokers, including the appellant herein, and reported them to the respective Commissionerates including the appellant herein.

4. The Commissioner issued a show cause notice[5] dated 25.4.2023 to the appellant and appointed an Inquiry officer, who, after considering the reply filed by the appellant and completing the inquiry, submitted his Inquiry Report on 21.7.2023. The concluding paragraph of the inquiry report is as follows:

> "6.2 In view of the foregoing, I conclude that CB M/s Pushpanjali Logistics had not complied with the obligations cast on him under Regulation 10(d), (e) &(n) of CBLR, 2018 as alleged in the SCN and liable for appropriate action under the provisions of Customs Brokers Licensing Regulations, 2018.

5. Thus, the Inquiry officer found that the charge in the show cause notice that the appellant violated Regulations 10(d), 10(e) and 10(n) of CBLR, 2018 was established. A copy of the inquiry report was served on the appellant, who

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4. DGARM
5. SCN

submitted a written representation dated 29.9.2023 to the Commissioner.

6. After considering the SCN, the inquiry report and the representation, the Commissioner passed the impugned order holding that the appellant had violated Regulations 10(d) and 10(n) of CBLR 2018 but there is no evidence of violation of Regulation 10(e). He revoked its Customs Brokers' licence, forfeited the security deposit and imposed a fine of Rs. 50,000/- on it.

7. The questions which need to be answered by us in this case are:

a) Given the factual matrix of the case and evidence available on record, was the Commissioner correct in holding that the appellant Customs Broker has violated Regulations 10(d) and 10(n) of CBLR, 2018?

b) If the answer to (a) above is affirmative, can the revocation of licence of the appellant customs broker be sustained?

c) If the answer to (a) above is affirmative, is the forfeiture of security deposit correct?

d) If the answer to (a) above is affirmative, is the imposition of penalty of Rs. 50,000/- upon the appellant customs broker correct?

Alleged violations of Regulations 10(d) and 10 (n)

8. The allegation in the show cause notice and the finding in the impugned order that the appellant had violated Regulations 10(d) and (n) is based on the fact that the appellant had filed 2 shipping Bills in the name of M/s Arise Enterprises[6] (of which one was purged by the system because no goods were brought for export within time) and ready-made garments were exported against the shipping Bill declaring high values to claim undue export benefits. The Additional Commissioner of Customs Mundra, had passed Order in Original dated 7.7.2023 wherein he held that on verification, Arise was found to be non-existent. Based on this order of the Additional Commissioner, Mundra that Arise did not exist, the Commissioner concluded that the appellant, who filed the Shipping Bill for Arise, had violated Regulations 10(d) and (n) of CBLR, 2018.

9. Regulation 10(d) reads as follows:

> **10. Obligations of Customs Broker-** A Customs Broker shall-
>
> ….
>
> *(d) advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;*

10. The Commissioner recorded that the exporter Arise was found to be non-existent on verification. The rent agreement

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6. Arise

uploaded by it on the GST Portal was found to be forged and as the owner of the premises denied having signed any such agreement. Therefore, the exporter as well as his supply chain were fake. The GST registration of the exporter was cancelled suo moto by the department.

11. In the impugned order, the Commissioner recorded his agreement with the inquiry officer that on examining the profile of the exporter itself, the exporter appears suspicious as it was in the business of footwear and suddenly after taking a new registration started dealing in readymade garments from a new address as both these commodities come under inverted duty structure where the exporter can claim refund of accumulated Input Tax Credit (ITC) under Rule 89(5) of the Central Goods and Services Tax Rules, 2017. On the basis of these findings, the Commissioner concluded that Customs Broker had failed to advise his client to comply with the provisions of the Act and other allied Acts and the Rules and Regulations thereof and in case of non-compliance, bring it to the notice of the Deputy Commissioner and thereby he had violated Regulation 10(d).

12. Learned counsel submits that the appellant, as the Customs broker, had no responsibility with respect to the registration of the exporter under GST or the documents submitted or uploaded by the exporter in order to obtain the GST registration. The responsibility of the appellant under

regulation 10(d) can only be related to the export or imports which it handled. She also submitted that nothing in the SCN or in the impugned order establishes that the appellant had not advised its client, the exporter, to comply with the law or that it was aware that the exporter had not complied with any law and had still not brought it to the notice of the Assistant Commissioner or Deputy Commissioner.

13. Learned authorised representative vehemently supported the impugned order.

14. We have considered the arguments advanced by both sides and the findings of the impugned order.

15. In the impugned order the Commissioner held that the appellant had violated regulation 10(d) for the following reasons:

a) Arise, the exporter, on whose behalf the appellant had filed the shipping bill was found to be non-existent;
b) The profile of Arise itself was suspicious because it was usually engaged in the business of footwear and had obtained a new GST registration for garments ostensibly to avail undue export benefits;
c) Even the rent agreement uploaded by Arise on the GST portal to obtain the registration was found to be fake; and
d) On verification, Arise was found to be non-existent and therefore, its GST registration was cancelled.

16. We find that no inference can be drawn from the above that the appellant had not advised Arise to comply with the provisions of the Customs Act or other allied Acts or rules or

regulations or that it was aware of the violation of any Acts or Rules by Arise and had not brought it to the notice of the Assistant Commissioner or Deputy Commissioner.

17. In fact, the appellant, as the Customs Broker, had neither any role or authority or responsibility with respect to the GST registration of Arise. It is between Arise which had applied for the GST registration and the officer who issued the registration. If the entity was non-existent and the officer issued a benami GST registration to a non-existent entity, the responsibility for that rests squarely on the officer who issued such registration and the entity which applied for and obtained such benami registration. Once a GST registration is issued by the department, the appellant had no choice but to accept it.

18. The appellant had no authority to sit in judgment over the GST registration issued by the department. Neither the fact that benami registration was issued by the officer nor that it was subsequently cancelled ab initio makes any difference. The appellant, as the Customs Broker, had no choice but to assume that was done by the department was correct and proceed.

19. It also needs to be noted that Regulation 10(d) which requires the Customs Broker to advise its client can only be interpreted with respect to the imports or exports of the client with which it was dealing- whether it is Customs Act, Rules and Regulations or other allied Acts. The Customs broker has no

responsibility to either advise its clients about compliance with any other law or compliance with respect to any other import or export consignment which it was not dealing with.

20. **The appellant had clearly not violated Regulation 10(d).**

21. Regulation 10(n) requires the Customs Broker to *verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information.*

22. The Commissioner considered the appellant's submission that it had obtained KYC documents viz., importer exporter code (IEC), PAN card, Aadhar Card, authorisation and verification certificates issued by the Bank before filing the Shipping Bill and that it had verified the GSTIN from the GST website. He found that GST website is an open source and the claim of verification of the GST registration does not hold ground.

23. He further observed that the exporter usually dealt with in footwear and had applied for a new registration for export of garments using the same PAN but declaring a different address. He also observed that two registrations cannot be issued for the same PAN. On verification, the exporter was

found to be non-existent and the GST registration was cancelled. It was a dummy firm created with the sole intention of filing incorrect shipping bills with higher valuation of goods to avail undue export benefits. The appellant, as the Customs Broker, was supposed to safeguard the interests of both the importers/exporters and the department and the appellant failed to do so. For all these reasons, he held that the appellant had violated Regulation 10(n).

24. Learned counsel for the appellant relied on several orders of this Tribunal on similar revocation of Customs Brokers' licences where the exporters had valid GST registrations issued by the GST officers and IEC issued by the Directorate General of Foreign Trade but after export, on verification by the department, the exporters were found to be non-existent. In such cases, it was held that there was no violation of Regulation 10(n). She prayed that this case being identical to these cases, the revocation of licence, forfeiture of security deposit and the penalty imposed may be set aside.

25. Learned authorised representative for the Revenue vehemently supported the impugned order.

26. We have considered the submissions. The responsibility under Regulation 10 (n) does not extend to physically going to the premises of each of the exporters to ensure that they are functioning at the premises. When a Government officer issues a certificate or registration with an address to an exporter, the

Customs Broker cannot be faulted for trusting the certificates so issued. It has been held by the High Court of Delhi in **Kunal Travels**[7] that **"the CHA is not an inspector to weigh the genuineness of the transaction. It is a processing agent of documents with respect of clearance of goods through customs house and in that process only such authorized personnel of the CHA can enter the customs house area…….. It would be far too onerous to expect the CHA to inquire into and verify the genuineness of the IE code given to it by a client for each import/export transaction. When such code is mentioned, there is a presumption that an appropriate background check in this regard i.e., KYC, etc. would have been done by the customs authorities….." (emphasis supplied)."**

27. The Customs Broker is not Omniscient and Omnipotent. The responsibility of the Customs Broker under Regulation 10(n) does not extend to ensuring that all the documents issued by various officers of various departments are issued correctly. The Customs Broker is not an overseeing authority to ensure that all these documents were correctly issued by various authorities. If they were wrongly issued, the fault lies at the doorstep of the officers and it does not lie with the Customs broker.

28. It is possible that all the authorities who issued the above documents had issued them correctly and thereafter, by

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6. 2017 (3) TMI 1494- Delhi High Court

the time of verification, situation may have changed. If so, it is a ground for starting a thorough investigation by the officer and is not a ground to suspend/cancel the licence of the Customs Broker who processed the exports. It is not the responsibility of the Customs Broker to physically go to and verify the existence of each exporter in every location, let alone, keeping track if the exporter has moved from that address. In this case, there is no clarity whether the exporter was not available at the registered premises on the date of export or if it ceased to operate after the export. Even if the exporter had changed its addresses and failed to intimate, it cannot be held against the Customs Broker.

29. We now proceed to examine the scope of the obligations of the Customs Broker under Regulation 10(n). It requires the Customs Broker to **verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN),identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information**. This obligation can be broken down as follows:

a) Verify the correctness of IEC number
b) Verify the correctness of GSTIN
c) Verify the identity of the client using reliable, independent, authentic documents, data or information
d) Verify the functioning of the client at the declared address using reliable, independent, authentic documents, data or information

30. Of the above, (a) and (b) require verification of the documents which are issued by the Government departments. The IEC number is issued by the Director General of Foreign Trade and the GSTIN is issued by the GST officers under the Central Board of Indirect Taxes and Customs of the Government of India or under the Governments of State or Union territory. The question which arises is does it mean that the Customs Broker to satisfy himself that these documents or their copies given by the client were indeed issued by the concerned government officers or does it mean that the Customs Broker has to ensure that the officers have correctly issued these documents. In our considered view, Regulation 10(n) does not place an obligation on the Customs Broker to oversee and ensure the correctness of the actions by Government officers. Therefore, the verification of documents part of the obligation under Regulation 10(n) on the Customs Broker is fully satisfied as long as the Customs Broker satisfies itself that the IEC and the GSTIN were, indeed issued by the concerned officers. This can be done through online verification, comparing with the original documents, etc. and does not require an investigation into the documents by the Customs Broker. Therefore, the appellant was correct in verifying the GSTIN issued by the department on the GST portal. The presumption is that a certificate or registration issued by an officer or purported to be issued by an officer is correctly issued. Section 79 of the Evidence Act, 1872 requires

even Courts to presume that every certificate which is purported to be issued by the Government officer to be genuine. It reads as follows:

> "79. **Presumption as to genuineness of certified copies**. **The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government**, or by any officer in the State of Jammu and Kashmir who is duly authorized thereto by the Central Government.
>
> Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper."

31. The onus on the Customs Broker cannot, therefore, extend to verifying that the officers have correctly issued the certificate or registration. Of course, if the Customs Broker comes to know that its client has obtained these certificates through fraud or misrepresentation, nothing prevents it from bringing such details to the notice of Customs officers for their consideration and action as they deem fit. However, the Customs Broker cannot sit in judgment over the certificate or registration issued by a Government officer so long as it is valid. In this case, there is no doubt or evidence that the IEC, the GSTIN and other documents were issued by the officers. So, there is no violation as far as the documents are concerned.

32. The third obligation under Regulation 10(n) requires the Customs Broker to verify the identity of the client using reliable, independent, authentic documents, data or information. In other words, he should know who the client is and the client cannot be some fictitious person. This identity can be established by independent, reliable, authentic:

a) documents;
b) data; or
c) information

33. Any of the three methods can be employed by the Customs Broker to establish the identity of his client. It is not necessary that it has to collect information or launch an investigation. So long as it can find some documents which are independent, reliable and authentic to establish the identity of his client, this obligation is fulfilled. Documents such as GSTIN, IEC and PAN card issued etc., certainly qualify as such documents. However, these are not the only documents the Customs Broker could obtain; documents issued by any other officer of the Government or even private parties (so long as they qualify as independent, reliable and authentic) could meet this requirement. While obtaining documents is probably the easiest way of fulfilling this obligation, the Customs broker can also, as an alternative, fulfill this obligation by obtaining data or information. In the factual matrix of this case, we are fully satisfied that the appellant has fulfilled this part of the obligation under Regulation 10(n).

34. The fourth and the last obligation under Regulation 10(n) requires the Customs Broker to verify the functioning of the client at the declared address using reliable, independent, authentic documents, data or information. This responsibility, again, can be fulfilled using documents or data or information so long as it is reliable, independent and authentic. Nothing in this clause requires the Customs Broker to physically go to the premises of the client to ensure that they are functioning at the premises. Customs formations are only in a few places while exporters or importers could be from any part of the country and they hire the services of the Customs Brokers. Besides the fact that no such obligation is in Regulation 10(n), it will be extremely difficult, if not, totally impossible, for the Customs Broker to physically visit the premises of each of its clients for verification. The Regulation, in fact, gives to the Customs Broker the option of verifying using documents, data or information. If there are authentic, independent and reliable documents or data or information to show that the client is functioning at the declared address, this part of the obligation of the Customs Broker is fulfilled. If there are documents issued by the Government Officers which show that the client is functioning at the address, it would be reasonable for the Customs Broker to presume that the officer is not wrong and that the client is indeed, functioning at that address. In the factual matrix of this case, we find that the GSTIN issued by the officers of CBIC itself shows the address of the client and

the authenticity of the GSTIN is not in doubt. In fact, the entire verification report is based on the GSTIN. Further, IEC issued by the DGFT also shows the address. There is nothing on record to show that either of these documents were fake or forged. Therefore, they are authentic and reliable and we have no reason to believe that the officers who issued them were not independent and neither has the Customs Broker any reason to believe that they were not independent.

35. The responsibility of the Customs Broker under Regulation 10(n) does not include keeping a continuous surveillance on the client to ensure that he continues to operate from that address and has not changed his operations. Therefore, once verification of the address is complete as discussed in the above paragraph, if the client moves to a new premises and does not inform the authorities or does not get his documents amended, such act or omission of the client cannot be held against the Customs Broker.

36. We, therefore, find that the appellant Customs Broker did not fail in discharging its responsibilities under Regulation 10(n). The impugned order is not correct in concluding that the Customs Broker has violated Regulation 10(n) because the exporter was found to not exist during subsequent verification by the officers.

37. In view of the above, we proceed to answer the questions framed by us in paragraph 6 above. The answer to

question (a) is that in the factual matrix of the case and evidence available on record, the Commissioner was not correct in holding that the appellant Customs Broker had violated Regulations 10 (d) and 10(n) of CBLR, 2018. Consequently, the answer to questions (b), (c) and (d) are in the negative.

38. We find that the impugned order cannot be sustained and, therefore, set it aside and allow the appeal with consequential relief to the appellant.

(Order pronounced in open court on 04/06/2024.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

PK

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.
PRINCIPAL BENCH - COURT NO.III

Customs Appeal No.51001 of 2021 (DB)

[(Arising out of Order-in-Original No.48-MK-POLICY-2021 DATED 14.06.2021 passed by the Commissioner of Customs (Airport and General), New Customs House, New Delhi.]

M/s.Jetset Shipping Pvt.Ltd., **Appellant**
H.No.48, 2nd Floor, WZ-49,
Block-A, Sharda Puri Ramesh Nagar,
New Delhi.110 015.

VERSUS

Commissioner of Customs, **Respondent**
(Airport and General),
New Customs House,
Near IGI Airport,
New Delhi.

APPEARANCE:

Ms. Vidhushi Subham, Advocate for the appellant
Shri M.R.Dhaniya, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V.SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 55570/2024

DATE OF HEARING: 02.04.2024
DATE OF DECISION: 18.04.2024

BINU TAMTA:

The appellant being the Customs Broker ('CB') has challenged the Order-in-Original No.48/MK/Policy/2021 dated 14.06.2021 where his licence (valid upto 09.10.2026) was revoked and the security deposit amount was forfeited along with penalty of Rs.50,000/- under Customs Brokers Licensing Regulations, 2018 (CBLR).

2. On the basis of the Analytics Report received vide email dated 17.08.2020 from Joint Director, DGARM, New Delhi, inquiry of violation under CBLR, 2018 was initiated against the appellant. Accordingly, show cause notice dated 20.12.2020 was issued to the appellant for the contravention of provision of Regulation 10(n) of the CBLR. Pursuant to the inquiry, the inquiry report dated 18.03.2021 was submitted, whereby it was found that the Customs Broker had failed to comply with the obligations cast upon them under the provisions of Regulation 10(n) of CBLR, 2018.

3. During verification/identification of 'Risky Exporters' by the respective GST Commissionerate, several exporters were found to be non-existent at their registered addresses, whose export consignments were handled by the appellant. On physical verification of identification of the Risky Exporters viz. M/s.Jupiter Exports, M/s.D.N. Enterprises and M/s. Kunj Textiles were found to be non-existent. Therefore, it appeared that the Customs Broker had not bothered to follow KYC guidelines as prescribed under the Regulations. By the impugned order, the Commissioner, Customs in exercise of powers under Regulation 14 and 18 read with Regulation 17(7) of CBLR, 2018 passed the impugned order, which is under challenge before us.

4. We have heard Ms. Vidhushi Subham, learned Counsel for the appellant and Mr. M.R. Dhaniya, learned Authdorised Representative for the Revenue and have perused the records of the case.

5. Learned Counsel for thea appellant submitted that the appellant acted with due diligence as the KYC documents were verified from the Government Website for GST and Income Tax Department. The documents produced are official documents and its correctness cannot be doubted. The appellant denied that under the Regulations, there is any requirement to physically verify the address of the exporters. The learned Counsel for the appellant placed reliance on the decisions of the Tribunal specifically dealing with the issue where several exporters were found to be non-existent by the GST Commissionerate on the basis of the report by the Directorate General of Analytics and Risks Management (DGARM).

6. Learned Authorised Representative submits that as per mandate of the Regulation 10(n) of the CBLR, 2018 read with the Circular no.09/2010-Customs dated 08.04.2010, it was incumbent upon the CB to verify and identify and functioning of his client at the declared address by using reliable, independent authentic documents, data or information which apparently the CB has failed to do so. Since large number of exporters were found to be untreacable, it appears that the CB has failed to exercise due diligence and grossly violated the KYC guidelines of the said circular dated 08.04.2010. He further submitted that a large number of 19 exporters were found to be non-existent which is not a mere coincidence but shows failure of the appellant to perform its obligation as provided under Regulation 19(n) of the CBLR, 2018. The appellant has failed to produce the

exporters whose goods he had handled for the process of export which ultimately resulted in the IGST refund frauds. The Customs Broker operates on the basis of trust. He acts as an agent of the Customs House as well as of the exporter and importer. Acting as a Customs Broker, the CB should take all steps to observe related laws meticulously.

7. The issue for our consideration is whether the revocation of the CB licence is justified on the ground that the several exporters whose consignments were handled by the appellant, having committed IGST fraud and were found to be un-traceable on physical verification by the DGRAM, New Delhi, is justified. We find that this issue has been considered at length in the decision of this Tribuanl in **Mauli Worldwide Logistics vide Final Order No.50561/2022 dated 04.07.2022** by referring to the earlier orders:-

> **"(a)**Final order No.52053-52054/2021 dated 3.12.2021 of CRM Logistics Pvt. Ltd.
> **(b)**Final order No.500002/2022 dated 3.1.2022 of M/s.Anax Air Services Pvt. Ltd.
> **(c)**Final order No.50347/2022 dated 29.04.2022 of M/s.Perfect Cargo and Logistics.**"**

The observations of the Tribunal are as under:-

> **"17.** It is undisputed that the GSTIN, PAN, IEC, and other documents obtained by the appellant as a part of the KYC were genuine documents and were issued by the officers concerned. In our considered view, if the GSTIN is issued by the officers to persons who did not exist at the time of verification it could mean that the officers have issued GSTIN to non-existent firms or that they had subsequently either stopped operating from that address or that they had moved from that place and have not changed the address. **In any of these scenarios, if the GSTIN was issued by the departmental officers to such a**

large number of non-existent persons, it shows either the lack of any due diligence on the part of the officers or an inherently flawed system of issuing GSTIN. The appellant cannot be faulted for trusting the GSTIN issued by the department.

18. Similarly, if the importer-exporter code6 issued by the Director General of Foreign Trade7 is wrongly issued to non-existent businesses and entities, the appellant cannot be blamed for trusting the IEC issued by the DGFT. Similar is the case with respect to other documents such as PAN card (issued by the Income Tax Department), Driving Licence (issued by the Transport Department), Voter ID (issued by the Election Commission). When a document is issued by a Government authority, it is reasonable to presume it to be valid. It is not open to the appellant to question the issue of these documents and as a Customs Broker to sit in judgment over the decisions of these officers. **If the verification reports are true and none of the exporters existed at their premises, the irresistible conclusion is that all these officers of various departments have been either extremely careless or were operating under flawed systems which allowed documents to be issued to non-existing businesses.**

19. It would have been a different matter if the documents produced by the appellant were fake or forged and were not issued by the officers. Such is not the case. In fact, the entire investigation by DGARM was initiated based on the GSTIN issued to various assessees as available in its System. Therefore, there is no possibility of the GSTIN being not issued by the department because it was extracted from its own system. Similarly, the Importer-Exporter Code (IEC) is an essential field for filing any Shipping Bill in the Customs EDI system and we find it unbelievable that an IEC not issued by the DGFT would be accepted by the Customs EDI system. Since the GSTIN is PAN based, the PAN must have also been issued by the Income Tax Department. It is a different matter if the Customs Broker files export documents in the name of "A" when the goods are actually being exported by "B" or produces forged documents. Such is not the allegation in this case. To sum up, indisputably, various documents such as GSTIN, IEC, PAN card, etc. were issued by the concerned authorities which were obtained by the appellant as a part of KYC.

21. We find that Regulation 10(n) requires the Customs Broker to **verify correctness of Importer**

Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information. This responsibility does not extend to physically going to the premises of each of the exporters to ensure that they are functioning at the premises. When a Government officer issues a certificate or registration with an address to an exporter, the Customs Broker cannot be faulted for trusting the certificates so issued. It has been held by the High Court of Delhi in the case of **Kunal Travels**[8] that **"the CHA is not an inspector to weigh the genuineness of the transaction. It is a processing agent of documents with respect of clearance of goods through customs house and in that process only such authorized personnel of the CHA can enter the customs house area…….. It would be far too onerous to expect the CHA to inquire into and verify the genuineness of the IE code given to it by a client for each import/export transaction. When such code is mentioned, there is a presumption that an appropriate background check in this regard i.e., KYC, etc. would have been done by the customs authorities….." (emphasis supplied).**

22. The Customs Broker is not Omniscient and Omnipotent. The responsibility of the Customs Broker under Regulation 10(n) does not extend to ensuring that all the documents issued by various officers of various departments are issued correctly. The Customs Broker is not an overseeing authority to ensure that all these documents were correctly issued by various authorities. If they were wrongly issued, the fault lies at the doorstep of the officer and not the Customs Broker.

23. It is possible that all the authorities who issued the above documents had issued them correctly and thereafter, by the time of verification, situation may have changed. If so, it is a ground for starting a thorough investigation by the officer and is not a ground to suspend/cancel the licence of the Customs Broker who processed the exports. It is not the responsibility of the Customs Broker to physically go to and verify the existence of each exporter in every location, let alone, keeping track if the exporter has moved from that address. In this case, there is no clarity whether the exporters were not available at the registered

premises on the dates of export or if they ceased to operate after the export. Even if the exporters have changed their addresses and failed to intimate, it cannot be held against the Customs Broker.

25. We now proceed to examine the scope of the obligations of the Customs Broker under Regulation 10(n). It requires the Customs Broker to **verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN),identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information.** This obligation can be broken down as follows:

a) Verify the correctness of IEC number

b) Verify the correctness of GSTIN

c) Verify the identity of the client using reliable, independent, authentic documents, data or information

d) Verify the functioning of the client at the declared address using reliable, independent, authentic documents, data or information

26. Of the above, (a) and (b) require verification of the documents which are issued by the Government departments. The IEC number is issued by the Director General of Foreign Trade and the GSTIN is issued by the GST officers under the Central Board of Indirect Taxes and Customs of the Government of India or under the Governments of State or Union territory. The question which arises is has the Customs Broker to satisfy himself that these documents or their copies given by the client were indeed issued by the concerned government officers or does it mean that the Customs Broker has to ensure that the officers have correctly issued these documents. In our considered view, Regulation 10(n) does not place an obligation on the Customs Broker to oversee and ensure the correctness of the actions by the Government officers. Therefore, the verification of documents part of the obligation under Regulation 10(n) on the Customs Broker is fully satisfied as long as the Customs Broker satisfies itself that the IEC and the GSTIN were, indeed issued by the concerned officers. This can be done through online verification, comparing with the original documents, etc. and does not require an investigation into the documents by the Customs Broker. The presumption is that a certificate or registration issued by an officer or purported to be issued by an officer is correctly issued. Section 79 of the Evidence Act, 1872 requires even Courts to presume that every certificate which is purported to

be issued by the Government officer to be genuine. It reads as follows:

> **"79. Presumption as to genuineness of certified copies. The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government** or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorized thereto by the Central Government.
>
> Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper."

27. The onus on the Customs Broker cannot, therefore, extend to verifying that the officers have correctly issued the certificate or registration. Of course, if the Customs Broker comes to know that its client has obtained these certificates through fraud or misrepresentation, nothing prevents it from bringing such details to the notice of Customs Officers for their consideration and action as they deem fit. However, the Customs Broker cannot sit in judgment over the certificate or registration issued by a Government officer so long as it is valid. In this case, there is no doubt or evidence that the IEC, the GSTIN and other documents were issued by the officers. So, there is no violation as far as the documents are concerned.

28. The third obligation under Regulation 10(n) requires the Customs Broker to verify the identity of the client using reliable, independent, authentic documents, data or information. In other words, he should know who the client is and the client cannot be some fictitious person. This identity can be established by independent, reliable, authentic:

a)documents;
b) data; or
c) information

29. Any of the three methods can be employed by the Customs Broker to establish the identity of his client. It is not necessary that it has to only collect information or launch an investigation. So long as it can find some documents which are independent,

reliable and authentic to establish the identity of his client, this obligation is fulfilled. Documents such as GSTIN, IEC and PAN card issued etc., certainly qualify as such documents. However, these are not the only documents the Customs Broker could obtain; documents issued by any other officer of the Government or even private parties (so long as they qualify as independent, reliable and authentic) could meet this requirement. While obtaining documents is probably the easiest way of fulfilling this obligation, the Customs Broker can also, as an alternative, fulfill this obligation by obtaining data or information. In the factual matrix of this case, we are fully satisfied that the appellant has fulfilled this part of the obligation under Regulation 10(n).

30. The fourth and the last obligation under Regulation 10(n) requires the Customs Broker to verify the functioning of the client at the declared address using reliable, independent, authentic documents, data or information. This responsibility, again, can be fulfilled using documents or data or information so long as it is reliable, independent and authentic. Nothing in this clause requires the Customs Broker to physically go to the premises of the client to ensure that they are functioning at the premises. Customs formations are only in a few places while exporters or importers could be from any part of the country and they hire the services of the Customs Brokers. Besides the fact that no such obligation is in Regulation 10(n), it will be extremely difficult, if not, totally impossible, for the Customs Broker to physically visit the premises of each of its clients for verification. The Regulation, in fact, gives to the Customs Broker the option of verifying using documents, data or information. If there are authentic, independent and reliable documents or data or information to show that the client is functioning at the declared address, this part of the obligation of the Customs Broker is fulfilled. If there are documents issued by the Government Officers which show that the client is functioning at the address, it would be reasonable for the Customs Broker to presume that the officer is not wrong and that the client is indeed, functioning at that address. In the factual matrix of this case, we find that the GSTIN issued by the officers of CBIC itself shows the address of the client and the authenticity of the GSTIN is not in doubt. In fact, the entire verification report is based on the GSTIN. Further, IECs issued by the DGFT also show the address. There is nothing on record to show that either of these documents were fake or forged.

> Therefore, they are authentic and reliable and we have no reason to believe that the officers who issued them were not independent and neither has the Customs Broker any reason to believe that they were not independent.**"**

8. Following the aforesaid observations made in the similar context, we are of the view that revocation of the customs broker licence is not justified. The appellant had verified the antecedents and correctness of IEC, KYC documents, GST and other documents of their clients from the Government's official website (DGFT, GST and Income Tax Department) before the clearance of the goods. As noted by the Tribunal there cannot be more reliable data than the official government website. Consequently, there was no reason for the appellant to have suspected the genuineness of the documents when the contents thereof matched with the details available on the official government website. Therefore, we do not find any violation of the obligation in terms of Regulation 10(n) by the appellant. The impugned order revoking the Customs Brokers Licence, forfeiting the amount of security deposit and imposition of penalty needs to be set aside.

9. The appeal is, accordingly, allowed.

[Order pronounced in open court on 18th April, 2024]

(Binu Tamta)
Member (Judicial)

(P. V. Subba Rao)
Member (Technical)

Ckp.

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH - COURT NO. I

Customs Appeal No. 50231 of 2024

[Arising out of Order-in-original No. 76/ZR/Policy/2023 dated 30.10.2023 passed by the Commissioner of Principal Commissioner of Customs (Airport & General), New Delhi]

Global Links **Appellant**
105, Bhanot Cornor,
Pamposh Enclave, Greater Kailash-I,
New Delhi-110048

Versus

Principal Commissioner of Customs (Airport & General, New Delhi **Respondent**
New Customs House, Near IGI Airport
New Delhi- 110020

Appearance:
Dr. Prabhat Kumar, Advocate for the Appellant
Shri Munsi Ram Dhaniya, Authorised Representative for the Department

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/Decision: July 10, 2024

FINAL ORDER NO. 56023/2024

JUSTICE DILIP GUPTA

M/s Global Links[1] has sought quashing of the order dated 30.10.2023 passed by the Commissioner of Customs (Airport & General)[2] by which the Customs Broker License of the appellant that was valid up to 31.12.2026 has been revoked under the provisions

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1. the appellant
2 the Commissioner of Customs

of the Customs Brokers Licensing Regulations, 2013[3]. The order further forfeits the amount of security deposit furnished by the appellant and also imposes penalty of Rs. 50,000/- on the appellant.

2. It transpires from the records that the appellant had filed 46 shipping bills at Air Cargo Complex, IGI Airport, New Delhi for export of readymade garments by M/s UP Garments[4] under a duty drawback scheme.

3. A show cause notice dated 16.09.2020 was issued to the exporter to show cause why duty drawback should not be denied and the goods already exported should not be confiscated and penalty should not be imposed under sections 114 (iii) and 114AA of the Customs Act, 1962[5]. The show cause notice also called upon the appellant to show cause why penalty should not be imposed upon the appellant under sections 114(iii) and 114AA of the Customs Act.

4. The Additional Commissioner adjudicated the show cause notice by order dated 07.02.2023 and the operative part of the order is:

> "(I**) I hereby reject the claimed Drawback to the tune of Rs. 1,90,84,449/-** (Rupees One Crore Ninety Lakh Eighty Four Thousand Four Hundred Forty Nine Only) **in respect of Shipping Bills** (Table 4 of the Show Cause Notice) being inadmissible under Section 75 of the Customs Act, 1962 read with in terms of Rule 17 of Customs and Central Excise Duties Drawback Rules, 2017 **since the export proceeds for the said goods has not been realized by or on behalf of the said**

---

3 the 2013 Regulations
4. the exporter
5 the Customs Act

Exporter within nine month time as prescribed under FEMA Act, 1999 & Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 and RBI Master Circular issued in this regard.

(II) I hold that the export goods (with claim/availment of duty drawback) in respect of shipping bills as mentioned in Table-4 of the Show Cause Notice with declared FOB value of Rs. 19,36,38,839/- (Rs. Nineteen Crore Thirty Six Lakh Thirty Eight Thousand Eight Hundred Thirty Nine Only) are liable for confiscation under Section 113(i) and 113(ia) of the Act ibid due to misdeclaration in respect of value, as discussed above, and also due non realisation of the export proceeds. However, as these goods were not subjected to seizure and as such are not available for actual confiscation, I refrain from determining redemption fine on such goods in lieu of confiscation in terms of Section 125(1) of Customs Act 1962.

(III) I impose penalty under Section 114(iii) of the Customs Act, 1962 of Rs. 20,00,000/- (Rs. Twenty Lakh Only) upon the exporter M/s UP Garments (IEC No-0517512696) Noticee 1 for their acts of omission and commission with sole motive to defraud the Govt Exchequer to avail undue drawback.

(IV) I impose penalty under Section 114AA of the Customs Act, 1962 of Rs. 20,00,000/- (Rs. Twenty Lakh Only) upon the exporter M/s U P Garments (IEC No-0517512696).

(V) I impose penalty under Section 114(iii) of the Customs Act, 1962 of Rs. 20,00,000/- (Rs. Twenty Lakh Only) upon Shri Deepak Takkar.

(VI) I impose penalty under Section 114(iii) of the Customs Act, 1962 of Rs. 20, (Rs. Twenty Lakh Only) upon CHA M/s Global Links.

(VII) I don't impose penalty under Section 114AA of the Customs Act, 1962 upon M/s Global Links.

(VIII) I refer the matter of M/s Global Links to the policy wing, New Custom

> **House, New Delhi-110037 to examine the conduct of M/s Global Links under CBLR-2018**."

(emphasis supplied)

5. As the Additional Commissioner had referred the matter to the Policy Wing, New Custom House, New Delhi to examine the conduct of the appellant under the Regulations, the Commissioner of Customs issued a show cause notice dated 09.05.2023 to the appellant.

6. Paragraphs 1 and 2 of the show cause notice are reproduced below:

> "M/s Global Links, 105, Bhanot Corner, Pamposh Enclave, Greater Kailash-1, New Delhi - 110048 (hereinafter also referred to as 'the CB' or 'CHA') is a Customs Broker having CB License No. R-008/97/DEL/CUS/2017 (PAN: AADFG5566E) valid upto 31.12.2026, issued by the Commissioner of Customs (Airport & General), New Delhi.
>
> Whereas, copy of Order-in- Original No.-06/JA/ADC/ACE/2023 dated 07.02.2023 (RUD-1) issued by Shri Jyotiraditya, Additional Commissioner of Customs, ACC-Export, Delhi, to M/s Global Links & Ors. was received in this office on 10.02.2023 wherein the matter was referred to this office for taking appropriate action against the CB."

7. Paragraph 3 of the show cause notice, which runs from page numbers 135 to 173 of the show cause notice, is a mere reproduction of the order dated 07.02.2023 passed by the Additional Commissioner.

8. After reproducing the order passed by the Additional Commissioner in paragraph 3, the show cause notice mentions the following facts in paragraphs 4, 5 and 6.

> "4. **Whereas from the above. it appears that the CB has violated the following regulations of CBLR 2013 for the reasons narrated in preceding paras**:-
>
> **Regulation 11(d) of CBLR 2013**: advise his client to comply with the provisions of the Act and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be,
>
> **Regulation 11(e) of CBLR 2013**: exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage:
>
> **Regulation 11(n) of CBLR 2013**: verify antecedent, correctness of Importer Exporter Cle (IFC) number, identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;
>
> **Regulation 17(9) of CBLR 2013**: The Customs Broker shall exercise such supervision as may be necessary to ensure the proper conduct of his employees in the transaction of business and he shall be held responsible for all acts or omissions of his employees during their employment;
>
> 5. **Whereas, it appears that the above CB was found to be contravening the provision of Regulation 11(d), 11(e), 11(n) and 17(9) of CBLR, 2013 for the reasons narrated in preceding paras. therefore, in order to establish the contravention as detailed above, an enquiry/examination is essential**. Therefore, in terms of Regulation 20 of CBLR

> 2013, Shri Rajesh Kumar Meena, Deputy Commissioner of Customs, ICD Export Tughlakabad, New Delhi is being appointed as an Inquiry officer in the above discussed case. M/s Global Links, the authorized Customs Broker is required to join the proceedings before the Inquiry officer and to submit his representation, if any. to the inquiry officer within thirty days of the issuance of this Show Cause Notice. The Inquiring authority shall submit a report within ninety days of the issuance of this Show Cause Notice to the Commissioner of Customs (Airport & General), New Custom House, New Delhi.
>
> 6. M/s Global Links, 105, Bhanot Corner, Pamposh Enclave, Greater Kailash-1, New Delhi - 110048, Customs Broker having CB License No. R-008/97/DEL/CUS/2017 (PAN: AADFG5566E) valid upto 31.12.2026, in terms of Regulation 20 of CBLR 2013 are hereby called upon to Show Cause to the Commissioner of Customs (Airport & General), New Custom House, New Delhi within thirty days of the receipt of the Inquiry Report, that in terms of the above paras and the Inquiry Report as to Why;
>
> a) they should not be held responsible for contravention of provisions of Regulation 11(d), 11(e), 11(n) and 17(9) of Customs Broker Licensing Regulation 2013;"
>
> (emphasis supplied)

9. The appellant filed a reply to the said show cause notice and the Commissioner of Customs passed an order dated 30.10.2023. The operative part of the order is as follows:

> "In exercise of powers conferred in terms of Regulation 18 & 22 read with Regulation 20 (7) CBLR, 2013,
>
> (i) **I revoke the CB Licence** No. R-008/97/DEL/CUS/2017 (PAN: AADFG5566E) **valid upto 31.12.2026 of M/s Global Links.**
>
> (ii) **I direct the CB to immediately surrender the Original CB License** No.

> R-008/97/ DEL/CUS/2017 (PAN: AADFG5566E) valid upto 31.12.2026 along with all 'F/G/H Cards insued there under;
>
> (iii) **I order for forfeiture of the whole amount of security deposit furnished by them**;
>
> (iv) **I impose a Penalty of Rs.50,000**/- on M/s Global Links (PAN: AADFG5566E) **under Regulation 22 of CBLR, 2013**."

(emphasis supplied)

10. It is this order dated 30.10.2023 passed by the Commissioner of Customs that has been assailed in this appeal.

11. It is pertinent to note that though the show cause notice refers to violation of sub-clauses (d), (e), (n) of Regulation 11 as also Regulation 17(9) of the 2013 Regulations, the impugned order upholds the violation of Regulations 11(n) and 17(9) only of the 2013 Regulations and a categorical finding has been recorded by the Commissioner of Customs that the appellant did not violate Regulations 11(d) and 11 (e) of the 2013 Regulations.

12. Dr. Prabhat Kumar, learned counsel for the appellant submitted that the order passed by the Commissioner of Customs deserves to be set aside for the reason that the time limit prescribed in Regulation 20(1) of the 2013 Regulations has not been adhered to by the department. Elaborating this submission, learned counsel submits that the Commissioner of Customs was required to issue the notice in writing to the Customs Broker within a period of 90 days from the date of receipt of the offence report, but in the present case the notice was issued much beyond the said period. Learned

counsel also submitted that the order passed by the Commissioner of Customs also deserves to be set aside for the reason that the provisions of Regulation 11 (n) and 17(9) were not violated by the appellant in the present case. Learned counsel pointed out that not only did the show cause notice not contain any specific charge against the appellant for violating these two Regulations, but the impugned order has not correctly appreciated the factual position.

13. Shri M.R. Dhaniya, learned authorised representative appearing for the department, however, supported the impugned order and submitted that the appellant is not correct in asserting that the time limit prescribed in Regulation 20 (1) of the 2013 Regulations had not been adhered to. Learned authorised representative also submitted that in the facts and circumstances of this case, it cannot be said that the appellant had not violated the provisions of Regulation 11 (n) and Regulation 17 (9) of the 2013 Regulations.

14. The submissions advanced by both the learned counsel for the appellant and the learned authorised representative appearing on behalf of the department have been considered.

15. To appreciate the contentions, it would be appropriate to reproduce the relevant Regulations. Regulation 11 (n) is reproduced below:

> "**11. Obligations of Customs Broker**- A Custom Broker shall-
>
> (a) xxxx

> (n) verify antecedent, correctness of Importer Exporter Code (IEC) number, identity of is client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information; and
>
> (o) xxxx"

16. Regulation 17 (9) is also reproduced below:

> "**17. Employment of persons-**
>
> (9) The Customs Broker shall exercise such supervision as may be necessary to ensure the proper conduct of his employees in the transaction of business and he shall be held responsible for all acts or omissions of his employees during their employment."

17. Regulation 20(1) is reproduced below:

> "20. Procedure for revoking license or imposing penalty-
>
> (1) The Commissioner of Customs shall issue a notice in writing to the Customs Broker within a period of ninety days from the date of receipt of an offence report, stating the grounds on which it is proposed to revoke the license or impose penalty requiring the said Customs Broker to submit within thirty days to the Deputy Commissioner of Customs or Assistant Commissioner of Customs nominated by him, a written statement of defense and also to specify in the said statement whether the Customs Broker desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs."

18. Regulations 20 (1) of the 2013 Regulations, as noticed above, provides that the Commissioner of Customs shall issue a notice in writing to the Customs Broker within a period of 90 days from the

date of receipt of the offence report. Even if the submissions of the learned counsel for the appellant that the show cause notice should be treated as the offence report and not the order dated 07.02.2023 passed by the Additional Commissioner, then too it was necessary for the appellant to specifically state the date on which the Commissioner of Customs received the show cause notice. All that has been submitted by the learned counsel for the appellant is that since the copy of the show cause notice was also marked to the Commissioner of Customs and the office is situated in the same building, it must be presumed that it was received by the Commissioner of Customs.

19. It is not possible to accept this contention of the learned counsel for the appellant. In order to substantiate that the provisions of Regulations 20 (1) had been violated, it was imperative for the appellant to have specifically mentioned the date on which the show cause notice was actually received by the Commissioner of Customs, even if it is assumed that it is the show cause notice that would constitute the offence report and not the order passed by the Commissioner.

20. There is, therefore, substance in the submission advanced by the learned authorised representative appearing for the department that the provisions of Regulations 20 (1) of the 2013 Regulations have not been violated.

21. What has now to be examined is whether the appellant had violated the provisions of Regulation 11 (n) and Regulation 17 (9) of the 2013 Regulations.

22. To examine this contention, it would be necessary to consider the charges that were leveled against the appellant in the show cause notice. It is seen that there is no specific allegation in the show cause notice, either with regard to violation of the provisions of Regulation 11 (n) or with regard to violation of Regulation 17 (9) of 2013 Regulations. Paragraphs 1 and 2 of the show cause notice, which have been reproduced above, merely talk of the Customs Broker License having been issued to the appellant and the order dated 07.02.2023 passed by the Additional Commissioner, which order has also been enclosed as a relied upon document no. 01. Paragraph 3 of the show cause notice is merely a reproduction of the order dated 07.02.2023 passed by the Additional Commissioner and continues from pages 135 to 173 of the appeal memo. After having reproduced the order passed by the Additional Commissioner in these many pages, the show cause notice, in paragraph 4 which has also been reproduced above, merely states that it appears that the Customs Broker violated these four Regulations and these four Regulations have been reproduced in the same paragraph.

23. It clearly transpires that the show cause notice does not give any reason as to why the said four Regulations of the 2013 Regulations had been violated. The order impugned in this appeal is, therefore, liable to be set aside for this reason alone as the show cause notice is the very foundation of an order.

24. The order that has been passed by the Commissioner of Customs can also been examined on merits. In regard to violation of Regulation 11(n) of the 2013 Regulations, the reply filed by the appellant, as contained in the order, is reproduced below:

> "(iii) There is no contravention of regulation 11(n) of CBLR as there no allegation of the incorrectness of Importer Exporter Code (IEC) number or Goods and Services Tax Identification Number (GSTIN) and functioning of Exporter at the declared address. The IEC number of the Exporter has been found to be genuine. Similarly, the Exporter has been found to be functioning at his declared address. Hence, there is no contravention of regulation 10(n) of CBLR and as such the show cause notice may be quashed."

25. The Commissioner of Customs, after reproducing the reply filed by the appellant, merely observes that the Customs Broker had not obtained the KYC document directly from the exporter and secondly billing M/s Satyam Aviation Pvt Ltd. instead of the exporter would constitute a violation of Regulation 11 (n). The relevant portion of the order passed by the Commissioner of Customs is reproduced below:

> "**Therefore, in the given matrix of facts, there appear two infractions in the context of obligation on** CB under Regulation 11 (n) of CBLR, 2013. Therefore, I take cognizance of the said two infarctions, **i.e., not obtaining KYC documents directly from the exporter and secondly, billing M/s Satyam Aviation Pvt. Ltd instead of the exporter etc.** Business dynamics may have compelled the CB to procure business from a third party but billing somebody who is completely unconnected should have alarmed CB. I, thus, find that the CB was in violation of provisions of Regulation 11(n) of the CBLR, 2013.
>
> (emphasis supplied)

26. It is not in dispute that the appellant had submitted the KYC documents. This fact is also evident from the paragraph 2 of the order dated 07.02.2023 passed by the Additional Commissioner wherein it has been stated that the KYC documents, purchase invoice, bank statements were submitted by the appellant. What persuaded the Commissioner of Customs to hold that Regulation 11(n) has been violated is the fact that the KYC documents were not directly obtained from the exporter. This cannot be said to be a relevant ground for violation of Regulation 11 (n) of the 2013 Regulations as the KYC documents were submitted by the appellant. This apart, as to who ultimately billed cannot also be a relevant factor for holding that Regulation 11 (n) of the 2013 Regulations has been violated.

27. Thus, it is not possible to sustain the finding recorded by the Commissioner of Customs that Regulation 11 (n) of the 2013 Regulations has been violated.

28. In regard to violation of Regulation 17(9) of 2013 Regulations, it is to be noticed that apart from the fact that the show cause notice does not contain any specific allegation regarding violation of the Regulations, the Commissioner of Customs has merely reproduced the reply submitted by the appellant and, thereafter, the order passed by the Additional Commissioner and from those two facts has concluded that the Regulation 17 (9) of the 2013 Regulations had been violated.

29. The show cause notice should have spelt out specific charges in regard to violation of Regulation 17(9) of the 2013 Regulations. Even the reply submitted by the appellant has not been considered at all and a finding is based on the order dated 07.02.2023 passed by the Additional Commissioner.

30. Thus, the Commissioner of Customs was not justified in holding that the provisions of the Regulations 17 (9) of the 2013 Regulations have been violated.

31. It is, therefore, not possible to sustain the order dated 30.10.2023 passed by the Commissioner of Customs. It is, accordingly, set aside and the appeal is allowed.

(Order pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Diksha

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. III

Customs Appeal No. 50944 of 2021

(Arising out of Order-in-Original No. 75/MK/Policy/2021 dated 22.07.2021 passed by the Commissioner of Customs (Airport & General), New Delhi)

M/s Freight Logistics **Appellant**
RZ – 2048, Lane No. 26
Tughlakabad Extension
New Delhi – 110019.

VERSUS

Commissioner of Customs (Airport & General) **Respondent**
New Custom House, New Delhi-110037.

Appearance

Dr. Prabhat Kumar and Shri Karan Kanwal, Advocates – for the Appellant.

Shri Girijesh Kumar, Authorized Representative – for the Respondent

AND
Customs Appeal No. 51839 of 2021

(Arising out of Order-in-Original No. 75/MK/Policy/2021 dated 22.07.2021 passed by the Commissioner of Customs (Airport & General), New Delhi)

Commissioner of Customs (Airport & General) **Appellant**
Commissionerate, New Custom House,
New Delhi-110037.

VERSUS

M/s Freight Logistics **Respondent**
RZ – 2048, Lane No. 26
Tughlakabad Extension
New Delhi – 110019.

Appearance

Shri Girijesh Kumar, Authorized Representative – for the Appellant

Dr. Prabhat Kumar and Shri Karan Kanwal, Advocates – for the Respondent

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 05/01/2024
Date of Decision: 02/02/2024

Final Order Nos. 50161-50162/2024

Binu Tamta

The Order-in-Original No. 75/MK/POLICY/2021 dated 22.07.2021 is under challenge both by the Customs Broker and also by the Revenue. The challenge by the appellant Customs Broker is to the forfeiture of the security deposit and imposition of penalty of Rs. 50,000/-. The Revenue on the other hand has challenged the impugned order as it refrained from revoking the Customs Broker License of the appellant. Hence the two appeals.

2. The facts leading to the present petition are that the appellant is a holder of Customs Broker License which is valid up to 28.08.2027. On the basis of specific information/input by the DRI, Delhi Zonal Unit that one syndicate was attempting to export mask/fabric of mask to China by way of mis-declaring it as "Packing Materials" and one such consignment of 2480 Kg. was going to be exported vide Airway Bill No. 87612324992 and name of the IEC holder could be M/s Ala Foodstuff Pvt. Ltd. The shipment of the goods attempted to be exported vide Shipping Bill No. 2619886 dated 11.05.2020 was put on hold for further detailed examination by SIIB, Air Cargo Export, New Delhi. The Shipping Bill had been filed by the Customs Broker M/s Freight Logistics. As per the shipping bill, the export goods pertained to the exporter M/s Ala Foodstuff Pvt. Ltd. (IEC No. 1207001406) GSTIN No. 03AAGCA3947FIZY), Amritsar, Punjab. The goods were declared as "packing material for pouch" (RITC Code 48239090). However,

on examination by SIIB on 13.05.2020, the goods were found as "non-woven fabrics" appeared to be used in the manufacturing of Mask, which was prohibited for export vide Notification No. 52/2015-2020 dated 19.03.2020, issued by the Director General of Foreign Trade (DGFT). Thus, the goods were mis-declared and also found to be prohibited. Accordingly, the impugned goods were seized vide seizure memo dated 13.05.2020 under Section 110 of the Customs Act, 1962. 3. Show cause notice dated 22.12.2020 was issued by Additional Commissioner of Customs, Air Cargo Export, New Delhi, wherein M/s Freight Logistics was also made a party as they failed to obtain any authorization from the exporter and did not verify the correctness of KYC documents. In addition,, they were also found to be concerned with those goods which were found liable for confiscation under Customs Act, 1962 and were therefore, called upon to show cause to the Additional Commissioner of Customs Air Cargo Export, New Delhi as to why the penalty should not be imposed on them under Section 114(i) and 114AA of the Customs Act, 1962. On the basis of said show cause notice dated 22.12.2020, an inquiry for violation under CBLR, 2018 was initiated against the appellant. Accordingly, the license of the appellant was suspended vide order-in-original dated 07.01.2021 in terms of Regulation 16(1) of the CBLR, 2018. Thereafter, vide order-in-original dated 15.01.2021, the suspension order was confirmed in terms of the Regulation 16(2) of the CBLR, 2018.

4. The exporter M/s Ala Foodstuff Pvt. Ltd. vide their letter dated 21.05.2020 addressed to the Supdt. of SIIB stated that they

are completely unaware about the export consignment under shipping bill No. 2619886 dated 11.05.2020 and the invoice no. against which the shipping bill has been filed do not pertain to them as they do not use series like A/B. Shri Akshit Arora, General Manager of the exporter company in his statement dated 01.06.2020 recorded under Section 108 of the Customs Act stated that their company is exclusively involved in exporting of rice under the brand name of ALA for the past 10 years to various countries like UAE, Yamen, Oman etc. but they have never exported their goods to China. It was also stated that they had exported three consignments through the forwarder named M/s CAG Shipping Pvt. Ltd. and M/s Smooth Cargo Mover Pvt. Ltd. who had appointed the Customs Broker named as Freight Logistics and M/s Green View Logistics. On examination of the invoice in question, it appeared that the invoice no. is 830 A dated 05.05.2020 whereas the company had raised the invoice number as 894 dated 05.05.2020. The exporter had also submitted a list containing the past export of their consignments, where no such invoice has been found mentioning as A or B.

5. Further, CB in his statement dated 15.07.2021 submitted that the documents were checked by one Shri Kumud Kumar Choudhary who was their employee and he may have committed a mistake in not checking up the authorisation in the shipping bill in question. The Customs Broker pleaded ignorance and that he had no knowledge about the mistake committed by Shri Kumod Kumar Choudhary.

6. Accordingly, show cause notice dated 28.01.2021 was issued to the appellant for violation of the provisions of Regulation 10(a), 10(e) and 10(n) of CBLR, 2018 and for taking action for revocation of the license and forfeiture of the security amount in terms of Regulation 14 read with Regulation 17 of CBLR, 2018 and also for imposition of penalty under Regulation 18 of CBLR, 2018 read with Regulation 17 of CBLR, 2018. On adjudication, the Commissioner concluded that active role was played by Shri Kumod Kumar Choudhary, employee of the CB and Shri Pushpraj Yadav. Also that role of CB has not come out anywhere in the investigation and that he had taken immediate action by terminating the services of Shri Kumod Kumar Choudhary with effect from 16.05.2020 and also by lodging an FIR with the Police on the said date. Having noted that it does not prima facie appear to be judicious enough to continue suspension of the CB license especially where no role of CB has come out in the instant case, the following order was passed:

> "In exercise of powers conferred in terms of Regulation 14 & 18 read with Regulation 17(7) of CBLR, 2018 (erstwhile Regulation 18 & 22 read with Regulation 20(7) of CBLR, 2013).
>
> (i) I refrain from revoking the CB License No. R-05/DEL/CUS/2008 (PAN : AABFF2641R) vlaid upto 28.08.2027 of M/s Freight Logistics, RZ-2048, Lane No. 26, Tugalakabad Extension, New Delhi-110019.
>
> (ii) I order for forfeiture of the whole amount of security deposit furnished by them;
>
> (iii) I impose penalty of Rs.50,000/- on M/s Freight Logistics."

7. Being aggrieved, both the Customs Broker and the Revenue has filed the appeal before this Tribunal.

8. The appellant had led much emphasis on the fact that it was a mistake of their employee for it he had taken the immediate

action. He also relied on the findings of the Commissioner holding Shri Kumod Kumar Choudhary and Shri Pushpraj Yadav responsible and yet action has been taken against the Customs Broker. According to the learned counsel there is no justification for forfeiture of security amount and imposition of penalty. He referred to the export made in the past in the name of the same exporter where no discrepancy has been found. It was also stated that the KYC documents of the exporter already existed in the records and referred to the following documents which were reliably authenticated such as under:

(a) Copy of Aadhar card of the person concerned.

(b) IEC number's copy of exporter was obtained which is on record. (verification of IEC No. Was done online).

(c) Exporter's KYC form was obtained.

(d) The Pan Card of exporter was obtained (on record).

(e) Copy of GSTIN was obtained which is on record. Verification of the same was done online.

The learned counsel challenged the forfeiture of the security deposit and the imposition of penalty basically on the ground that no role has been played by the CB and there is no finding arrived at by the adjudicating authority against the CB. The learned counsel referred to several judgements which we would be dealing later.

9. The contention raised by the department is that the appellant had not obtained the authorisation from the exporter and have, therefore, violated Regulation 10(a). They had also not obtained

the export documents from the exporter and refuted the argument that one of their employee did not verify the authorisation as it was obligatory on the Customs Broker to verify the authorisation.

The learned Authorised Representative referred to CBEC Circular No. 9/2010-Cus. dated 08.04.2010 and submitted that the CB failed to obtain proper KYC sheet from the exporter without photograph and signature. The learned Authorised Representative relied on the decision in **Skytrain Services Vs. Commissioner of Customs (Airport & General), New Delhi – 2019 (369) ELT 1739 (Tri.-Delhi)** and **Commissioner of Customs Vs. K.M. Ganatra & Co. – 2016 (332) ELT 15 (SC).** The department in support of their appeal has also submitted that violation of Regulation 10(a), 10(e) and 10(n) of CBLR, 2018 are grave in nature and the role of the Customs Broker is not limited to an act of omission or commission committed by their staff as he could not have done it without the knowledge of the seniors of the company and hence prayed for revocation of the Customs Broker License.

10. We have heard the learned counsel for the appellant and also the learned Authorised Representative for the Revenue and have perused the records of the case.

11. Before adverting to the merits of the matter on the allegations pertaining to Regulation 10(a), 10(e) and 10(n), we may quote the relevant provisions:

> **"10. Obligations of Customs Broker.—A Customs Broker shall —**
>
> (a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;

> (e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;
>
> (n) verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information".

12. What we find from the facts of the present case is that there have been deep rooted conspiracy to manipulate the export consignment without the knowledge of the exporter, M/s Ala Food Stuff Pvt. Ltd. who are actually in the export of RICE only for the past 10 years to various countries, UAE, Yemen, Oman, etc. and had never exported to China. Sh. Akshit Arora, General Manager of the exporter in his statement recorded under Section 108 of the Customs Act stated that the said consignment did not belong to their company and the alleged invoice No. 830A dated 5.5.2020 which was part of the export document did not pertain to them as they do not have series A/B. From his statement, we find that under invoice no. 830 dated 05.03.2020 the exporter had exported rice shipment to Seychelles and on 5.5.2020 the invoice no. 894 was raised. Therefore, invoice no. 830A dated 05.05.2020 was manipulated to illegally export the prohibited goods behind the back of the exporter.

13. Similarly as part of the conspiracy, the services of the appellant as customs broker was availed by concealing the involvement of the persons behind this manipulation. We find that Shri Manish Sharma, partner and F Card holder of the appellant company tendered his voluntary statement that the shipping bill was filed on the basis of export documents received from Shri Pushpraj Yadav who is running forwarding firm in the name of M/s POL Enterprises and had received the KYC documents from him but

did not receive any authority letter from the exporter and also that he did not verify the address of the exporting firm as being located at Amritsar. Further, it has come on record that Mr. Kumod Kumar Choudhary, an employee of the CB firm was in charge of checking the documents and the submission on behalf of the appellant is that he could have committed the mistake in not checking the authorisation in the impugned shipping bill. We cannot rule out this possibility and the benefit of doubt will go in favour of the appellant, more so when he had promptly taken the requisite action against Sh. Kumod Kumar Choudhary by terminating his services with effect from 16.05.2020 and also by registering FIR on the same day. The fact that within three days from the date the consignment was kept on hold on 13.05.2020, the appellant had acted diligently and there was no delay on the part of the appellant, therefore, no mala fides can be attributed on CHA. Even Sh. Kumod Kumar Choudhary who was absconding had surrendered H Card. In this regard, we may refer to the decision of the Delhi High Court in **Kunal Travels (Cargo) Vs. CC (I &G), IGI Airport, New Delhi - 2017 (354) ELT 447, (Del.)** where the contention of the appellant had been that the documents were filed unauthorisedly by a person incompetent to do so and the action of the employee has not been defended and claimed ignorance and innocence of the contents of the consignment, it was held that there cannot be a presumption of its deliberate act or intention to defraud and the appellant cannot be faulted or punished in the manner it has been. The court also observed that given the factual finding that the CHA was not aware of the misuse of the G cards,

(and thus, also unaware of the contents being smuggled), no additional blame can be heaped upon the CHA on that count alone.

14. There appears to be no doubt that fraud has been committed by manipulating the documents to enable the illegal export of prohibited goods but there is no evidence to say that the appellant connived or was aware of the modus-operandi. However, we cannot ignore that by virtue of a license granted under the Regulations, a customs broker is eligible and entitle to carry on the work of clearance of goods for import and export. As laid down in various decisions, CHA occupies a very important position in the Customs House. He is supposed to safeguard the interests of both the importers and the Customs and therefore a lot of trust is kept in CHA by the importers or exporters as well as by the Government Agencies, **Noble Agency Vs. Commissioner of Customs, Mumbai 2002 (142) ELT 84.** Therefore, the appellant when he admits that he did not verify the address of the exporting company as they were in Amritsar and also did not raise any query for non production of the authorization from the exporter company had violated the obligations cast on a customs broker under the Regulations. Considering the extent of violation that can be attributed to the appellant and the fact noted by the Commissioner that active role was played by Shri Kumod Kumar Choudhary, employee of the CB and role of CB has not come out anywhere in the investigation as also CB has taken immediate action against the employee, we feel that applying the doctrine of proportionality the forfeiture of security deposit is far beyond proportion and imposition of penalty of Rs. 50,000/- is sufficient. We therefore

modify the impugned order to the extent that forfeiture of the security deposit needs to be set aside and only the order whereby the penalty has been imposed is affirmed. We therefore, partly allow the appeal filed by the appellant, customs broker as referred above.

Appeal No. 51839/2021

15. The appeal filed by the department against the impugned order for not revoking the customs broker license needs to be dismissed for the reasons stated while considering the appeal of the customs broker. Moreover, it has been settled over the period that no doubt, CHA is a link between the Customs Authorities and the importer and the CBLR Regulations imposes obligation upon them which have to be taken as mandatory but any and every infraction of the CHA Regulations do not justify the imposition of punishment of revocation of license.

16. We may refer to the decision of this Tribunal in **Falcon Air Cargo and Travels (P) Ltd. Vs. Commissioner of Customs, New Delhi - 2002 (141) ELT 284** where one of the charges related to improper employee supervision and it was observed that:

> "7. …….The Delhi High Court, while remanding the matter, had expressed the view that "when revocation is directed it has to be only in cases where infraction is of a very serious nature warranting exemplary action on the part of the authorities, otherwise two types of actions (suspension and revocation) would not have been provided for.....the authorities while dealing with the consequences of any action which may give rise to action for suspension, revocation or non-renewal have to keep several aspects in mind. Primarily, the effect of the action vis-a-vis right to carry on trade or profession in the background of Article 19(1)(g) of the Constitution has to be noted. It has also to be borne in mind that the proportionality question is of great significance as action is under a fiscal statute and may ultimately lead to a civil death". Similar views were echoed by the Tribunal in the case of *Lohia Travel & Cargo*, supra, wherein the Tribunal held that "revocation of licence..... is a grave punishment as it deprives permanently a person of the means of livelihood". In the said case where the

> allegations were short shipment with the connivance of CHA's employee and export of hasish by the employee, the Tribunal held that no case for revocation of CHA's licence had been made as the CHA was not aware of the fraud committed by their employees. The Tribunal also took into consideration the fact that "the CHA has already suffered hardship, for being out of business during the period of suspension of the licence..... and thereafter during the refusal of temporary renewal of licence .... and since August, 2000 when the Adjudicating Authority revoked their licence". In the present matter also, the licence was not functional after 13-1-2000, as observed by the High Court, and it was revoked by the impugned Order dated 13-7-2000. The charges against the Appellants, in our view are not so grave that a grave punishment of revocation of licence is called for. It is well settled law that punishment should be commensurate with the offence. In the facts and circumstances of the present matter and particularly in view of the findings of two Inquiry Officers, we feel that it is not a fit case for revoking the licence and depriving of the Appellants of their means of livelihood……"

17. In **Ashiana Cargo Services Vs. Commissioner of Customs, 2014 (302) ELT 161,** the Delhi High Court dealt with the issue of proportionality of the penalty to be awarded to the CHA under the Regulations and observed that revocation is justified only in case of aggravating factors that allow infraction to be levelled as grave and though it is not possible to make exhaustive list of such aggravating factors, precedent cases show that revocation of license has been upheld, where there was element of active facilitation of infraction, i .e. finding of mens-rea or a gross and flagrant violation of CHA Regulations. In the present case also we do not find that the appellant had any knowledge that illegal exports were attempted or there was any active or passive facilitation on the part of the appellant. There was no finding of any mala fide on the part of CHA such that trust operating between CHA and customs authorities was violated or irritably lost for future operation of the license. We may also take note of a later decision in **Exim Cargo Service Vs. Commissioner of Customs (General) – 2019 (368) ELT 1024** where the High Court of Delhi set aside the revocation of license on the ground that there is no

corroborative evidence or statement of anybody that CHA had information, knowledge, or connived in alleged forgery of invoices, mis-declaration and undervaluation.

18. In view of the various pronouncements, we do not find any merit in the appeal filed by the department and the impugned order is thereby upheld. Accordingly, the department's appeal is dismissed.

(Pronounced in open Court on 2nd February, 2024)

(Binu Tamta*)*
Member (Judicial)

(P.V. Subba Rao)
Member (Technical)

RM

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH-COURT NO. 1

Customs Appeal No. 50863 of 2020

[Arising out of Order-in-Original No. 31/MK/REVOCATION/POLICY dated 26.06.2020 passed by the Commissioner of Customs (Airport & General, New Delhi]

M/s Perfect Cargo and Logistics **Appellant**
RZ-3285, Gali No. 37, Tughlakabad Extn,
New Delhi-110019

Versus

Commissioner of Customs (Airport & General) **Respondent**
New Customs House, Near IGI Airport
New Delhi-110037

Appearance

Shri Alok Aggarwal and Shri Shubham Tyagi, Advocates for the Appellant
Shri Rakesh Kumar, Authorised Representative for the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing : December 10, 2020
Date of Decision : December 17, 2020

FINAL ORDER NO. 51641/2020

JUSTICE DILIP GUPTA

1. M/s Perfect Cargo and Logistics[1] has filed this appeal for setting aside the order dated June 26, 2020 passed by the Commissioner of Customs (Airport and General)[2], by which the Customs Broker Licence[3] of the Appellant which was valid up to November 07, 2027

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1 the Appellant
2 the Commissioner
3 the Licence

has been revoked. The order also forfeits the security deposit of Rs. 5 lakhs and imposes penalty of Rs. 50,000/-.

2. The records indicate that the Deputy Director, DRI, DZU, New Delhi, by a letter dated September 03, 2019, informed the office of the Commissioner that the Appellant had undertaken customs clearance for export of goods of two firms, namely, M/s Impex Trading and M/s Global Trading, without verifying the existence of the exporters and without even meeting the partners of the said firms and investigation also revealed that the said firms and their partners did not exist at the addresses given in their Import Export Code/ Bank Accounts and that the Bank Realisation Certificates were not received against the exports made by them. The investigation report and copies of the statement of Virdender Kumar Saraswat, a G-Card holder of the Appellant, were forwarded to the office of the Commissioner for action under the provisions of the Customs Brokers Licensing Regulations, 2018[4].

3. It, therefore, appeared to the Department that the Appellant had failed to comply with the provisions of Regulations 10(a), 10(d), 10(e), 10(n) and 13(12) of the Licensing Regulations and so action could be taken under the Licensing Regulations, including revocation of license, forfeiture of part or whole of security and imposition of penalty. The Deputy Commissioner in the office of the Commissioner of Custom (Airport & General) was appointed as the Inquiry Officer. Thereafter, a show cause notice dated December 03, 2019 was issued to the Appellant requiring the Appellant to show cause as to why it should not be held responsible for contravention of the aforesaid

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4 the Licensing Regulations

provisions of the Licensing Regulations and why the Licence should not be revoked and part or whole of the security submitted at the time of issue of the License be not forfeited. The Appellant was also asked to show cause as to why penalty should not be imposed in terms of Regulation 18 read with Regulation 17 of the Licensing Regulations.

4. The Appellant, by a letter dated January 02, 2020, submitted a detailed reply stating, inter alia,:

(i) The Appellant and the G-Card holder had before filing the shipping bill, fulfilled the "know your customer"[5] norms by asking for the documents mentioned in Regulation 10 (n). The partnership deeds, service tax registration, voter cards, PAN card and Importer Exporter Code were submitted and the addresses of the firms were available in the Importer Exporter Code Certificates.

(ii) Though the G-Card holder had not personally met all the partners of the exporting firms, but as per the practice he had met the representative of the exporting firms for taking the authorisation letters and also documents including export documents, as required by KYC norms, on the basis of which the shipping bills were filed. Copies of the authorisation letter and various emails and KYC documents were also enclosed with the reply.

(iii) It was not the duty of the Appellant to verify the addresses of the exporters by personally visiting the

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5. KYC

addresses given in the export documents or in the Importer Exporter Code or in the registration certificates.

(iv) Evidence of over valuation was not in the knowledge of the Appellant and hence there was no question of advising the client. As per the practice, the address and verification of the Importer Exporter Code number, GST number and identity of the client are done by taking all the KYC norm documents prescribed in Circular No. 9 of 2010 dated April 8, 2010. The bank verifies the correctness of the address of the exporters by following the KYC norms verification. Hence, it is not correct to allege that the Appellant had violated Regulation 10(e) of the Licensing Regulations. The Appellant had exercised proper supervision over the conduct of the G-Card holder and the G-Card holder had also discharged his duty as per the Licensing Regulations. There was no act or omission on the part of the G-Card holder.

(v) There was, therefore, no violation of Regulations 10(a), 10(d), 10(e), 10(n) and 13 (12) of the Licensing Regulations.

(vi) Case laws in support of the contentions raised in the reply were referred to.

5. The reply filed by the Appellant, however, did not find favour of the Commissioner, who by order dated June 26, 2020 revoked the Licence of the Appellant by exercising powers under Regulation 14 of the Licensing Regulations.

6. The Appellant has submitted a chart that contains the Regulation of which violation has been alleged, the ingredient of the Regulation, the finding of the Commissioner and the submissions of the Appellant. The same are contained in the following Table:

Regulation invoked	**Ingredient of the Regulation**	**Finding of Commissioner**	**Submissions of the Appellant**
10(a)	Obtain authorization from the company which has employed the Customs Broker	Find it unconceivable that there can be a true authorisation from a firm which does not physically exist.	Copies of the authorisation letters dated January 04, 2017 and January 07, 2017 of the two firms were submitted, as is clear from page 56 of the order.
10(d) and 10(e)	Advice the client to comply with the provisions of the Act and the Regulations. Exercise due diligence to ascertain the correctness of any information which he imparts to a client.	The firm in question was proved to be non-existing and, therefore, there is no question of advising his client to comply with provisions of the Act. Customs Broker has failed to exercise due diligence to ascertain the correctness of the information which he furnished for the said firm since he never visited the two firms nor met any of the partners.	Due diligence does not include physical verification. As per practice IEC number, GST number and identity of clients has been done by taking all KYC norm documents prescribed in Circular 09/2010.
10(n)	Verify correctness of IEC, GSTIN, identity of his client and functioning of his client at the declared address by using reliable independent authentic documents data or information	The Customs Broker provided partnership deed but failed to produce any of the documents listed in the Annexure to the Circular. Customs Broker was bound to verify the existence of the importer/exporter at the declared address.	Partnership deed, ST registration, PAN card, IEC code, Voter Card, Electricity Bill, Rent Agreement, Banks Details & Mobile Number of the partner and e-mail ID were submitted. At page 59 of the order it is mentioned that in reply to show cause notice, the Customs Broker submitted Partnership deed, ST registration, Voter ID, PAN, IEC and

			during proceedings submitted self attested copy of same, but in the very next paragraph it is stated that Customs Broker had not provided any document except Partnership deed. Thus, the allegation is self-contradictory and unsustainable.
13(12)	Customs Broker shall exercise such supervision as may be necessary to ensure proper conduct of his employee in the transaction of business and he shall be held responsible for all acts or omissions of his employees during employment.	Had the Customs Broker exercised proper supervision on the functioning of his G-Card employee, the fictitious exporting firms would have not succeeded in exporting overvalued goods.	There has been no act or omission by employee since he acted in accordance with Board Circular 09/2010 and exercised due diligence by procuring all independent authentic documents in accordance with the Licensing Regulations.

7. Shri Alok Agarwal, learned Counsel for the Appellant made the following submissions:

(i) The Appellant was issued the Licence 20 years back. The Department started investigation in 2017 against various exporters of readymade garments and during investigation it was found that five exports pertained to the Appellant. In the show cause notice dated December 3, 2019 issued to the Appellant, it was mentioned that two exporters, namely, M/s Impex Trading and Global Trading were not available at the address provided in the KYC documents. The Department visited the address for physical verification after a long gap of 18 months and it appeared that the exporters in order to avoid the investigation abandoned the given address.

(ii) The Appellant had followed all the provisions of the Licensing Regulations and infact had duly carried out the KYC procedure norms provided for in the Licensing Regulations and the Board Circular dated April 08, 2010;

(iii) The Appellant had no reason to doubt the veracity of the facts mentioned in the KYC documents as the same had been issued by the Government of India. All these documents were submitted by the Appellant to the Investigation Agency;

(iv) There was no violation of Regulations 10(a), 10(d), 10 (e), 10(n) and 13 (12) of the Licensing Regulations. Copies of the authorisation letters had been submitted as also the Importer Exporter Code number and GST number. The identity of clients was established by the KYC documents. The Appellant also submitted the partnership deed, service tax registration, PAN card, electricity bill, rent agreements, bank details and mobile number of the partners and email id. Due diligence as per the practice was undertaken by the Appellant. There was also no act or omission on the part of the G-Card holder since he acted in accordance with the Board Circular and exercised due diligence by procuring all the documents in accordance with the Regulations;

(v) The duty of a Customs Broker is confined to obtaining the relevant KYC documents and he cannot be held responsible for not physically verifying the address of the exporter, as has been observed by the Tribunal in various decisions; and

(vi) In support of the submissions, learned counsel for the Appellant placed reliance on the following decisions:

(a) Kunal Travels (Cargo) vs. CC (I & G), IGI Airport, New Delhi[6].

(b) Commissioner of Customs vs. Shiva Khurana[7].

(c) Nimesh Suchde vs. Commissioner of Customs, Nhava Sheva[8]

(d) Setwin Shipping Agency vs. Commissioner of Cus. (General), Mumbai[9]

8. Shri Rakesh Kumar, learned Authorised Representative of the Department, however, supported the order and made the following submissions:

(i) The Appellant had done customs clearance of goods for two firms M/s Impex Trading and M/s Global Trading without even verifying the existence of the exporters. Investigations revealed that the two firms were non-existent at the address given in the Importer Exporter Code/ Bank Accounts and no Bank Realisation Certificates were received against the exports made by them;

(ii) Statements made by Vivek Kumar, a G-card holder of the Appellant, on January 28, 2017 and March 29, 2019 support the case of the Department;

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6. 2017 (354) ELT 447 (Del.)
7. 2019 (267) ELT 550 (Del.)
8. 2007 (209) ELT 276 (Tri.-Mumbai)
9. 2010 (250) ELT 141 (Tri.-Mumbai)

(iii) The exporters never responded to the summons and the letters addressed to them returned with a note that the exporters or the firm have not been found at the address;

(iv) Proper authorisation was not obtained as per Regulation 10 (a) and so the question of exercising due diligence under Regulation 10(e) and advising the client to adhere to the provisions of the Act and the Regulations, as contemplated under Regulation 10 (d), does not arise;

(v) Regulation 10 (n), which requires the Customs Broker to verify the genuineness of documents, has also not been followed;

(vi) Regulation 13 (12), which requires the Customs Broker to exercise such supervision as may be necessary to ensure proper conduct of his employees in the transaction of business, has also not been followed; and

(vii) In support of the submissions, reliance has been placed on the following decisions:

(a) Millenium Express Cargo Pvt Ltd. vs. Commr. of Cus., New Delhi[10].

(b) HLPL Global Logistics Pvt. Ltd. vs. Commr. of Cus. (Airport & Admn.), Kolkata[11]

(c) Bhaskar Logistic Services Pvt Ltd. vs. Union of India[12].

(d) Multi Wings Clearing & Forwaring P. Ltd. vs. C.C. (General), New Delhi[13].

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10. 2017 (346) ELT 471 (Tri.-Del.)
11. 2019 (370) ELT 501 (Tri.-Del.)
12. 2016 (340) ELT 17 (Pat.)
13. 2019 (369) ELT 820 (Tri.-Del.)

9. The submissions advanced by the learned Counsel for the Appellant and the learned Authorised Representative of the Department have been considered.

10. The License was issued to the Appellant about 20 years back. The Appellant, as a holder of the License, had done customs clearance for firms. The Department had started investigation in 2017 in respect of various exports of readymade garments and during this investigation it was found that five of such exports pertained to the Appellant. According to the show cause notice dated December 03, 2019 that was issued to the Appellant, of the five exporters, two exporters, namely, M/s Impex Trading and Global Trading were not available at the address mentioned in the KYC documents. The Appellant claims that the officers of the Department visited the address provided by these two firms after a long period of about 18 months.

11. The show cause notice alleges violation of Regulations 10 (a), (d), (e), (n) and 13 (12) of the Licensing Regulations. They are reproduced:

> **"10. Obligations of Customs Broker**.-A Customs Broker shall-
>
> > **(a)** obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commission of Customs, as the case may be;
> >
> > **(d)** advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall being the matter to the notice of the Deputy Commissioner of

Customs or Assistant Commissioner of Customs, as the case may be;

(e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;

(n) verify correctness of Importer Exporter Code (IEC) number, Goods and Service Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;

13. Engagement or employment of persons-

(12) The Customs Broker shall exercise such supervision as may be necessary to ensure proper conduct of his employees in the transaction of business and he shall be held responsible for all acts or omissions of his employees during their employment."

12. The Appellant, in his defence referred to a Circular dated April 08, 2010 issued by the Central Board of Excise and Customs, New Delhi. The relevant clarification relating to Know Your Customer (KYC) norms for identification of clients by Customs House Agents in the said Circular is reproduced below:

CIRCULAR DATED 08-04-2010

"(iv) Know Your Customer (KYC) norms for identification of clients by CHA's:

6. In the context of increasing number of offences involving various modus-operandi such as misuse of export promotion schemes, fraudulent availment of export incentives and duty evasion by bogus IEC holders etc., it has been decided by the Board to put in place the "Know Your Customer (KYC)" guidelines for CHA's so that they are not used intentionally or unintentionally by importers/exporters who indulge in fraudulent activities. Accordingly, Regulation 13 of CHALR, 2004, has been suitably amended to provide that certain obligations on the CHAs to verify the antecedent, correctness of import export code Number, identity of his client and the functioning of his client in the declared address by using reliable, independent, authentic documents, data or

information. In this regard, a detailed guideline on the list of documents to be verified and obtained from the client/ customer is enclosed in the Annexure. **It would also be obligatory for the client/ customer to furnish to the CHA, a photograph of himself/herself in the case of an individual and those of the authorised signatory in respect of other forms of organisation such as company/trust etc., and any two of the listed documents in the annexure."**

(emphasis supplied)

13. The relevant portion of the Annexure of the said Circular containing the features to be verified and the documents to be obtained from the client/ customers in relation to Partnership Firms is reproduced below:

Client/Customer identification Procedure

Features to be verified and documents to be obtained from clients/ customers

S No.	Form of organisation	Features to be verified	Documents to be obtained
1.	Partnership firm	(i) legal name (ii) Permanent address, in full, complete and correct. (iii) Name of all partners and their addresses, in full complete and correct. (iv) Telephone, fax number, e-mail address of the firm and partners	(i) Registration certificate ,if registered (ii) Partnership deed (iii) Power of Attorney granted to a partner or an employee of the firm to transact business on its behalf. (iv) Any officially valid document identifying the partners and the person holding the Power of Attorney and their addresses (v) Telephone bill in the name of firm/partners

14. The Commissioner, before examining the violation of the various provisions of the Regulations, examined whether the two firms existed and in this context observed that these two firms 'were non-existing'. The observations are as follows:

> "25. **I observe that the investigations conducted by DRI have revealed that the two firms in the name & style of M/s Impex Trading and M/s Global Trading, having same partners, were found non-existing. None of the partners of the said firm were available at their addresses given in the documents and the said two firms were also not found operating at their address as given in the IEC/ Bank Account.** The Summons issued to the said two firms as well summons issued to the stated partners of the said firms were returned undelivered by the postal authorities. Physical verification of the given addresses were also done and it was found that no such firms existed at the said given addresses. No BRC was received against the exports made in the name of the said two firms. I further observed that at no place or time during the course of investigation or in their defense submissions before the Inquiry Officer or in the court of proceedings in this office, the CB has ever asserted that M/s Impex Trading and M/s Global Trading the two firms for whom he has been doing customs clearance do really exist, nor the CB has controverted the allegation of non-existence of the said firms and thus he has admitted the fact on non-existence of the said two firms. **Thus, I find that non-existence of the said two firms M/s Impex Trading and M/s Global Trading is a true and is an undisputed fact**."
>
> **(emphasis supplied)**

15. Each violation of the Regulation alleged in the show cause notice shall be taken up separately.

10 (a) of the Licensing Regulations

16. Regulation 10(a) deals with obligations of Customs Broker and provides that the Customs Broker shall obtain an authorisation letter from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs. The Commissioner has recorded the following finding in regard to violation of Regulation 10 (a):

> "In this regard, agreeing with report of the inquiry officer, and as already discussed by me in the foregoing part, I find that it has been conclusively proved by ample of evidence that the two firms in the name & style of M/s Impex Trading and M/s Global Trading, were found non-existing. The CB has also at no stage of proceedings contradicted or controverted the alleged fact that the said firms are non-existing. I further notice that the CB has submitted the copy of the authorization in respect of M/s Global Trading dated 04/01/2017 and M/s Impex Trading dated 07/01/2017 before the inquiry officer. **I find it unconceivable that there can be a true authorisation from a firm which does not physically exist at the ground. The authorisation produced by the CB itself loses it credibility in law when the firm whose authorisation it claims to be, it non-existing.** Thus, I concur with the findings of the IO and **hold that the CB has failed to comply with Regulation 10(a) of the CBLR, 2018."**
>
> **(emphasis supplied)**

17. The contention of the Appellant is that the authorisation letter dated January 04, 2017 issued by M/s Global Trading and the authorisation letter dated January 07, 2017 issued by M/s Impex Trading had been submitted by the Appellant. The Commissioner has noted that these two authorisation letters were submitted, but he has observed that Regulation 10(a) was not complied with since the authorisation letters produced by the Customs Broker would have no credibility in law as the firms did not exist.

18. This conclusion drawn by the Commissioner is clearly erroneous. The Regulation requires the Customs Broker to obtain an authorisation, which the Appellant did. It is not the case of the Department that the signatures on the authorisation letter were forged or that the persons authorising the Appellant denied having given the authority letters. This apart, the Appellant also claims that due diligence was carried out for ascertaining the functioning of the

clients at the address declared by the clients and in this connection the partnership deed as well as service tax registration, PAN card, Import Export Code, voter card, electricity bill, bank details and mobile number of the partners with email id were also examined. The Commissioner, therefore, committed an illegality in holding that Regulation 10(a) of the Licensing Regulations had been violated.

10(d) and 10 (e) of the Licensing Regulations

19. These two Regulations were taken up together by the Commissioner. Regulation 10(d) requires a Customs Broker to advice his client to comply with the provisions of the Act and the Rules and Regulations. Regulation 10(e) requires a Customs Broker to exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage.

20. The Commissioner has placed much emphasis on the statements made by Virender Kumar Saraswat, who is a G-Card holder. The Commissioner noted that he had made a statement that he had never visited the firms nor he had met any of the partners of the said firms and that it was Shashank Sharma who used to meet the G-Card holder on behalf of the two firms to hand over the papers. Emphasis has been also placed on his statement that he had asked Shashank Sharma for verification of the two firms. The Commissioner, therefore, concluded that the Customs Broker and his G-Card holder were conscious of the fact that the two firms, for whom they were making customs clearance, were fictitious or non-existing. After having so noted, the Commissioner made the following observations:

> **"I, therefore, hold that the CB has failed to exercise due diligence to ascertain the correctness of any information which he furnished for the said firms. Further, as the firms in question were proved to be non-existing there is no question of advising his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof and the CB has definitely failed to do so.** I have gone through the submissions of the CB in this regard and find no force in his submissions in view of the above. I observed that the inquiry officer too in his report has observed that the case has to be analysed in the totality of circumstances and he ultimately concluded that CB has contravened the provisions of 10(d) & 10(e) of the CBLR, 2018.
>
> **Thus, I concur with the finding of the IO that the CB has violated the provisions of 10(d) and 10(e) of the CBLR, 2018 (erstwhile Regulation 11(d) and 11(e) of the CBLR, 2013)."**
>
> **(emphasis supplied)**

21. Learned Counsel for the Appellant submitted that due diligence does not mean actual physical verification. In fact, the practice always has been to verify the correctness of the information provided by examining the KYC documents prescribed in the Circular dated April 08, 2010.

22. Paragraph 6 of the Circular provides for certain obligations on the Customs Broker to verify the correctness of Import/Export Code Number, identity and functioning of the client at the declared address by using reliable, independent, authentic documents, data or information. For this purpose, detailed guidelines on the features to be verified and obtained from the clients have been provided in the Annexure to the Circular. It has also been mentioned in the Circular that it would be obligatory for the client/customer to furnish a photograph in the case of an individual and those of the authorised

signatory in respect of other forms of organisations, such as company/trusts and any two of the listed documents mentioned in the Annexure.

23. The Annexure to the Circular, in the case of a partnership firm, requires certain features to be verified and documents to be obtained. The features to be verified are as follows:

(i) legal name

(ii) Permanent address, in full, complete and correct.

(iii) Name of all partners and their addresses in full and correct.

(iv) Telephone, fax number, e-mail address of the firm and partners.

24. The documents to be obtained are as follow:

(i) Registration certificate, if registered

(ii) Partnership deed

(iii) Power of Attorney granted to a partner or an employee of the firm to transact business on its behalf.

(iv) Any officially valid document identifying the partners and the person holding the Power of Attorney and their addresses

(v) Telephone bill in the name of firm/partners.

25. Out of the documents listed in the Annexure to the Circular, only two documents have to be obtained. The Appellant did obtain two documents. Neither the Circular nor the Annexure requires any physical verification of the premises. It is not the case of the Department that the documents that had been obtained were forged documents. The reply submitted by the Appellant has not been discussed at all nor any reason has been assigned as to why these documents could not be considered. The Commissioner appeared to have been swayed by the fact that the two firms did not exist at the

addresses provided and so the documents cannot be relied upon. It needs to be noted that this verification of the address was undertaken by the Department after 18 months.

26. The provisions of Regulation 10(e) of the Licensing Regulations were examined at length by the Delhi High Court in **Kunal Travels** and the relevant observation are as follows:

> **"12.**Clause (e) of the aforesaid Regulation requires exercise of due diligence by the CHA regarding such information which he may give to his client with reference to any work related to clearance of cargo. Clause (l) requires that all documents submitted, such as bills of entry and shipping bills delivered etc. reflect the name of the importer/exporter and the name of the CHA prominently at the top of such documents. **The aforesaid clauses do not obligate the CHA to look into such information which may be made available to it from the exporter/importer. The CHA is not an inspector to weigh the genuineness of the transaction. It is a**
>
> **processing agent of documents with respect to clearance of goods through customs house and in that process only such authorized personnel of the CHA can enter the customs house area. What is noteworthy is that the IE Code of the exporter M/s. H.M. Impex was mentioned in the shipping bills, this itself reflects that before the grant of said IE Code, the background check of the said importer/exporter had been undertaken by the customs authorities, therefore, there was no doubt about the identity of the said exporter.** It would be far too onerous to expect the CHA to inquire into and verify the genuineness of the IE Code given to it by a client for each import/export transaction. When such code is mentioned, there is a presumption that an appropriate background check in this regard i.e. KYC etc. would have been done by the customs authorities. **There is nothing on record to show that the appellant had knowledge that the goods mentioned in the shipping bills did not reflect the truth of the consignment sought to be exported.** In the absence of such knowledge, there cannot be any mens rea attributed to the appellant or its proprietor. Whatever may be the value of the goods, in the present case, simply because upon inspection of the goods they did not corroborate with what was declared in the shipping bills, cannot be deemed as misdeclaration by the CHA because

> the said document was filed on the basis of information provided to it by M/s. H.M. Impex, which had already been granted an IE Code by the DGFT. **The grant of the IE Code presupposes a verification of facts etc. made in such application with respect to the concern or entity. If the grant of such IE Code to a non-existent entity at the address WZ-156, Madipur, New Delhi - 63 is in doubt, then for such erroneous grant of the IE Code, the appellant cannot be faulted. The IE Code is the proof of *locus standi* of the exporter. The CHA is not expected to do a background check of the exporter/client who approaches it for facilitation services in export and imports. Regulation 13(e) of the CHALR, 2004 requires the CHA to : "exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage"** (emphasis supplied). The CHAs due diligence is for information that he may give to its client and not necessarily to do a background check of either the client or of the consignment. Documents prepared or filed by a CHA are on the basis of instructions/documents received from its client/importer/exporter. Furnishing of wrong or incorrect information cannot be attributed to the CHA if it was innocently filed in the belief and faith that its client has furnished correct information and veritable documents. The misdeclaration would be attributable to the client if wrong information were deliberately supplied to the CHA. Hence there could be no guilt, wrong, fault or penalty on the appellant apropos the contents of the shipping bills. Apropos any doubt about the issuance of the IE Code to M/s. H.S. Impex, it was for the respondents to take appropriate action. Furthermore, the inquiry report revealed that there was no delay in processing the documents by the appellant under Regulation 13(n)."
>
> **(emphasis supplied)**

27. It is clear from the aforesaid decision of the Delhi High Court that there is no obligation on the Customs House Agent to look into the information made available by the exporter/exporter. The Customs House Agent is merely a processing agent of documents with respect to clearance of goods through Customs House and he is not an inspector to weigh the genuineness of the transaction. When the Importer/Exporter Code Number was provided and before this code was issued a background check of the said importer/exporter is

undertaken by the Customs Authority, there should be no doubt about the identity of the said exporter. It would be too onerous to expect a Customs House Agent to inquire into what is stated in the documents when there is a presumption that an appropriate background check is done by the Customs Authorities. In fact, the grant of Importer/Exporter Code Number is a proof regarding verification of facts and if the grant of such a code number to an entity at the address mentioned is in doubt, then for such erroneous grant of the Importer/Exporter Code Number, the Appellant cannot be faulted.

28. The Appellant has also stated that the Service Tax Registration Certificate, Voter Card, PAN Card of partners, the Importer Exporter Code Number and Rent Agreement were submitted and in this connection has pointed out that for issuance of these documents the following documents are required :

S. No.	Document Submitted	Document required for issuance
1.	Service Tax Registration Certificate	Self-attested copy of the following documents: 1 Copy of the PAN Card of the proprietor/partners 2. Photograph and proof of identity (<u>any one</u> out of below list) of the person filling the application : - PAN Card - Passport - Voter Identity Card - Aadhar Card - Driving license - Any other Photo-identity card issued by the Central Government, State Government. 3. Document to establish possession of the premises to be registered such as proof of ownership, lease or rent agreement, allotment letter from Government, or No Objection Certificate from the legal owner. 4. Details of the main Bank Account 5. Memorandum/Articles of Association/List of Directors 6. Authorisation by the Board of Directors/Partners/Proprietor for the person filing the application. 7. Business transaction numbers obtained from other Government departments or agencies such as Customs Registration No. (BIN No.), Import Export Code (IEC) number, State Sales Tax Number (VAT), Central Sales Tax Number,

		Company Index Number (CIN) which have been issued prior to the filing of the service tax registration application.
2.	PAN Card of Partners/Partnership Firm	1 Copy of certificate of registration issued by Registrar of firms of Copy of Partnership Deed duly notarized by Notary in India which works as proof of the firm's existence along with PAN Card from 49A. 2 Address Proof of firm – If the registered office place is rented, rent agreement andone utility bill (electricity bill, water bill, property tax bill, gas receipt etc.) have to be submitted. Also, NOC from landlord is also submitted. 3 PAN card of partners – All partners are required to submit their PAN number as identity proof. 4 Address proof of partners – Partners can submit any one of the documents – Aadhar Card, Driving License, passport or Voter ID card as address proof. Name and other details on address proof should match PAN card details.
3.	IEC Code	1.Firm's copy of PAN Card 2.Firm's cancel cheque copy of current bank account 3. Copy of Rent Agreement or Electricity Bill of the premise.
4.	Voter Card	Following documents are needed while applying for an election or voter ID card – 3 Address proof 2 Age proof 3 Passport size photographs For Address proof one may provide any of the following documents : -Mobile telephone bill -Land phone bill -Water bill -Electricity bill -Property tax receipt -Bank statement -Passport -Ration card -House Lease/Rental agreement -LPG receipt -Driving license -Identity cards given by the employer.
5.	Rent Agreement	1 Two passport size photos 2 Aadhar card 3 If the tenant is a company, then the person coming for the registration should bring a board resolution/authorization letter from the company mentioning the person's right to register the lease, along with the company seal. **<u>Note :</u> Rent Agreements are made on stamp papers and is signed in the presence of two witnesses who also sign the rent agreement.**

29. It transpires that for issuance of the aforesaid documents, a person has to make available number of authentic documents, most of

which are documents issued by the Government of India.

30. The Commissioner was, therefore, not justified in ignoring the documents provided by the Appellant. Reliance placed by the Commissioner on the statement made by Virender Kumar Saraswat is misplaced. As noted above, the verification is required to be undertaken on the basis of the documents and it is not possible to draw any inference from the said statement that he had any serious doubts about the existence of the firms. The findings that the Appellant had not followed the provisions of Regulations 10(d) and 10(e) of the Licensing Regulations is, therefore, erroneous.

10(n) of the Licensing Regulations

31. Regulation 10(n) requires the Customs Broker to verify the correctness of Importer/Exporter Code Number, Service Tax Identification Number, identity card of the client and functioning of the client at the declared address by using reliable, independent, authentic documents, data or information.

32. The Commissioner, after referring to the Board Circular dated April 08, 2010 and its Annexure, observed as follows:

> **"In this regard, the Inquiry Officer observed that to verify above said feature of partnership firm any two of the above said documents had to be obtained. In the instant case, CB has provided partnership deed. But CB has failed to provide any other document i.e. either registration certificate of partnership firm or Power of Attorney granted to a partner or an employee of the firm to transact business on its behalf or any officially valid document identifying the partners and the person holding the Power of Attorney and their addresses or Telephone bill in the name of firm/ Partners**. Further, the Inquiry Officer found from the statement

recorded on two occasions of Shri Virender Kumar Saraswat that he did not specifically mentioned that he obtained partnership deed from the exporting firms neither he forwarded any such deed to DRI through his mail whereas he forwarded other documents to the DRI on their mail. Therefore, the inquiry officer rightly held that the partnership deed produced during subject proceedings cannot be attributed as an authentic document as at this stage it cannot be verified simply because neither partner of the firm nor the firms are existent and traceable and concluded that CB that failed to produce any of the documents as listed in the above table and hence the contravened the provisions of Regulation 10(n) of CBLR, 2018 (read with erstwhile regulation 11(n) of CBLR, 2013). **Further, regarding the contention of the CB that it is not compulsory for CB to physically verify the existence of importer/ exporter, the inquiry officer found that CB is not required to physically verify the existence of the importer/ exporter at the declared address but CB is bound to verify the existence of importer/ exporter at the declared address as per the Regulation 10(n) of CBLR, 2018 as well as CBIC Circular No. 09/2010 by obtaining prescribed documents from their clients.** Further, the inquiry officer observed that CB has not checked the authenticity of the representative/ manager of export firm i.e. Shri Shashank Sharma and even CB has failed to obtained any authorisation in favour of Shri Shashank Sharma. **The inquiry officer found no merit in the submissions of the CB and concluded that the CB has violated provisions of the said Regulation 10(n). I have also gone through the submissions of the CB in this regard and find no force in his submissions in view of the above.**

In view of above, I concur with the observations of the IO and hold that the CB has violated provisions of the said Regulation 10(n) of CBLR, 2018."

(emphasis supplied)

33. The Delhi High Court in **Shiva Khurana** had an occasion to examine the provisions of Regulation 13(o) of the 2004 Regulations, which Regulation is similar to Regulation 10(n) of the Licensing Regulations, and the relevant observations are as follows :

> "7. This court is of the opinion that the impugned order is justified in the facts and circumstances of the case. The reference to the verification of "antecedents and correctness of Importer Exporter Code (IEC) Number" and the identity of the concerned exporter/importer, in the opinion of this Court is to be read in the context of the CHA's duty as a mere agent rather than as a Revenue official who is empowered to investigate and enquire into the veracity of the statement made orally or in a document. If one interprets Regulation 13(o) reasonably in the light of what the CHA is expected to do, in the normal course, the duty cast is merely to satisfy itself as to whether the importer or exporter in fact is reflected in the list of the authorized exporters or importers and possesses the Importer Exporter Code (IEC) Number. As to whether in reality, such exporters in the given case exist or have shifted or are irregular in their dealings in any manner (in relation to the particular transaction of export), can hardly be the subject matter of "due diligence" expected of such agent unless there are any factors which ought to have alerted it to make further inquiry. There is nothing in the Regulations nor in the Customs Act which can cast such a higher responsibility as are sought to be urged by the Revenue. In other words, in the absence of any indication that the CHA concerned was complicit in the facts of a particular case, it cannot ordinarily be held liable."

34. The basic requirement of Regulation 10 (n) is that the Customs Broker should verify the identity of the client and functioning of the client at the declared address by using, reliable, independent, authentic documents, data or information. For this purpose, a detailed guideline on the list of documents to be verified and obtained from the client is contained in the Annexure to the Circular dated April 8, 2010. It has also been mentioned in the aforesaid Circular that any of the two listed documents in the Annexure would suffice. The Commissioner noticed in the impugned order that any two documents could be obtained. The appellant had submitted two documents and this fact has also been stated in paragraph 27(a) of the order. It was obligatory on the part of the Commissioner to have mentioned the documents and discussed the same but all that has been stated in the impugned order is that having gone through the submissions of the Customs Broker, it is found that there is no force in the submissions.

The finding recorded by the Commissioner that the required documents were not submitted is, therefore, factually incorrect.

35. The Commissioner, therefore, committed an error in holding that the appellant failed to ensure due compliance of the provisions of Regulations 10(n) of the Licensing Regulations.

13 (12) of the Licensing Regulations

36. This Regulation provides that the Customs Broker shall exercise such supervision as may be necessary to ensure proper conduct of his employees in the transaction of business and he will be held responsible for all acts and omissions of his employees during their employment.

37. The Commissioner has made the following observations to conclude that the provisions of Regulations 13(12) of the Licensing Regulations have not been complied with:

> "I find that the Inquiry Officer in his report after considering the submissions of the CB observed that the CB has failed to explain in what manner he used to supervise the functioning of this employee. The Inquiry Officer also found from the statement dated 28.01.2017 of Sh. Virender Kumar Saraswat that he had oral understanding with CB firm and all the export papers/shipping bills of CB at Delhi Air Cargo filed by him. He also stated that he was in charate of overall supervision of all the exports made through the firm M/s Perfect Logicare Private Limited. Further, the Inquiry Officer found that he stated that he joined CB firm in 2008 and till now he had been working with the CB firm. The Inquiry Officer rightly observed from the statement of Sh. Virender Kumar Saraswar that he is overall in charge of the CB firm at Delhi. CB has failed to explain in what manner he used to supervise the functioning of his G-Card employee. It was the responsibility of CB to ascertain from his G-Card holder that nature of documents that he obtained from his clients for KYC purpose are legally valid. But the CB has failed to do the same. Had the CB exercised his proper supervision on the functioning of his G-Card employee, the fictitious exporting firms would have not succeeded in exporting the overvalued goods with intention to avail ineligible drawback. The Inquiry Officer found no merit in the contentions of CB and concluded that CB has contravened the provisions of Regulation 13(12) of CBLR, 2018 {read with erstwhile regulation 17(9) of CBLR, 2013}

In view of the above, I concur with the observations of the IO and hold that the CB has violated provisions of the said Regulation 13(12) of CBLR, 2018 {read with erstwhile regulation 17(9) of CBLR, 2013}."

(emphasis supplied)

38. The contention of the appellant is that the G-Card holder acted strictly in accordance with the guidelines issued in the Circular dated April 8, 2010. According to the appellant, the G-Card holder exercised due diligence by procuring all independent and authentic documents.

39. As noticed above, if the documents that were submitted to the G-Card holder, prima-facie appeared to be authentic, there was no reason for the G-Card holder to verify the contents of the documents. The grant of an Importer Exporter Code number was held by the Delhi High Court in **Kunal Travels** to pre-suppose verification of facts. The decision rendered by the Tribunal in **Millenium Express** does not help the Department in view of the judgments of the Delhi High Court in **Kunal Travels** and **Shiva Khurana.** The decision of the Tribunal in **HLPL Global Logistics** would not be applicable in the present case since this decision relates to violation of the provisions section 114 of the Customs Act, 1962 and not the Licensing Regulations. The decision of the Patna High Court in **Bhaskar Logistic** also does not help the Department. The misuse of Importer and Exporter Code had been detected in the case. The decision of the Tribunal in **Multi Wings** does not also help the Department as it was found as a fact that the KYC documents were not available with the assessee at the time of visit of the Investigating Agency.

40. It also needs to be noted that the statement of the Customs Broker in the present case was not recorded and only the statement of

his G-Card holder was recorded by the Investigating Agency. It was necessary to record the statement of the Customs Broker as allegations have been made against the Customs Broker. This fact has also been noticed by the Tribunal in **G.M. Enterprises** vs. **Commissioner of Cus. (Export), Nhava Sheva**[14]**.**

41. The inevitable conclusion, therefore, that follows is that the Commissioner was not justified in revoking the License of the appellant or forfeiting the security deposit or imposing penalty.

42. Thus, for all the reasons stated above, it is not possible to sustain the impugned order dated June 26, 2020 passed by the Commissioner. It is, accordingly, set aside and the appeal is **allowed**.

(Pronounced on **December 17, 2020**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Tejo/Babita

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14 2010 (262) ELT 796 (Tri. Mumbai)

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH,COURT NO. 3

CUSTOMS APPEAL NO. 51471 OF 2022

[Arising out of Order-in -Original 19/MK/Policy/2021 dated 10.03.2021 passed by the Commissioner of Customs (Airport), New Delhi]

FRIENDS CARGO SERVICES
B-16, Oriental Apartments
Plot No.50, Sector 9,
Rohini, Delhi 110085. **APPELLANT**

Vs.

COMMISSIONER OF CUSTOMS ,
(Airport & General),
NCH, IGI, Airport,
New Delhi **RESPONDENT**

Appearance:
Present for the Appellant : Shri G S Arora, Advocate
Present for the Respondent: Shri Nagender Yadav, Authorised Representative

CORAM:

HON'BLE Ms.BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE Ms.HEMAMBIKA R. PRIYA, MEMBER(TECHNICAL)

Date of Hearing : **22/11/2023**
Date of Decision : **13/02/2024**

FINAL ORDER No. 50241 /2024

PER HEMAMBIKA R PRIYA

The present appeal has been filed against the Order-in -Original 19/MK/Policy/2021 dated 10.03.2021 passed by the Commissioner of Customs (Airport), New Delhi by M/s Friends Cargo (hereinafter referred to as the appellant) wherein the Customs Broker license was revoked, the security deposit was forfeited and penalty of Rs 50,000/- was imposed.

2. The brief facts are that the DGARM (Directorate General of Analytics and Risk Management), CBIC sent a communication identifying risky exporters involved in fraudulent IGST refunds,

who were not traceable, along with the details Customs Brokers involved in the clearance of the alleged risky consignments. It was noted that the appellant had handled the consignments of 15 risky exporters whose premises could not be verified physically or were untraceable. Based on the reports received, the jurisdictional Commissioner alleged that the appellant had violated the provisions of CBLR, 2018 by not following the KYC guidelines. The CB license was suspended and thereafter, the inquiry as mandated was conducted. The impugned order was passed ordering for revoking the license, forfeiture of deposit and imposition of penalty.

3. The learned Counsel for the appellant submitted that no relied upon documents such as the DGARM report was shared with the appellant, thereby violating the principles of natural justice. He contended that in the order in original, three exporters'physical verification report cited against the appellant are of M/s Samium Fabrication Private Limited, Grow Well Overseas and Shyam Traders. The verification report of these three exportersare not substantiated, nor stated in the show cause notice and there is no evidence that the three are in any way connected to the appellant as the appellant had not handled their consignments. The counsel further added that with the introduction of GST, no Shipping Bill can be processed without the valid GSTIN being mentioned on the Shipping Bill. As regards IGST refunds, he contended that the same are automatically credited to the account of the exporter which is registered via AD code with the Department, which also requires extensive

documentation. The mere non-traceability of the exporters in itself is no basis to assume that the exports were fraudulent and were not eligible for IGST refund. The learned counsel further submitted that there is no evidence in the SCN, Inquiry report or the impugned order to substantiate that the exports were incorrect or illegal, nor that there any error in the documentation.

4. The learned counsel further submitted that Regulation 10(n) of CBLR, 2018 mandates the CB to verify the identity of importer by way of independent documentation. In the present case the appellant cannot be held responsible for the exporters not being traceable as all necessary documents to ascertain the veracity of the exporter had been undertaken none of the documents is found to be false or forged. He contended that mere non-traceability of an exporter by itself does not lead to any conclusion that the appellant had violated the provisions of Regulation 10(n) of the CBLR 2018. He submitted that the appellant had taken all the necessary documents and conducted verification of the exporters based on documents, which has been held as valid in catena of judgements. The learned counsel went on to further submit that the department had also not adduced any evidence that the exporters of the appellant were not present at the address mentioned in the documents at the time of filing their shipping bills. There was no requirement under the CBLR, 2018 for a CB to make a visit to the business premises is on the exporter for verifying its functioning.

5. As regards the finding of the violation of Board’s circular, the learned counsel submitted that the subject circular was issued in

respect of the earlier regulations viz., Custom House Agents Licensing Regulations, 2004 and the same are no longer valid after the promulgation of CBLR, 2018. He also contended that Regulation 10(n) does not prescribe any particular document other than the IEC number and GSTIN. The CB has the freedom to ascertain the identity and functioning of its client by using any reliable, independent, authentic document, data or information, which was done by the appellant. He relied on the following decisions to support his contention:

(i) M/s Bright Clearing and Carrier Private Limited vs Commissioner of Customs (Airport & General) and M/s Star Carriers vs Commissioner of Customs, (Airport and General) [2022 (11) TMI 935 - CESTAT NEW DELHI]

(ii) Mauli Worldwide Logistics vs Commissioner of Customs, (Airport and General) [2022-TIOL-603-CESTAT-DEL]

6. While reiterating the findings of the adjudicating authority, the learned Authorised Representative submitted that the Tribunal in **M/s Baraskar Brothers vs Commissioner of Customs (General), Mumbai [2009(244) ELT 562]** had upheld that "there is no second opinion of the fact that the CHA is a very important component in the whole system of Customs Administration, which has a bearing on Customs revenue collection and national security. The CHAs cannot shy away from the responsibilities and obligations casted upon them by law". In this context, the learned Authorised Representative submitted that the appellant did not take the documents as prescribed in the annexure to the Board's circular wherein the CB, in case of a company, has to obtain Certificate of Incorporation, Memorandum of Association, Articles of Association, Power-of-Attorney granted

to its managers, PAN allotment letter, etc. However, the appellant had obtained only the IEC, Pan card, Aadhaar card, electricity bill, which were not as per the circular guidelines. The appellant had relied on Board's guidelines which were applicable to authorised courier companies, and not for others. He prayed that the appeal may be dismissed and the impugned order upheld.

7. We have heard the learned counsel for the appellant and the learned authorised representative for the Department. The issue relates to the appellant, who is a Customs Brokers [CB] whose license was revoked by the impugned order under Customs Brokers Licensing Regulations [CBLR], 2018 and the security deposits made by him was forfeited. Penalty was also imposed on the ground that the appellant had violated Regulation 10(n) of CBLR 2018.

8. The factual matrix is that the Directorate General of Analytics and Risk Management [DGARM] of the Central Board of Indirect Taxes and Customs [CBIC] analysed their data and identified risky exporters involved in fraudulent IGST refunds. The verification of the premises was carried out by the jurisdictional GST officers, wherein exporters who were not found available at their registered premises were identified as risky. DGARM also identified the Customs Brokers who had handled these exports by these exporters and informed the details to respective jurisdictional Commissionerate. Consequent to this DGARM intimation, Show Cause Notice was issued to the appellant and Inquiry officers was appointed. After considering the reply to the SCN and the inquiry report, the Commissioner has passed the

impugned order holding that the appellant had violated Regulation 10(n) of the CBLR.

9. In order to appreciate the arguments of the Learned Counsel and the Learned AR, we need to refer to Regulation 10 of CBLR, 2018 which reads as follows:

> "10. Obligations of Customs Broker.-A Customs Broker shall…
> (n) verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN),identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;

10. We note that the learned consultant for the appellant has submitted that this responsibility cast on the CB as per the above regulation is fulfilled if the Customs broker obtains at least two KYC documents. It is not the responsibility of the Customs Broker to physically inspect the premises of each of its clients to ensure that it is operating from that address. He submits that it is far too onerous for the Customs Broker to fulfil such a responsibility. We find that Regulation 10(n) requires the Customs Broker to verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN),identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information. This obligation essentially involves two step verification viz., the correctness of IEC number and the correctness of GSTIN and in addition, verify the identity and functioning of the client using reliable, independent, authentic documents, data or information. It is noted that IEC and GSTIN are issued by the Government

departments. Therefore, any verification would be based on the copies of these documents submitted by the client/exporter, which can be verified independently online in DGFT/GSTN portals. The Department cannot expect the appellant/CB to be responsible to ensure the correctness of the actions of the Government Department which have issued these certificates. Consequently, verification of certificates as part of the obligation under Regulation 10(n) on the Customs Broker stands satisfied as long as it satisfies itself that the IEC and the GSTIN were issued by the concerned officers. We note that same view was taken in a similar case by this Tribunal in its decision in **M/s Bright Clearing & Carrier Pvt Ltd., vs Commissioner of Customs(A&G) and Star Carriers vs Commissioner of Customs(A&G) [2022 (11) TMI 935 - CESTAT NEW DELHI]** has held as follows:

> *"7. Of the above, (a) and (b) require verification of the documents which are issued by the Government departments. The IEC number is issued by the Director General of Foreign Trade [DGFT] and the GSTIN is issued by the GST officers under the CBIC or by officers of the Government of India or under the Governments of State or Union territory. The question which arises is whether the Customs broker is required to satisfy itself that these documents or their copies given by the client were, indeed issued by the concerned government officers OR is the Customs Broker also required to ensure that the officers have correctly issued these documents. In our considered view, Regulation 10(n) of CBLR cannot be read to mean the latter as it would imply treating the Customs Broker as one who is competent and responsible to oversee and ensure the correctness of the actions by the Government officers. It would also mean that actions by the Customs Broker under the CBLR prevail over the actions by officers under the Foreign Trade (Development and Regulation) Act, 1992 (under which the IEC is issued by DGFT) and the Central Goods and Services Tax Act (or state GST Act) (under which the GSTIN is issued by the GST officers). In our view this is*

not a correct construction of the legal provision. Therefore, verification of certificates part of the obligation under Regulation 10(n) on the Customs Broker is fully satisfied as long as it satisfies itself that the IEC and the GSTIN were, indeed issued by the concerned officers. This can be done through online verification, comparing with the original documents, etc. and does not require an investigation into the documents by the Customs Broker. The presumption is that a certificate or registration issued by an officer or purported to have been issued by an officer correctly issued. Section 79 of the Evidence Act, 1872 requires even Courts to presume that every certificate which is purported to be issued by the Government officer to be genuine. It reads as follows:

79. Presumption as to genuineness of certified copies. The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorized thereto by the Central Government. Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

8. The onus on the Customs Broker cannot, therefore, extend to verifying that the officers have issued the certificate or registration correctly. It has been held by the High Court of Delhi in the case of Kunal Travels [2017 (3) TMI 1494- Delhi High Court] that "the CHA is not an inspector to weigh the genuineness of the transaction. It is a processing agent of documents with respect of clearance of goods through customs house and in that process only such authorized personnel of the CHA can enter the customs house area…….. It would be far too onerous to expect the CHA to inquire into and verify the genuineness of the IE code given to it by a client for each import/export transaction. When such code is mentioned, there is a presumption that an appropriate background check in this regard i.e., KYC, etc. would have been done by the customs authorities….." (emphasis supplied)."

Of course, if the Customs Broker comes to know that its client had obtained these certificates through fraud or

misrepresentation, nothing prevents it from bringing such details to the notice of Customs officers for their consideration and action as they deem fit. However, the Customs Broker cannot sit in judgment over the certificate or registration issued by a Government officer so long as it is valid. In these cases, there is no doubt or evidence that the IEC and the GSTIN were issued by the officers. So, there is no violation as far as the documents are concerned."

11. Regulation 10(n) requires the Customs Broker to verify the identity of the client using reliable, independent, authentic documents, data or information. In other words, he should know who the client is and the client cannot be some fictitious person. As per the Regulation, this identity can be established by independent, reliable, authentic: a) documents; b) data; or c) information. Any of these methods can be employed by the Customs Broker to verify the identity of its client. It is not necessary that the CB appellant has to only conduct a physical verification or launch an investigation. So long as the CB can find documents which are independent, reliable and authentic to establish the identity of his client, this obligation is fulfilled. In addition, under Regulation 10(n) the Customs Broker is required to verify the functioning of the client at the declared address using reliable, independent, authentic documents, data or information. This responsibility, again, can be fulfilled using documents or data or information so long as they are reliable, independent and authentic. Nothing in this clause requires the Customs Broker to physically go to the premises of the client to ensure that they are functioning at the premises. We find that both the GSTIN as well as the IEC indicates the address of the

client. This in itself is independent data to verify the correctness of the identity/address of the client. We also note that there is nothing on record to show that either of these documents were fake or forged. Therefore, once verification of the address is complete as discussed above, the responsibility cast on the appellant under Regulation 10(n) stands fulfilled. In this regard, we note that the Principal Bench of this Tribunal in the case of **M/s Mauli Worldwide Logistics vs Commissioner of Customs (A&G**) **[2022-TIOL-603-CESTAT-DEL]** held as follows:

> "31. The responsibility of the Customs Broker under Regulation 10(n) does not include keeping a continuous surveillance on the client to ensure that he continues to operate from that address and has not changed his operations. Therefore, once verification of the address is complete, as discussed in the above paragraph, if the client moves to a new premises and does not inform the authorities or does not get his documents amended, such act or omission of the client cannot be held against the Customs Broker.
>
> 32. We, therefore, find that the Customs Broker has not failed in discharging his responsibilities under Regulation 10(n). The impugned order is not correct in concluding that the Customs Broker has violated Regulation 10(n) because the exporters were found to not exist during subsequent verification by the officers."

12. We note that in a recent judgment of the High Court of Delhi in the case of **Naman Gupta vs Commissioner of Customs (A & G) dated 30.01.2024 in W.P. (C) 15808/2022** held as follows:

"20. It is thus evident from the legal position as enunciated in Kunal Travels (supra), Customs Broker is entitled to proceed on the basis that IEC has come to be generated in favour of the exporter after appropriate background check having been conducted by the customs authorities. The further details that may have been captured and form part of IEC Registration of an importer are aspects which have to be verified by the customs authorities themselves. Moreover, it is also not the case of the Department that IEC, GSTIN, PAN & Authorized Dealer Code of the exporters were not genuine. In the aforesaid backdrop the Court in Kunal Travels (supra) held that the obligation of the CHA under Section 13 (e) of the CHALR, 2004 cannot be stretched to it being obliged to undertake a further background check of the client. As such, as a Customs Broker, the petitioner cannot be held W.P. (C)15808/2022 Page 22 of 22 liable because exporters were not traceable, after the issuance of 'Let Export Orders' and export of the goods out of the country."

13. In view of the above discussion, the impugned order revoking the Customs Brokers license of the appellant, forfeiting their security deposit and further imposing penalty on the appellant cannot be sustained and are set aside. Consequently, the appeal is allowed, with consequential relief, if any.

(Pronounced in the open court on 13.02.2024)

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER(TECHNICAL)

ss

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86621 OF 2024

[Arising out of Order-in-Original No: 17/CAC/PCC(G)/SG/CBS-Adj dated 12th June 2024 passed by the Principal Commissioner of Customs (General), Mumbai.]

M D Ruparel & Sons
Torana Apartment, 1-A, Sahar Village Road,
Andheri (E), Mumbai 400 099 … ***Appellant***

versus

Principal Commissioner of Customs (General)
New Custom House, Ballard Estate, Mumbai 400 001 ***…Respondent***

APPEARANCE:

Shri JC Patel and Shri Vineet Singh, Advocates for the appellant

Shri Ram Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85521/2025

DATE OF HEARING: 09/10/2024
DATE OF DECISION: 08/04/2025

PER: C J MATHEW

This appeal of M/s M D Ruparel & Son, holder of customs broker licence no. 11/244, lies against order[1] of Principal

[1] [order-in-original no. 17/CAC/PCC(G)/SG/CBS-Adj dated 12th June 2024]

Commissioner of Customs (General), Mumbai in which the licence was ordered to be revoked and security deposit forfeited under regulation 14 of Customs Broker Licensing Regulations, 2018 while imposing penalty of ₹ 50,000 under Customs Broker Licensing Regulations, 2018 on them for alleged breach of obligations enumerated in regulation 10 of Customs Broker Licensing Regulations, 2018.

2. Allegedly, the customs broker had been involved in handling of consignments of several exporters by forging 'factory stuffing permissions' to give the appearance that the goods had been subjected to examination and, thus, entitled to claim ineligible drawback of ₹ 49,56,21,314 on shipment declared to be valued at ₹ 5,43,58,38,842. Narrowing down the imputation of misconduct to the facts, proceedings were initiated for breach, thereby, of regulation 10(a), 10(d) and 10(n) of Customs Broker Licensing Regulations, 2018 and, though the enquiry officer did returned a report of none of the charges having been proved, Principal Commissioner of Customs (General) thought it fit to issue a disagreement memo, insofar as the finding on regulation 10(a) and regulation 10(n) of Customs Broker Licensing Regulations, 2018 is concerned, and, holding these to be proved, rained all the provisioned detriments on the customs broker.

3. We have heard Learned Counsel for the appellant and Learned Authorized Representative.

4. We find that, in the instant case, notice was issued on 22nd May 2023 well beyond the 90 days from receipt of offence report stipulated for initiating action. Furthermore, the report dated 28th November 2023 was also submitted beyond the 90 days from the date of show cause notice prescribed for completion of inquiry. It is also seen that the revocation order dated 12th June 2024 exceeded the 90 days from the date of enquiry report mandated for completion of the process. There was, thus, patent breach of timelines at every stage of the proceedings.

5. On perusal of the impugned order, there is no finding that the acts, omission or commission on the part of the customs broker was cause of one or more of the delays. The Hon'ble High Court of Bombay in *Principal Commissioner of Customs (General), Mumbai v. Unison Clearing P Ltd [2018 (361) ELT 321 (Bom)]* held that

> *'10. The question, therefore, is whether the provision contained in Regulation 20 is mandatory or directory. The use of the word "shall" in normal parameters be construed as mandatory and the word "shall" would be required to be read as "must" unless and until it was essentially read as "may" to achieve the legislative intention and to be construed in accordance with its use in the provision. However, it cannot be laid down as an universal rule that whenever the word "shall" is used in a statute, it would only mean to be of mandatory nature, whereas the word "may", would be indicative of being directory. However, use of such word is not the sole test or criteria, but the said word shall be construed by taking into*

consideration the nature, design and the consequences, which would flow from construing it one or the other way.

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13. The Learned Counsel appearing for the licensee, by relying on the said judgments would argue that the said Hon'ble High Courts have granted benefit to the Customs Brokers on account of non-adherence to the time limit. Reliance is also placed on the judgment of the said CESTAT West Zonal Bench, Mumbai delivered in Appeal No. C/87322/15 [2017 (357) ELT 1017 (Tribunal)] in case of M/s. Maakrupa Forwarders Pvt. Ltd v. Commissioner of Customs, Mumbai, dated 18 October, 2016. Perusal of the said judgment, would reveal that Revenue had taken 1221 days to complete the inquiry for which a period of 270 days is prescribed in CBLR, 2013 and in this backdrop, the Tribunal observed that due to inordinate delay of exceptional nature in completing the proceedings, fundamental right of work is being denied to the appellant and it was also observed that the Customs Brokers who are unscrupulous, get the advantage of the delay and people who are not guilty would continue to suffer the suspension and revocation on account of delay by revenues due to lack of responsibility.

The said judgment of the CESTAT reflects a extreme situation and the data which was placed before the Tribunal revealed that inquiries had been pending for more than five years and in this backdrop, the Tribunal commented about the inordinate delay. This is what precisely is to be avoided. The order passed by the CESTAT cannot be said to be erroneous by taking into consideration the enormous delay, reflecting the attitude of the Revenue, which had failed to discharge its duty, causing serious inconvenience to the Customs House Agent, which in any cannot be justified. However, the said principle cannot be

accepted as an absolute principle where the delay of 15 days has also been held to be inordinate and the licence came to be restored. We do not propose to deal with these two extremities since we are of the considered view that the midline has to be drawn where the time line may not be construed as so rigid, inflexible and a reasonable deviation is permissible where delay is accounted for and the Revenue would be made accountable in discharge of its statutory duty.

The principle, which is to be applied to construe whether the Regulation is directory or mandatory, is to be tested by examining the consequences of the Regulation being treated either way in the context of the aim and object of the provision.

14. Adherence to the time schedule prescribed in the Regulation 20 in a rigid way would lead to a situation where non-compliance with the time frame and even deviation by a single day would resultantly invalidate the entire action and the licence which is under suspension or which is revoked, is liable to be restored. The procedural formality as required to be complied within the time frame prescribed in the regulation, even if it is deviated for whatsoever reason beyond the control of the revenue or the Customs House Agent would result into consequences of declaring the entire action invalid if the provision is construed as mandatory. On the other hand, if the provision the construed as directory, the Customs House Agent would be deprived of his licence for considerable long time, if the time schedule is not adhered to the Revenue at its sweet choice would prolong the procedure and which is a likely situation, no attempts would be made to complete the inquiry within the stipulated period.

This is what has weighed in the mind of the High Courts while dealing with the said regulation and holding the same to be mandatory

The catena of judgments on which reliance has been placed to declare the provision as mandatory have referred to the extraordinary delay caused at the instance of the revenue in conducting inquiry against the Customs House Agent, depriving them of their means of livelihood and it was observed that the purpose of prescribed time limit was to safeguard the interest of the Customs Broker and smooth import and export of goods. By relying on a celebrated principle, when a statute prescribes a thing to be done in a particular manner, it must be performed in such a manner, the use of the word "shall" in the Regulation has been construed as mandatory.

With due respect to the finding so recorded in the judgment of the Madras Court in case of Masterstroke Freight Forwarders P. Ltd. v. C.C.(I), Chennai-I, reported in 2016 (332) ELT 300 (Madras) delivered by the Learned Single Judge, the parameters of construing a provision as mandatory or directory, when it deals with a discharge of a public duty and a resultant consequence has not been specifically taken into consideration. The salutary principle, whether statute imposes a public duty and lays down the manner and time within which the duty shall be performed, the injustice or inconvenience resulting from a rigid adherence to the statutory prescription, is a relevant factor for holding such provision only as directory has been completely overlooked. As observed by Justice Denman in Caldow v. Pixell, (1877) 2 CPD 562, "in considering whether the statute is imperative, the balance may be struck between inconvenience or sometime rigidly adhered to, or sometime departure from this direction". In that case, it was held that where a public officer was directed by statute to perform a duty within a specific time the case is established that the provisions are only directory, as already discussed above. There might be reason why such time limits cannot be adhered to and these reasons may be at times attributable to

the revenue and some time to the Customs house agent. Strict adherence to the said time limit and not making it even slightly flexible would warrant a situation where even one day deviation from the time line would be equally fatal as a delay of one year. This surely is not the intention in framing the Regulation. Undisputedly, the intention is to curb the delay in concluding the inquiries, however, it should not be stretched to an extent where it would defeat the very purpose of the Regulation, being to enforce a regime of discipline in the Customs arena and it would result in letting the miscreant set loose by taking benefit of deviation of the time schedule. The said CESTAT West Zonal Bench, Mumbai in Unison Clearing Pvt. Ltd v. Commissioner of Customs (General), Mumbai (supra) has in detail dealt with the Regulation 22 and has examined whether it has to be construed as mandatory or directory. Relying on catena of judgments delivered by the Hon'ble Apex Court, and specifically in Delhi Air Take Services Pvt. Ltd. and Another v. State of West Bengal and Another, CESTAT has concluded that while deciding whether the time period is directory or mandatory, it would be seen that the purpose of law prescribing it as mandatory and consequently the absence of provisions of consequences in case of non-compliance with the requirement would indicate that the provisions are directory irrespective of use of the word "shall". The CESTAT has concluded that if the time limits are construed as mandatory and the matter is put to an end, the purpose of Regulation would be defeated and so would be the intention behind framing such a Regulation. On the other hand, if there is no consequence stated in the regulation for non-adherence is a time period for conducting the inquiry, the time line cannot be proved to be fatal to the outcome of the inquiry. Based on these observations the Tribunal had held the Regulation is directory in nature. However, in the present judgment which is impugned before us, the CESTAT has taken

a view contrary to its earlier view in Unison Clearing Pvt. Ltd. (supra) and after referring to certain precedents where a view was taken that the regulations are mandatory delivered by the Tribunal itself, the Tribunal was pleased to quash and set aside the impugned order being not sustainable and allowed the appeals. It is to be noted that the Member Judicial (Ramesh Nair) who is a party to the judgment delivered by the said CESTAT in Unison Clearing Pvt. Ltd. v. Commissioner of Customs (General), Mumbai.

15. In view of the aforesaid discussion, the timelimit contained in Regulation 20 cannot be construed to be mandatory and is held to be directory. As it is already observed above that though the time line framed in the Regulation need to be rigidly applied, fairness would demand that when such time limit is crossed, the period subsequently consumed for completing the inquiry should be justified by giving reasons and the causes on account of which the timelimit was not adhered to. This would ensure that the inquiry proceedings which are initiated are completed expeditiously, are not prolonged and some checks and balances must be ensured. One step by which the unnecessary delays can be curbed is recording of reasons for the delay or non-adherence to this timelimit by the Officer conducting the inquiry and making him accountable for not adhering to the time schedule. These reasons can then be tested to derive a conclusion whether the deviation from the time line prescribed in the Regulation, is "reasonable". This is the only way by which the provisions contained in Regulation 20 can be effectively implemented in the interest of both parties, namely, the Revenue and the Customs House Agent.'

setting the tone for, and measure of, evaluating the circumstances in which the timelines are to benchmark as directory or mandatory.

6. Following this, by order[2] disposing off appeal[3] against order[4] of Principal Commissioner of Customs (General), Mumbai the Tribunal, in *AB Paul & Company v. Principal Commissioner of Customs (General), Mumbai*, held that

> *'14. Though the said decision has categorically held that time-lines in the Regulations are to be deemed as 'directory', the context is not without significance. It was held that setting aside of revocation, at the appellate level, by resort to ascertainment of conformity with time-lines, would defeat the intent of Regulations that is substantively elaborate in enacting framework for supervisory oversight of customs brokers. Nonetheless, the Hon'ble High Court of Bombay also noted that, without justification for delay in completion of proceedings demonstrated by findings on the contributory negligence of the notice-broker, the licencing authority is not permitted to take shelter behind 'directory' nature of the time-lines. Impliedly, the time-lines are deemed to be directory at the appellate stage and an order of detriment under the authority of Regulations is, in circumstances of non-adherence to times lines, not tenable in the absence of justification for delay.*
>
> *15. The impugned order is clearly bereft of such finding. Learned Authorised Representative has contended that the delay occurred owing to insistence on notice insisting upon cross-examination of their employee; an assertion of right to defence in proceedings is, of itself, not dilatory and, especially, in the light of our finding that no justifiable cause for rejection of cross-examination is available on record. In such*

[2] [final order no. A/85907/2023 dated 2nd June 2023]
[3] [customs appeal no. 86451 of 2022]
[4] [order-in- original no. 11/CAC/PCC(G)/SJ/SBS Adj. dated 13th May 2022]

circumstances, the decision of the Hon'ble High Court of Bombay in re Unison Clearing Pvt Ltd does not come to the assistance of the licencing authority. It is clear that the time-lines specified in regulation 17 of Customs House Broker Licensing Regulations, 2018 had not been adhered to. Consequently, no purpose would be served by directing cross-examination now because that will only approve non-adherence to timelines; we cannot condone that which is not condonable. We also do not find it necessary to delve further into the deviation from the specificity, warranted in show cause notice, by the arrangement of obligations in regulation 10 of Customs Broker Licencing Regulations, 2018.'

7. In addition to the circumstances failing to portray any delay occasioned by dereliction on the part of the customs broker, there is no explanation whatsoever in the impugned order justifying the delay as unavoidable and beyond human control. That is irresponsible discharge of responsibility fastened on the licencing authority in the Regulations and not in accordance with the leeway afforded by Hon'ble High Court of Bombay in *re Unison Clearing Pvt Ltd.*

8. For the above reasons, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 08/04/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH-COURT NO. 1

Customs Appeal No. 52739 of 2019

[Arising out of Order-in-Appeal No. Comm/ Appeal/ DLH/CUS/Import/NCH/265/2017 dated 23.08.2019 passed by the Commissioner of Customs (Appeals) New Customs House, New Delhi]

Cisco Systems India Private Limited **Appellant**
2nd Floor, Brigade South Parade,
10 M G, Road, Bengaluru-560001

Versus

Commissioner of Customs,(Appeals) **Respondent**
New Customs House, Near IGI Airport,
New Delhi

Appearance

Shri B L Narasimhan, Shri Rachit Jain and Ms. Pooja Aggarwal, Advocates for the Appellant

Shri Sunil Kumar, Authorised Representative for the Department

Coram:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C L MAHAR, MEMBER (TECHNICAL)

Date of Hearing/ Decision: October 14, 2020

FINAL ORDER NO. 51573 / 2020

JUSTICE DILIP GUPTA

1. The order dated August, 22, 2019 passed by the Commissioner of Customs (Appeals) New Delhi[1], dismissing the appeal that had been filed by the Appellant to assail the

1. **the Commissioner (Appeals).**

order dated August 01, 2017 passed by the Assistant Commissioner of Customs has been challenged in this Appeal. This order of the Assistant Commissioner rejected the refund claim filed by the Appellant for an amount of Rs. 46,53,86,615/- under section 27 of the Customs Act, 1962[2].

2. The Appellant is, inter alia, engaged in the import of goods for providing captive services in the nature of software development, sales and marketing support, product replacement services and other support services to its affiliates. The Appellant had imported goods from related parties during the period April 2004 to June 2008 and had submitted Bills of Entry from time to time, which were assessed after loading the declared invoice value so as to make the value equal to 58 % of the global price list of the Appellant in terms of order dated August 26, 2004 passed by the Assistant Commissioner of Customs (Special Valuation Branch), New Delhi. The goods were, accordingly, cleared on payment of duty on the loaded value.

3. However, feeling aggrieved by the said order dated August 26, 2004, the Appellant filed an appeal before the Commissioner (Appeals), who by order dated August 20, 2007 remanded the matter to the Adjudicating Authority to assess the goods after verifying the data submitted by the Appellant and after complying with the principles of natural justice.

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2. the Customs Act.

4. This time, the Assistant Commissioner of Customs by order dated April 23, 2009 ordered that the price may be enhanced to 46% of the global price list for the years 2000 to 2008. This order dated April 23, 2009 was accepted by both the Appellant and the Department.

5. The Appellant, thereafter filed a refund claim on April 12, 2010 under section 27 (1) of the Customs Act since duty had been paid on 58% loaded value.

6. A Show Cause Notice dated June 14, 2010 was issued to the Appellant proposing to reject the refund claim on the following grounds:

(i) The Appellant had not submitted the re-assessed copy of the Bills of Entry, in the absence of which the claim for refund was not maintainable;

(ii) The Appellant had not submitted any evidence that payment of duty was made under protest and so the refund claim was barred by limitation provided under section 27 of the Customs Act.

7. The Appellant filed a reply to the show cause notice stating, inter alia, that payment of duty by the appellant has to be treated as paid under protest since the Appellant had filed an appeal against the assessment order and, therefore, the limitation of claiming refund under section 27 of the Customs Act would not apply. However, the Assistant

Commissioner of Customs, by order dated August 31, 2010, rejected the refund application.

8. Feeling aggrieved, the Appellant filed an appeal before the Commissioner (Appeals), who by order dated February 10, 2011 dismissed the appeal.

9. The Appellant, thereafter filed an appeal before this Tribunal which appeal was disposed of by order dated April 13, 2016. The matter was remanded to the Adjudicating Authority and the observations of the Tribunal are as follows:

> "9. **As per the provisions of section 27 of Customs Act, 1962, refund claim is required to be filed before the expiry of six months from the date of payment made by the assessee. However, as per 2nd proviso to section 27 (1)(b), such limitation of one year/ six months as the case may be, shall not apply when any duty and interest has been paid under protest.** The appellants have strongly contended that duty stand paid by them under protest, during the pendency of the appeal before the Commissioner (Appeals) and inasmuch as such protest never stands vacated by the Revenue, no limitation would be available to the Revenue so as to deny the refund claim.
>
> 10. On the other hand, Revenue's stand is that the dispute on the valuation, came to an end with effect from 23.04.2009 with the passing of order by Astt. Commissioner SVB allowing the declared value by 46% of the GPA. As such, limitation to file refund claim start running from the date of said order and refund claim filed on 12.04.2010 is barred by limitation.
>
> 11. **We find that there is no clear finding by the authorities below on the fact of duty having been paid under protest**. Even the appellant has not been placed on record any documentary evidence to reflect upon the said effect. **On going through the second proviso to section 27, we find that same clearly lays down that the limitation period shall not apply when any duty has been paid under protest.** The second proviso nowhere restricts the limitation to passing of any order by the original adjudicating authority nor refers to any alternative date. It simiplicitor is to the effect that limitation will not apply when the duty has been paid under protest. **Infact, we find that the 4th proviso to section 27 (1) is to the effect that where the duty become refundable as a consequence of judgment,**

decree, order direction of the appellant authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment decree, order, or direction. However, we note that the said proviso is applicable only when the refund arises as a consequence of the order passed by the higher appellate authority. In that case, the assessee is required to file refund application within a period of one year of six months from the date of order.

However, we find that the present refund application has not arisen as a consequence of any order passed by the higher appellate forum. Commissioner (Appeals) in his order dated 28.08.07 simplicitor remanded the matter to the original adjudicating authority to pass a denovo order. As such, it cannot be clearly concluded that the refund has not arisen out of order in appeal and it is only after the denovo proceedings were finally concluded by the adjudicating authority vide his order dated 23.04.2009, that the appellant become entitled to the refund.

12. The legal question which arises is that when the duty was paid under protest whether the period of limitation as provided under section 27 would be applicable or not. We have already observed that the second proviso to section 27 (1) is simplicitor to effect that limitation will not be applicable where the duty has been paid under protest. The second proviso is neither extending the period nor limiting the same. **As such, we agree with the learned Advocate that if the duty has been paid under protest and in the absence of any vacation of that protest by the authorities, the limitation period may not apply.**

15. **However, as already observed, the fact as to whether the duty was paid under protest or not does not stand substantiated before us by production of sufficient documentary evidence. As such, we are of the view that inasmuch as neither of the authorities below have given categorical finding that duty was actually paid under protest, the matter needs to be remanded to the original adjudicating authority, for examining the above fact. In the alternative, the appellants plea that the fact of filing the appeal before the higher authorities itself amount to duty payment under protest, would also be considered by the adjudicating authorities in the light of various decisions, which may be brought to his notice by the assessee."**

(emphasis supplied)

10. On remand, the Commissioner (Appeals) rejected the appeal filed by the Appellant. The Commissioner (Appeals) noted that in terms of the directions issued by the Tribunal it was necessary to decide whether the amount of duty was paid

by the Appellant under protest and whether time limit stipulated under section 27 of the Customs Act would be applicable. These two issues were required to be decided on the basis of two parameters, namely, whether sufficient documentary evidence had been provided to substantiate the claim regarding payment of duty under protest; and whether filing of appeal before the higher authority itself would amount to duty paid under protest in the light of various judgments.

11. The findings recorded by the Commissioner (Appeals) on these two issues are reproduced below:

> "7. **As regards the issue of evidence** having been placed on record by the party to substantiate their claim at the relevant point of time that such duty was paid by them under protest**, I find that the party has failed to place any such evidence on record from which it can categorically be deciphered that such amount of Customs Duty to the tune of Rs. 46,53,86,615/- was paid by them under protest.**
>
> 8. On the contrary, vide their written submissions dated 19.08.2019, they have argued on the issue that SVB Order dated 26.08.2004 was challenged by way of an appeal implies that all the duties paid during pendency of such appellate proceedings should be treated/ deemed to have been paid under protest. This also indicates that the parties does not have any such documentary evidence on the basis of which it can be concluded that payment of Customs Duty was made under protest.
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> 9. **Now coming to the plea of the party that they challenged the SVB Order dated 26.08.2004 which itself implies that the duty was paid by them under protest, I find that the Hon'ble Tribunal, vide the said Order had directed that such plea of the party needs to be analysed in the light of various decisions, which may be brought to the notice by the party herein.**
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> 10. **In this regard, I note that in support of their aforesaid contention, the party has relied upon several judgments/ case laws; viz.**

(i) Union of India vs. Kamlakshi Finance Corporation Limited, 1991 (55) ELT 433 (S.C.)

(ii) Pals Micro Systems Ltd. vs. CCE, Manglore [2007 (212) ELT 373 (Tri.-Bang.)]

(i) Mafatlal Industries, 1997 (89) ELT 247 (SC);

(ii) Mohit World vs. Commissioner of Customs Mumbai-II-2014 (9) TMI 987, CESTAT-MUMBAI.

(iii) CCE Chennai II vs. Electro Steel Casting Ltd., 2014 (299) ELT 305 (Mad.);

(iv) Big Apple & Others vs. Commissioner of Customs, Banglore-2011 (11) TMI 155, CESTAT, Banglore;

(v) Hutchisom Max Telecom Pvt. Ltd. vs. CCE, Mumbai-2004 (165) ELT 175 (Tri.- Del)

(vi) CCE, Chandigarh vs. Ind Swift Lands Ltd.- 2017 (6) GSTL 21 (P & H);

11. **On going through the judgments referred and relied upon by the party, I find that none of the judgments cover period after 2007 when provisons of section 27 of Customs Act, 1962 were amended, except judgments mentioned at S. No. (viii) above. A perusal of the judgment CCE, Chandigarh vs. Ind Swift Land Ltd. also reveal that the facts of the case are entirely different in as much as no such letter of "payment of duty under pressure or protest to the concerned Asstt. Commissioner" could be produced by the party in the instant case.**

12. **The O-I-O passed by the Adjudicating Authority is very detailed and I don't find any ground to interfere with the said order**. The appeal filed by the appellant has no legs to stand and hence does not merit any consideration."

(emphasis supplied)

12. Shri B. L. Narasimhan learned Counsel appearing for the Appellant made the following submissions:

(i) The refund claim is not barred by time as the differential duty was deposited under protest for the reason that filing of an appeal against the assessment order has to be considered as the payment of duty

under protest. In this connection reliance has been placed on the following decisions:

a) Mafatlal Industies Ltd. vs. Union of India[3]

b) M/s Hutchison Max Telecom Pvt. Ltd. vs. CCE, Mumbai.[4]

c) Bayshore Glass Trading Pvt. Ltd. vs. CCE, Kolkata[5]

d) M/s Parle Biscuits Pvt. Ltd. vs. Commissioner of Customs, Mumbai[6]

e) M/s Big Apple vs. CCE, Hyderabad[7]

f) RFB Rig Corporation LLC vs. CC (Air Cargo Complex), Chennai[8]

g) Commissioner Central Excise Commissionerate, Chandigarh-I vs. M/s Ind Swift Lands Ltd.,[9];

(ii) No time limit is prescribed for filing refund claims for duty paid under protest. The second proviso to section 27(1) of the Customs Act categorically provides that the time limit under section 27(1) shall not apply where duty has been paid under protest; and

(iii) Even with the insertion of the fourth proviso to section 27(1) of the Customs Act with effect from May 11, 2007, it would be incorrect in law to state that a time limit has been prescribed for refund of claims when duty has been paid under protest. In this connection, reliance has been placed on the decision of the Punjab and Haryana High Court in **Malwa Industries Ltd., vs. Union of India.[10]**

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3. 1997 (89) ELT 247 (SC)
4. 2004 –TIOL-62-CESTAT-DEL
5. 2002 (148) ELT 1243 (Tri.-Kolkata)
6. 2006-TIOL-439-CESTAT-MUM
7. 2011-TIOL-163-CESTAT-BANG
8. 2018 (359) ELT 219 (Tri.-Chennai)
9. 2017–(2)-TMI-23- Punjab and Haryana High Court
10. 2018 (361) ELT 81 (P & H)

13. Shri Sunil Kumar, learned Authorized Representative of the Department has, however, supported the impugned order and made the following submissions:

(i) The Appellant failed to substantiate that duty was paid under protest by adducing documentary evidence;

(ii) The refund claims are not barred by limitation only when a specific and valid protest is made. In this connection reliance has been placed to the following decisions:

a) Inchek Tyres Ltd. vs. Union of India and Others[11] as confirmed by the Calcutta High Court[12]

b) Gujarat State Fertlizers & Chem Ltd. vs. Commr. Of C. Ex., Vadodara[13];

(iii) Mere filing of an appeal would not mean that a protest has been lodged. In this connection reliance has been placed on the decision of a learned judge of the Madras High Court in **DCW Ltd. vs. Assistant Commissioner of Customs, Madras[14],** which has distinguished the judgment of the Supreme Court in **Mafatlal Industries Limited**; and

(iv) The decision of the Punjab & Haryana High Court in **Malwa Industries Ltd** is clearly distinguishable, and in fact the decision of the Chennai Bench of the Tribunal in **Redington India Ltd. vs. Commissioner of Customs, Chennai [15]** is applicable.

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11. 1978 (2) ELT (J 643)
12. 1987(27)ELT 614(Cal.)
13. 2004 (166) ELT 193 (Tri.-Del.)
14. 2003 (157) ELT 510 (Mad.)
15. 2011 (269) ELT 233 (Tri.-Chennai)

14. The submissions advanced by the learned Counsel for the Appellant and the learned Authorized Representative of the Department have been considered.

15. The issue that arises for consideration in this appeal is as to whether filing of an appeal against an assessment order would itself mean that duty has been paid under protest.

16. The records indicate that the Appellant had imported goods from related parties and had filed Bills of Entry which were assessed and duty was paid after loading the declared invoice value so as to make the value equal to 58% of the global price list of CISCO. Subsequently, after remand the declared price was enhanced to only 46% of the global price list for the years 2000-08. This order was accepted both by the Appellant and the Department. The reduction of the loaded price from 58% to 46% led to the filing of an application by the Appellant for refund of the excess duty paid for the period April 2004 to June 2008. This application which was filed on April 12, 2010 was rejected primarily for the reason that the Appellant had not submitted any evidence to substantiate that duty had been paid under protest and so the refund claim was barred by limitation under section 27(1) of the Customs Act. The appeal filed by the Appellant before the Commissioner (Appeals) was rejected but the Tribunal, in the appeal filed by the Appellant, remanded the matter to the Commissioner (Appeals).

17. The gist of the decision dated April 13, 2016 of the Tribunal is as follows:-

(i) Section 27(1) of the Customs Act contemplates that a refund application has to be filed before the expiry of six months from the date of payment of duty by the assessee;

(ii) However, in view of the provisions of the second proviso to section 27(1) of the Customs Act, this limitation of six months shall not apply where the duty has been paid under protest;

(iii) There is no clear finding by the Adjudicating Authority that duty was paid under protest;

(iv) The fourth proviso to section 27(1) of the Customs Act, provides that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any Court, the limitation of six months shall be computed from the date of such judgment, decree, order or direction. In the present case, the refund application has not been filed as a consequence of any order passed by the Appellate Forum, because the Commissioner (Appeals) merely remanded the matter to the Adjudicating Authority for passing a fresh order;

(v) If a duty has been paid under protest, it is the second proviso to section 27(1) of the Customs Act, that would apply, which means that the limitation period of six months for filing a refund application would not apply;

(vi) Since it could not be substantiated by the Appellant through documentary evidence that duty was paid under protest and a categorical finding has also not been recorded in the order, the matter needs to be remanded to the Adjudicating Authority for passing a fresh order after examining the facts; and

(vii) The plea of the Appellant that the filing of an appeal before the higher authority itself would amount to payment of duty under protest, will also be considered by the Adjudicating Authority in the light of the decisions to be brought to the notice of the Adjudicating Authority by the Appellant.

18. The Commissioner (Appeals), however, on remand rejected the refund claim holding that;

(i) The Appellant failed to place any evidence on record from which it can be gathered that the amount of duty was paid by the Appellant under protest;

(ii) The decisions relied upon by the Appellant to support its contention that filing of an appeal implies that duty was paid under protest would not come to the aid of the Appellant for the reason that none of the decisions cover the period after 2007, when section 27 of the Customs Act was amended by addition of the fourth proviso.

19. To appreciate the rival contentions advanced on behalf of the parties, it would be appropriate to reproduce the relevant provisions of section 27 of the Customs Act:

> **"Section 27-** Claim for refund of duty.-(1) Any person claiming refund of any duty-

> (i) paid by him in pursuance of an order of assessment; or
>
> (ii) borne by him,
>
> may make an application for refund of such duty and interest, ' if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs-
>
> (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;
>
> (b) in any other case, before the expiry of six months,
>
> from the date of payment of duty and interest, if any, paid on such duty in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:
>
> xxxxxxxxxx
>
> **Provided** further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty has been paid under protest:
>
> xxxxxxxx
>
> **Provided** also that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment, decree, order or direction."

20. It needs to be noted that the fourth proviso to section 27(1) of the Customs Act was inserted with effect from May 11, 2007 by section 96 of the Finance Act, 2007.

21. A perusal of section 27 (1) of the Customs Act shows that a person claiming refund of duty paid by him in pursuance of an order of assessment, may make an application of refund of such duty to the Assistant Commissioner of Customs before

the expiry of six months from the date of payment of duty. The second proviso to section 27 (1), however, provides that the limitation of six months shall not apply where any duty has been paid under protest. The fourth proviso to section 27 (1) that was inserted with effect from May 11, 2007, provides that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, appellate tribunal or any other court, the limitation of six months shall be computed from the date of such judgment, decree, order or direction.

22. The contention of the Appellant is that the limitation of six months in making an application for refund of duty from the date of payment of duty contemplated under section 27 (1) of the Customs Act would not apply in a case where the duty has been paid under protest. In this connection the submission of the appellant is that mere filing of an appeal against an assessment order implies that the person has protested against the payment of duty.

23. The Department, however, contends that since a formal protest was not lodged by the Appellant, nor the Appellant submitted any documentary evidence to support this contention, the second proviso would not apply and even otherwise, as the refund claim was not filed within six months from the date of the order dated April 23, 2009 passed by the Assistant Commissioner on remand, which is the period

contemplated under fourth proviso to section 27 (1) of the Customs Act, the refund claim was barred by time.

24. Learned Counsel for the Appellant has submitted that the mode of protest against the payment of duty was by way of filing an appeal against the assessment order and if this is considered to be a protest, the limitation of six months provided for would not be applicable since the second proviso to section 27(1) of the Customs Act clearly stipulates that the limitation of six months shall not apply where any duty has been paid under protest.

25. The Constitution Bench of the Supreme Court in **Mafatlal Industries Limited**, in the context of section 11 B of the Central Excise Act, 1944, held that where a person proposes to contest the liability by way of appeal, revision or in the higher courts, he would naturally pay the duty under protest and it is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty. Paragraph 83 of the judgment, which deals with this aspect, is reproduced below:

> **"83.**It is then pointed out by the learned Counsel for the petitioners-appellants that if the above interpretation is placed upon amended Section 11B, a curious consequence will follow. It is submitted that a claim for refund has to be filed within six months from the relevant date according to Section 11B and the expression "relevant date" has been defined in Clause (B) of the Explanation appended to sub-section (1) of Section 11B to mean the date of payment of duty in cases other than those falling under Clauses (a), (b), (c), (d) and (e) of the said Explanation. It is submitted that Clauses (a) to (e) deal with certain specific situations whereas the one applicable in most cases is the date of payment. It is submitted that the appellate/revision proceedings, or for that matter proceedings in High Court/Supreme Court, take a number

> of years and by the time the claimant succeeds and asks for refund, his claim will be barred; it will be thrown out on the ground that it has not been filed within six months from the date of payment of duty. We think that the entire edifice of this argument is erected upon an incomplete reading of Section 11B. The second proviso to Section 11B (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". **Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to sub-section (1) of Section 11B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned Counsel."**
>
> **(emphasis supplied)**

26. The second proviso to section 11B (1) of the Central Excise Act, 1944 is reproduced below:

> "Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest."

27. It is seen that the second proviso to section 11B of the Central Excise Act is identical to the second proviso to section 27 (1) of the Customs Act.

28. Thus, it has to be held that if an appeal is filed against an assessment order, then duty that is paid has to be treated as duty paid under protest and in that case the limitation of six months for filing a refund claim from the date of payment of duty, would not apply.

29. A Division Bench of Haryana High Court in **M/s Ind Swift Lands Limited** also considered the issue as to whether the application filed for refund of duty was barred by limitation

under section 11B(1) of the Excise Act and observed as follows:

> "**10. The second proviso furnishes a complete answer in favour of the assessee**. It states that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty, has been paid under protest. Even assuming that the application fo refund of amounts paid in such circumstances, is to be made under section 11B(1), in the present case the application would not be barred by limitation as the amounts were paid under protest. The period of limitation, if any, therefore, would clearly be inapplicable to the assessee. It was not contended before us that any other period of limitation applies and that under such a provision, the claim would be bared nevertheless. **An act, including a payment can be made under protest in several ways. For the act to be under protest, it is not necessary that it be accompanied by the very words "under protest" whether an act is performed under protest or not must be determined on the basis on which it is performed, if the conduct indicates that it is not voluntary and is done out of compulsion it is under protest** even within the meaning of these words in the second proviso to section 118 (1) of the Act which we will refer to shortly."
>
> **(emphasis supplied)**

30. The Tribunal in **M/s Hutchison Max Telecom Pvt. Ltd., Bayshore Glass Trading Pvt. Ltd., Parle Biscuits Pvt. Ltd., Big Apple** and **RFB Rig Corporation LLC** also took the same view.

31. Learned Authorised Representative of the Department has, however, placed reliance upon the decision of a learned Judge of the Madras High Court in **DCW Limited.** After reproducing paragraphs 83, 85, 86 of the Constitution Bench judgment of the Supreme Court in **Mafatlal Industries,** the learned judge observed as follows:

> "Their lordships of the Supreme Court have held that where a person proposes to contest his liability by way of appeal, revision or in the higher Courts, he would naturally pay the duty under protest and it is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification and the assessee need not particularise the grounds of protest and it is open to him to say that the duty is not exigible according to law and the acknowledgement of the letter of protest shall be the proof to show that duty had been paid under protest and in that case, the period of limitation of six months will have no application to him. The Apex Court has further held that where the duty is paid under the orders of Court pending an appeal/reference/writ petition, it will certainly be a payment under protest and in such a case it would not be necessary to lodge the protest.
>
> **10.**Admittedly, in the present case, the petitioner has not made the payment of duty under protest and in that case, the period of limitation of six months will apply to the petitioner and the claim not being made within a period of six months from the date of payment has been rightly rejected by the respondent."

32. The Constitution Bench of Supreme Court in **Mafatlal Industries** clearly held that where a person proposes to contest his liability by way of appeal, he would naturally pay the duty under protest and it is difficult to imagine that duty would be paid without protest even when he contest the levy of duty. This apart, a Division Bench of the Madras High Court in **Commissioner of C. Ex. Chennai-II vs. Electro Steel Castings Limited**[16] followed the Constitution Bench judgment of the Supreme Court in **Mafatlal Industries** and held that the limitation period for filing a refund claim would not be applicable if an appeal has been filed since it would be a case where duty has been paid under protest. The relevant portion of the judgment is reproduced below:

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16. 2014 (299) ELT 305 (Mad.)

> **"5.** Thus, the determination of substantial question of law involved herein depends upon the question of limitation to make any refund claim, which inturn depends upon the mode of payment of duty under protest or not under protest? While according to the Revenue, the payment of duty is without any protest, the assessee's categorical stand is that it is deemed to be paid under protest.
>
> **6.** Both the Revenue and assessee relied on the same decision of the Apex Court in the case of *Mafatlal Industries Ltd.* reported in 1997 (89) E.L.T. 247 (S.C.) in respect of their respective contentions whether the refund claim was made under protest or not.
>
> **7.** Though it is sought to be contended on the side of the Revenue that the decision of the Supreme Court in the case cited above is more applicable to the case of the Revenue, we are not inclined to accept the same. The Apex Court in para 83 under an identical situation, dealt with the same issue, wherein also payment was made, when the assessee has been contesting the levy of duty for the earlier period. The Supreme Court is compelled to say that-
>
> "Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect..."
>
> That being the categorical observation of the Supreme Court, the same is squarely applicable to the facts of the present case in favour of the assessee, wherein also, the payment of duty was made only during the pendency of appeal against very levy of duty for the earlier period.
>
> **9.** Thus, the facts involved in both the cases decided by the Supreme Court were identical and the Supreme Court, while dealing with the issue relating to period of limitation, uniformly held that no limitation was applicable to the payment made under protest. The Hon'ble Supreme Court in the earlier judgment clearly observed that the payment made, when the assessee has been challenging the earlier levy of duty, is deemed to be under protest and not otherwise. Hence, the combined appreciation of both the cases decided by the Supreme Court would lead to an irresistible inference that the payment made herein is also deemed to be under protest and no limitation is applicable and the claim is maintainable and is rightly decided by the CESTAT."

33. The Commissioner (Appeals) has distinguished the aforesaid decisions relied upon by learned counsel for the Appellant, including the Constitution Bench Judgment of the Supreme Court in **Mafatlal** only for the reason that none of

the judgments cover the period after 2007, when the fourth proviso to section 27 (1) of the Customs Act was inserted.

34. The issue that was required to be decided by the Commissioner (Appeals) was whether in terms of the second proviso to section 27 (1) of the Customs Act, the limitation of filing the refund application within six months from the date of payment of duty would be applicable if an appeal had been filed against the order of assessment as that may amount to payment of duty under protest. The Commissioner (Appeals) was not required to examine whether the fourth proviso to section 27 (1) of the Customs Act would apply or not. The fourth proviso to section 27 (1) of the Act deals with an entirely different situation where the duty becomes refundable as a consequence of a judgment, decree, order or direction of the appellate authority, the appellate tribunal or any court. In such a situation, the limitation of six months shall be computed from the date of such judgment, decree or direction.

35. It needs to be noted that application filed by the Appellant for refund of duty was not as a consequence of any judgment, decree, order or direction of the appellate authority, appellate tribunal or any court.

36. In fact, the Tribunal in the present case, while remanding the matter to the Commissioner (Appeals) had examined the second proviso as also the fourth proviso to section 27(1) of the Customs Act and had distinguished the two. The Tribunal held that it is the second proviso to section

27 (1) of the Customs Act that would be applicable and not the fourth proviso and so all that the Commissioner (Appeals) was required to decide was whether duty had been paid under protest or not since an appeal against the assessment order had been filed. The Commissioner (Appeals) clearly misunderstood the direction issued by the Tribunal and based his order on the fourth proviso to section 27 (1) of the Act.

37. Thus, for all the reasons stated above, it is not possible to sustain the order passed by the Assistant Commissioner (Appeals). It is, accordingly, set aside and the application filed by the Appellant under section 27 (1) of the Custom Act is allowed with all consequential benefits. The appeal, therefore, stands allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C L MAHAR)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. 1

CUSTOMS APPEAL NO. 51171 OF 2020

[Arising out of Order-in-Appeal No. D-1/EXP/NCH/190/20-21 dated 15.07.2020 passed by the Joint Commissioner of Customs (Export), New Delhi]

M/s WHIRLPOOL OF INDIA LIMITED ……Appellant
Whirlpool house, Plot No. 40, Sector 44
Gurugram 122002

Versus

The Commissioner of Customs (Appeal) …..Respondent
New Custom House,
Near IGI Airport
New Delhi 110037

Appearance:

Present for the Appellant: Shri Kamal Aggarwal, Chartered Accountant Shri Manish Arora, Advocate

Present for the Respondent: Shri Nagendra Yadav Authorised Representative for the Revenue

COARM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 54539 /2024

DATE OF HEARING: 28.02.2024
DATE OF DECISION: 06.03.2024

P V SUBBA RAO:

1. M/s. Whirlpool corporation Ltd.[1], filed this appeal with a prayer to set aside the Order-in-Appeal[2] dated 15.7.2020 passed by the Commissioner (Appeals), New Custom House, New Delhi upholding the Order in original dated 30.12.2016

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1 Appellant
2 Impugned order

passed by the Joint Commissioner. The operative part of the order-in-original is as follows:

ORDER

> (1) I deny the benefit of DEPB license No.- 0310687088 dated 20.03.2012 and confirm the Customs duty amounting to Rs. 3,05,997/- (Rupees Three Lakh Five Thousand Nine Hundred Ninety Seven) under section 28(1) of the Customs Act, 1962 for import made under bill of entry No.- 6676015 dated 28.04.2012 by M/s. Whirlpool of India Ltd, and interest, at appropriate rate, thereof under section 28AA of the said Act.
>
> (2) I order for confiscation of the goods valued at Rs. 11,71,096/- imported under bill of entry No. 6676015 dated 28.04.2012 under Section 113 (d) of the Customs Act, 1962. However, I allow the said confiscated goods to be redeemed against payment of Redemption fine of Rs. 1,00,000/- (Rupees One Lakh only) in terms of the provisions of Section 125 of the Customs Act, 1962.
>
> (3) I impose penalty of Rs. 1,00,000/- (Rupees One Lakh only) upon M/s. Whirlpool of India Ltd (the Importer) under Section 114 AA of the Customs Act, 1962.
>
> (4) I impose penalty of Rs. 3,00,000/- (Rupees Three Lakh only) upon M/s. Super Trading Co. (the Exporter) under Section 114 AA of the Customs Act, 1962.
>
> (5) I impose penalty of Rs. 3,00,000/-(Rupees Three Lakh only) upon Shri Gurmeet Singh Kohli under Section 114AA of the Customs Act, 1962 for his acts of omissions & commissions.
>
> (6) I impose penalty of Rs. 3,00,000/-(Rupees Three Lakh only) upon Shri Ramesh Gurbux Singh under Section 114AA of the Customs Act, 1962 for his acts of omissions & commissions."

2. The appellant purchased Duty Entitlement Passbook Scheme[3] Scrips issued to M/s. Super Trading Co. by the Director General of Foreign Trade[4] through their regular broker and used it and cleared the goods claiming exemption no. 97/2009 dated 11.09.2009 applicable to the goods cleared

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3 DEPB
4 DGFT

using DEPB scrips. Bill of Entry No.6676015 dated 28.4.2012 was filed for the purpose and the goods were cleared for home consumption for the Customs.

3. DEPB Scrips are issued to exporters as an incentive by the DGFT based on the exports made and these scrips can be used by the exporters to import goods claiming exemption from the customs duty (and debiting the amount equal to the duty from the scrip instead). Alternatively, they can sell these scrips in the market. In this case, M/s. Super Trading Co. to whom the scrips were issued sold them to the appellant for a consideration and the appellant used them to clear goods.

4. After the goods were cleared, it was discovered during an investigation that the Shipping Bills which M/s. Super Trading Co. produced to obtain the scrip were forged. Accordingly, DGFT cancelled the scrips ab initio. Thereafter, Customs issued a Show Cause Notice[5] dated 3.9.2015 to the appellant, to M/s. Super Trading Co. and to its proprietor Shri Rajat Gulati others which culminated in the order-in-original which is upheld by the Commissioner (Appeals) through the impugned order. Learned consultant for the appellant contested the impugned order on merits as well as on limitation. It is his submission that since the appellant had not committed any fraud and had purchased the DEPB scrip for a consideration and had used it to clear the imported goods, the scrip was valid at the time of import. Any subsequent *ab initio* cancellation of the scrip should not be held against the appellant to either demand duty

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5 SCN

or to hold the that the imported goods were liable to confiscation or to impose penalty. He made elaborate submissions on the merits.

5. Learned consultant also submitted that the demand was issued invoking extended period of limitation under section 28. The extended period can be invoked only if the non-payment or short payment of duty is on account of (a) collusion; (b) wilful misstatement; or (c) suppression of facts by the importer. It is his submission that both the SCN and the order in original only state that the exporter had wilfully mis-stated or suppressed facts but do not say that about the appellant (importer).

6. Learned authorised representative for the Revenue supports the impugned order and asserts that it is correct and proper and calls for no interference. According to him, on merits, the appellant, as the buyer of the DEPB scrip, does not acquire a right or title better than the exporter to whom the scrip was issued. He also asserts that fraud vitiates everything and once the ab initio cancellation of the DEPB scrip by the DGFT is not challenged, the consequences follow and the appellant cannot get an exemption de hors the scrip which it used to clear the goods without paying duty. Once the scrip itself is held is cancelled ab initio, neither M/s. Super Trading Co. to whom the scrip was issued nor the appellant who bought it can enjoy on the scrip obtained by fraud and based on forged Shipping Bills.

7. We have considered the submissions on both sides. Before examining the merits of the case, we proceed to examine the question of limitation because it is undisputed that the demand was made under section 28 invoking extended period of limitation. No part of the demand falls within the normal period of limitation. Needless to say to invoke the extended period of limitation, the reasons why it is being invoked must be given in the SCN so that the appellant can present its defence on this point.

8. The ground for invoking extended period of limitation in the SCN is as follows:

> "16. From the above it appears that M/s Whirlpool of India Ltd., have purchased the DEPB authorization 0310687088 dated 20.03.2012, fraudulently obtained by the exporter through market brokers. The said M/s Whirlpool of India Ltd then utilized this DEPB authorization for Customs duty free imports totally valued at Rs. 11,71,096/- (Rupees Eleven lakhs seventy one thousand and ninety six only) under bill of entry no. 6676015 dated 28.04.2012 wherein the Customs duty foregone is Rs. 3,05,997/-. The said importer did not check the credentials of the exporter viz M/s Super Trading Co. in whose name the instant DEPB authorization was issued and which now stands cancelled, ab initio by the Joint Director General of Foreign Trade, since found to be obtained on the basis of forged Bills of Export and forged Bank Realisation Certificates. Thus the imports have become imports without payment of Customs Duty. Thus it appears that the Customs duty foregone in the case amounting to Rs 3,05,997/- as detailed above is liable to be demanded and recovered from the importer M/ Whirlpool of India Ltd under erstwhile Section 28(1) of The Customs Act, 1962 alongwith applicable interest under Section 28AA of The Act. And whereas the exporter has fraudulently obtained the impugned DEPB authorisation on the basis of forged documents by resorting to mis-statement and mis-declaration, hence in the instant case the extended period of five years is invocable under the provisions of proviso to erstwhile Section 28 (1) of the Customs Act, 1962 for demanding the duty and interest thereof."

9. The submissions of the appellant in its reply to the SCN on the question of limitation was as follows:

> **6. Extended period of limitation cannot be invoked since no malafide intention of the Noticee**
>
> 6.1. The impugned notice has been served on the Noticee by invoking the extended period of limitation as mentioned in section 28 of the Customs Act. However, the said extended period is not invokable since the said period can be invoked only in cases where treasury of the Government has suffered loss due to malafide acts of importer such as- collusion, wilful mis-statement or suppression of facts.
>
> 6.2. Since, in the present case, importer or the Noticee has not committed any crime as enumerated in section 28 and his intention was bona-fide throughout the transaction, accordingly, extended period cannot be invoked against him.
>
> 6.3. It is important to refer to the bare provisions at this juncture, in order to clarify the position in this regard. Relevant extracts are reproduced hereinbelow for immediate reference:
>
> "28.(1) Where any day has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, paid- part or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts-
>
> (a) The proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest...."
>
> "28.(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, paid- part or erroneously refunded, by reason of-
>
> (a) Collusion, or
>
> (b) Any wilful mis-statement; or
>
> (c) Suppression of facts,
>
> by the importer..., the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with the duty..."

> **"Explanation 1**: For the purpose of this section, "relevant date" means-
>
> (i) In a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;
>
> (ii) .....
>
> (iii) .....
>
> (iv) In any other case, the date of payment of duty or interest."
>
> 6.4. From the perusal of the abovementioned provisions, it is evident that extended period of five years can be invoked only in the cases of collusion, wilful mis-statement and suppression of facts by the person who is liable to pay the duty i.e. Noticee. Since no such factor exists in the present case, the extended period cannot be invoked."

10. The findings in the order-in-original on the question of limitation were as follows:

> " Further, the Commissioner of Customs (Export) JNCH, Nhava Sheva vide Public Notice No. 45/2009 dated 24.7.2009 brought the said judgement to the notice of the importers. Hence, I am of the view that M/s. Whirlpool of India Ltd. Did not check the credentials of the exporter. Thus, the imports have become imports without payment of Customs duty and liable to be demanded and recovered from them under erstwhile section 28(1) of the Customs Act, 1962 along with applicable interest under section 28AA of the Act. **As the exporter has fraudulently obtained the impugned DEPB authorisation on the basis of forged documents by resorting to mis-statement and mis-declaration, hence the extended period of five years is invokable under the provisions of proviso to erstwhile section 28(1) of the Customs Act 1962 for demanding the duty and interest thereof."**
>
> **(emphasis supplied)**

11. The impugned order of the Commissioner (Appeals) has not recorded any findings on the question of limitation but has upheld the Order in Original.

12. We find that the position of law is that extended period of limitation under section 28 can only be invoked only if the non-payment or short payment of duty is on account of 'collusion, wilful misstatement or suppression of facts' by the importer. None of these aggravating factors which will make extended period of limitation invokable in the case were alleged, let alone, established against the importer either in the SCN or in the order in original or the impugned order. Therefore, extended period of limitation could not have been invoked in this case and the demand itself is hit by limitation. It cannot therefore be sustained.

13. Since the demand is not sustainable on limitation itself, it is not necessary for us to examine the demand on merits.

14. The demand needs to be set aside along with the consequential order holding the imported goods liable to confiscation and the penalty imposed on the appellant.

15. In view of the above, the appeal is allowed and the impugned order is set aside insofar as it pertains to the appellant herein.

[Order pronounced on **06.03.2024**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

CUSTOMS APPEAL No. 51776 of 2022

[Arising out of Order in Appeal No.CC(A)/Customs/D-II/IMP/ICD/TKD/1954/2021-22 dated 04.03.2022 passed by Commissioner of Customs (Appeals), New Customs House, New Delhi]

M/s. Artex Textile Privat Limited **...Appellant**
Kh. No.282, Gali No.04, Industrial Area,
Shalimar Village, New Delhi-110088.

Versus

Commissioner of Customs, **....Respondent**
ICD Tughlakabad (Import),
New Delhi-110020.

APPEARANCE:
Mr. Prem Ranjan Kumar, Advocate for the appellant
Ms. Tamanna Alam, Authorized Representative for the Respondent

CORAM : HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/ Decision: **07/03/2023**

FINAL ORDER No. 50407/2023

DR.RACHNA GUPTA

The present appeal has been filed to assail the order in appeal No.1954/2021-22 dated 04.03.2022 vide which the refund claim of SAD in terms of Notification No.02/2007-Cus dated 14.09.2007 has been rejected while confirming the order of rejection passed by the Original Adjudicating Authority. The facts in brief relevant for the purpose are that the appellant had imported 9 consignments of fabrics during the period from 23.06.2016 to 24.11.2016 and had paid the customs duty as per the assessment, including SAD. It is on 12.10.2018 that the amount of Rs.7,85,947/-, as was paid as SAD was prayed to be refunded. On examination, the claim was observed to be barred by

time. The original adjudicating authority while relying upon the amendment in the aforesaid Notification No.102/2007 vide subsequent Notification No.93/2008 dated 01.08.2008 has rejected the claim vide Order in Original No.2080 dated 28.02.2019 holding the claim to have been filed beyond a period of one year as prescribed under Notification No.93/2008. Since the said order has been upheld by the Commissioner (Appeals) the appellant is preferred appeal before this Tribunal.

2. I have heard Mr. Prem Ranjan Kumar, ld. Counsel for the appellant and Ms. Tamanna Alam, ld Authorised Representative for the respondent.

3. Ld. Counsel for the appellant has relied heavily upon the decision of Hon'ble High Court of Delhi in the case of **Sony India Pvt. Ltd. vs. Commissioner of Customs, New Delhi reported as 2014 (304) ELT 660 (Del.)** wherein it was held that the time limit prescribed under the Notification No.102 of 2007/93 of 2008 will not apply. Ld. Counsel has also relied upon the decision of this Tribunal in the case titled as **Thermoking vs. Commissioner of Customs, ICD, TKD in Customs Appeal No.5077/2021** decided on 24.11.2021. It is submitted that recently also Hon'ble High Court of Delhi while hearing the appeal of Revenue against the said order of this Tribunal in the case of **Thermoking** (supra) has held vide order dated 18.08.2022 that the decision of **Sony India Pvt. Ltd. (supra)** is still applicable for the reason that limitation cannot be prescribed by a Notification

4. Ld. Counsel, in view of the above relied upon case law as prayed for order of Commissioner (Appeals) to be set aside and present appeal to be allowed.

5. While rebutting these submissions, ld. DR has mentioned that this Tribunal in several cases have taken the view that decision of **Sony India Pvt. Ltd. (supra**) is no more applicable for the reason that the period involved in **Sony India** was prior the Notification in question was got amended. For the subsequent period since Notification No.93 is in existence prescribing a time limit of one year for filing the refund claim of SAD that the limitation has to be followed. Ld. DR has relied upon the following decisions of Tribunal:-

1. C.C. - New Delhi (ICD TKD) (Import) vs. Indu Exporters- Final Order No. 53156/2018 dated 25.10.2018 in Customs Appeal No.C /52435/2018 [DB].
2. C.C.-New Delhi (ICD TKD) (Import) vs. J.G. Impex Pvt. Ltd. - Final Order No.53157/2018 dated 25.10.2018 in Customs Appeal No. C/52393/2018 [DB]
3. C.C.-New Delhi (ICD TKD) (Import) vs. Nav Bharat Trading Corporation - Final Order No.53154/2018 dated 25.10.2018 in Customs Appeal No. C/52436/2018 [DB]

6. It is mentioned that in the light of these decisions there is no infirmity in the order under challenge. Appeal is accordingly prayed to be dismissed.

7. While rebutting these submissions of ld. D.R., ld Counsel has mentioned that the decision of Hon'ble Delhi High Court in the case of **Thermoking (Supra)** is a subsequent decision to all the decisions relied upon by the Department. Hon'ble High Court of Delhi is the jurisdictional High Court for this Bench. It is therefore, prayed that the said decision may be followed for the disposal of the present appeal.

8. Having heard the rival contentions, I observe and hold as follows:-

Hon'ble High Court of Delhi in **Sony India (supra**) had held as follows:-

> *"Khemka and Co. (Agencies) Private Ltd. v. State of Maharashtra, (1975) 35 STC 571 and other decisions are authority on the question that in matters which deal with substantive rights, such as imposition of penalties and other provisions that adversely affect statutory rights, the parent enactment must clearly impose such obligations; subordinate legislation or rules cannot prevail or be made, in such cases. The imposition of a period of limitation for the first time, without statutory amendment, through a notification, therefore could not prevail."*

No doubt the period involved in the said decision is of the year 2007 when Notification No.102/2007 had no time limit prescribed for filing the refund claim of SAD. However, in August, 2008 the said Notification got amended vide Notification No.93/2008 wherein one year time period was prescribed for filing the refund claim. Section 27 of Customs Act, 1962 talks about the refund and a time limit has also been prescribed therein. The same has been taken note of by Hon'ble Delhi High Court even in Soni

India Pvt. Ltd. Keeping in view the amendment to be subsequent to the **Sony's** decision that this Tribunal vide the decisions as relied upon by ld. D.R. had upheld the rejection of SAD refund claim on the basis of time limit.

9. I also observe that in the recent decision of **Commissioner of Customs vs. Thermoking as decided on 18.08.2022**, Hon'ble High court of Delhi has also discussed Section 27 of Customs Act. However, still the earlier decision of **Sony India** has been impressed upon holding that the limitation cannot be prescribed by a Notification, thus, holding the Notification No.93/2008 as a flawed one. In view of those findings subsequent to the earlier findings of this Tribunal and also in view of the **Code** of judicial protocol, it is the recent decision of Hon'ble High Court of Delhi in **Termoking** (supra) which has to be followed. The Hon'ble High Court has held that refund of SAD cannot be rejected on the grounds of limitation. For the said reason, the order under challenge is hereby set aside. Consequent thereto the appeal stands allowed.

[Order dictated & pronounced in the open Court]

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita

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

REGIONAL BENCH- COURT NO. 1

Customs Appeal No. 10436 of 2024

(Arising out of Order in Appeal No. AHD-CUSTM-000-APP-438-439-23-24, dated 13.02.2024 passed by the Commissioner (Appeals)-Customs, Ahmedabad)

M/s Aeromar Logistics (I) Pvt Ltd **...Appellant**
Shiromani Complex, Opp Ocean Park,
Nehru Nagar Cross Road, Ambawadi,
Ahmedabad, Gujarat-380006

VERSUS

Commissioner of Customs –Ahmedabad **...Respondent**
Office of the Pr. Commissioner of Customs, 1st Floor,
Customs House, Opposite Old High Court, Navrangpura

APPEARANCE:
Shri Dhaval K. Shah, Advocate appeared for the Appellant
Shri A.R. Kanani, Superintendent (AR) appeared for the Respondent

CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. SATENDRA VIKRAM SINGH, MEMBER (TECHNICAL)

FINAL ORDER NO. 10240/2025

DATE OF HEARING: 12.03.2025
DATE OF DECISION: 11.04.2025

SATENDRA VIKRAM SINGH:

The present appeal has been filed by M/s Aermoar Logistics (I) Pvt Ltd. against the order-in-appeal No. AHD-CUSTM-000-APP-438-439-23-24 dated 13.02.2024 passed by the Commissioner (Appeals), Customs Ahmedabad in the appeals filed by M/s Dhanlabh Logistics (CHA) and M/s Aeromar Logistics against the order dated 29.12.2021 passed by the adjudicating authority. The case was made by the department against the exporter M/s Fusion Overseas [IEC No. AAGFF8041A] Shop No.-17, LSC Market, Block LU, Pitampura, Delhi wherein the present appellant was one of the co-noticee in the show cause notice dated 11.01.2021.

2.1 The facts of the case are that on the basis of inputs received, Preventive officers of Ahmedabad Customs intercepted export consignments of M/s Fusion Overseas at ICD Khodiyar. They examined 126 boxes of export cargo under 6 shipping bills said to contain "Super Ceramic Coating (Pro Polish)". On examination, they found difference not only in quantitative terms but also the goods were highly over valued to the extent of 22 times. Shri Rajiv Arya and Shri Satyavir Singh are the partners of the export firm. The Customs officials conducted inquiry against the exporter by searching his declared premises. They recorded the statements of Shri Rajiv Arya (partner) under Section 108 of the

Customs Act, 1962 wherein he claimed that one Shri Prince having Mobile No. 9818498910 and 9966745754 is the real beneficiary of the firm. The inquiry conducted at the end of M/s Dhanlabh Logisitics, Ahmedabad, (CHA in the case) revealed that he had received the invoices, packing list, KYC etc., of the exporter through M/s Aeromar Logistics (I) Pvt. Ltd., Ambawadi, Ahmedabad. Upon inquiry, M/s Aeromar Logisitcs (the appellant in this case) informed that they had received all export documents through M/s Mass Shipping Agencies, Naraina, New Delhi, whose proprietor was Smt. Manju Kumar Jha. The summons issued to Smt Manju Kumar Jha were received back from the postal authorities with remark "The office is locked since long". Subsequent summons issued to partners of M/s Fusion Overseas were also received back undelivered

2.2 The officers conducted inquiry at the end of the manufacturer of the said goods as per lables pasted on the plastic bottles of the export consignment. They sent E-mail dated 01.01.2021 to M/s Shine 'n' Care (India) Faridabad, who vide e-mail dated 02.01.2021 intimated that:

> *"they are not Mfg. this product. May be someone have use our company name & market this product. We wish to inform you that we sold around 10 Tons of one of our regular product Dash Board Polish in 50 Kg. packing to M/s. Greek Retail Pvt. Ltd. Plot No. 158, Industrial Area, Phase 1, Panchkula, Haryana 134113….. The duration of our deal/ supply from 18.05.2018 to 07.07.2018…"*

2.3 After completing investigation, show cause notice dated 11.01.2021 was issued to the exporter proposing rejection of FOB value, confiscation of export goods along with penalty upon the exporter, it's partner Shri Rajiv Arya, the CHA of M/s Dhanlabh Logistics, M/s Aeromar Logistics and M/s Mass Shipping Agency under Section 114(iii) and Section 114AA respectively of the Customs Act, 1962. It is alleged against the appellant that they did not verify the genuineness of the documents received from M/s Mass Shipping Agency through E-mail and passed on the said documents to the CHA. The adjudicating authority rejected the declared FOB value of Rs.3,82,54,946/- and redetermined the FOB value as Rs. 16,81,598/-, confiscated the impugned goods with option to redeem the same on payment of redemption fine of Rs. One crore. He imposed penalty of Rs. One crore each on the exporter under both the Sections i.e. Section 114(iii) and 114AA of the Customs Act, 1962. He also imposed penalty of Rs. 50 Lakh each on M/s Mass Shipping Agency, Shri Rajiv Arya, partner of the exporting firm, M/s Aeromar Logsitics & M/s Dhanlabh

Logistics LLP under both the section i.e. section 114(iii) and 114AA respectively.

2.4 The appellant filed appeal before the Commissioner (Appeals) who vide order-in-appeal No. AHD-CUSTM-000-APP-438-439-23-24 dated 13.02.2024 upheld the order and rejected the appeal filed by the appellant. Hence, the present appeal.

2.5 On behalf of the appellant, Learned Advocate argued that the party has not acted against the interest of Revenue. They have no obligation under the Customs law to fulfill any conditions as prescribed for the CHA under CBLR, 2018. They have acted as intermediary who received documents from third party and forwarded to the CHA who was obliged to comply with all the obligations under Customs Broker Licensing Regulations, 2018 read with the Customs Act. The obligations under the Customs Act are on the exporter and the CHA but not on the intermediary. The impugned order is violating principles of natural justice as none of the referred case laws have been considered and discussed by the learned Appellate Authority. No case has been made out against the appellant for imposition of penalty under Section 114(iii) and 114AA of the Customs Act, 1962 as the appellant has neither signed nor used any declaration, statement or document intentionally or unintentionally. There is no finding as to how goods have become liable to confiscation under Section 113 of the Customs Act only because the documents have been received from a third party and forwarded to the CHA. He cited the decision of the Tribunal in the case of PD Prasad & Sons Pvt Ltd. vs CC (Export-Delhi) 2017 (358) ELT 1004 (Tri. Del.) and the case of M/s Cochin Air Cargo Clearing House vs. CC (Preventive), Tiruchirapalli 2023 (9) TMI 1198-CESTAT Chennai. He pleaded for setting aside the penalty on the appellant.

3. Learned AR, on the other hand, reiterated the findings of the lower authorities and tried to justify penalties imposed on the appellant. He highlighted the decision of the Tribunal in the case of Harsons Overseas vs CC&CE-Delhi-IV 2019 (369) ELT 1582 and M/s SRJ International vs CC-Amritsar 2011 (269) ELT 497 (Tri. Del.).

4. Heard the rival submissions. From the records and the submissions of the learned Advocate, it is clear that the department has not recorded any statement of the appellant during investigation. The department sent a simple letter to the appellant to inquire about receipt of export documents to which he replied as having been received from M/s Mass

Shipping Agencies, New Delhi through E-mail. No further investigation seem to have been done at his end to bring out is role in alleged export of goods. The appellant has acted as intermediary in the case who only transmitted the export documents received from M/s Mass Shipping Agency to the CHA for filing the shipping bills with the Customs Authorities. The department has not substantiated charges of abetment or submission of false documents or material to justify penalty upon him under Section 114(iii) and 114AA of the Customs Act respectively.

5. We find that a similar issue was decided by this Tribunal in the case of Bansal Fine Foods Pvt. Ltd. Vs. Commissioner of Customs, Mundra at 2023 5 Centax 109 (Tri.-Ahmd.) wherein it wsa held that "*CHA who filed shipping bills as per documents provided by Indian exporter is not liable to penalty under section 114 and 114AA of Customs Act, 1962 when export consignment was rerouted to another country but ultimately delivered to original consignee."*The relevant para 5.7 of this order is reproduced below*:* -

> ***"5.7*** *In respect of the Appeal filed by M/s. V. Arjoon, CHA, we find that the CHA had filed shipping bills as per the documents provided to him by exporter. Therefore, the bonafide act of the Appellant cannot be doubted. The act of filing the export documents for customs clearances shows that the appellant has no mens rea and filed the documents being a bona fide facilitator. Further, in any event of the matter, since we have already held that the goods were ultimately delivered to the buyers at Iran, there is no justification for imposing penalty upon the appellant, therefore, the penalty imposed on the appellant is set aside".*

6. In the case of Rajeev Khatri Vs. Commissioner of Customs (Export) at (2023) 9 Centax 412 (Del.), Hon'ble High Court of Delhi has given following findings: -

> ***"30.*** *Thus, indisputably, persons who have committed the acts of omission or commission in relation to goods that rendered them liable for confiscation, are liable to pay the penalty as stipulated under section 112(a) of the Customs Act, without any requirement to establish their mal intent. However, the same principle would not apply to persons who are alleged to have abetted such acts of omission or commission. This is because, abetment, necessarily requires, at the minimum, knowledge of the offending Act.*
>
> ***31.*** *The use of the expression 'abet' in Section 112(a) of the Customs Act, makes it implicit that the person charged, who is alleged to have abetted the acts of omission or commission, has knowledge and is aware of the said acts. A plain meaning of the word 'abet' means instigation, aid, encouragement of an offence2. It necessarily involves the knowledge that the act being abetted is wrong.*

32. *The Black's Law Dictionary defines the expression 'abet' as under:*

"1. To aid, encourage, or assist (someone), esp. in the commission of a crime <abet a known felon>. 2. To support (a crime) by active assistance <abet a burglary>."

33. *In Queen v. Coney & Ors. (1882) 8 Q.B.D. 534: the Court for Crowned Cases Reserved held as under:*

> *"To constitute an aider or abettor, some active steps must be taken, by word or action, with intent to instigate the principal or principals. Encouragement does not, or necessity, amount to aiding and abetting. It may be intentional or unintentional. A man may unwittingly encourage another in fact by his presence, by misinterpreted gestures, or by his silence or non-interference - or he may encourage intentionally by expressions, gestures, or actions, intended to signify approval. In the latter case, he aids and abets; in the former he does not. It is no criminal offence to stand by a mere passive spectator of a crime, even of a murder. Non interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to present it, and had the power so to do or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he willfully encouraged, and so aided and abetted. But it would be purely a question for the jury whether he did so or not."*

34. *Section 3(1) of the General Clauses Act, 1897 expressly provides that the expression 'abet'4 would have the same meaning as in the Indian Penal Code, 1860 (hereafter 'the IPC').*

35. *Section 107 of the IPC explains the meaning of the expression 'abetment of a thing'. The said Section of the IPC reads as under:*

> *"**107. Abetment of a thing.** —A person abets the doing of a thing, who—*
>
> *First. — Instigates any person to do that thing; or*
>
> *Secondly. — Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
>
> *Thirdly. — Intentionally aids, by any act or illegal omission, the doing of that thing.*
>
> *Explanation 1. — A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.*
>
> *Illustration*

A, a public officer, is authorised by a warrant from a Court of Justice to apprehend Z, B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2. — Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

36. *Thus, in the context of Section 112(a) of the Customs Act, by definition, the expression 'abet' means instigating, conspiring, intentionally aiding the acts of commission or omission that render the goods liable for confiscation.*

37. *It is apparent from the above that the knowledge of a wrongful act of omission or commission, which rendered the goods liable for confiscation under section 111 of the Customs Act, is a necessary element for the offence of abetting the doing of such an act.*

38. *In Shree Ram v. State of U.P.: 1975 3 SCC 495, the Supreme Court held as under:*

"6……..Section 107 of the Penal Code which defines abetment provides to the extent material that a person abets the doing of a thing who "Intentionally aids, by any act or illegal omission, the doing of that thing". Explanation 2 to the section says that "whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act". Thus, in order to constitute abetment, the abettor must be shown to have "intentionally" aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107. A person may, for example, invite another casually or for a friendly purpose and that may facilitate the murder of the invitee. But unless the invitation was extended with intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted the murder. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active complicity is the gist of the offence of abetment under the third para of Section 107."

39. *In Amritlakshmi Machine Works v. The Commissioner of Customs (Import), Mumbai: 2016 (335) E.L.T. 225 (Bom.) (FB)/[216] 66 taxmann.com 49 (Bom.)(FB), a Full Bench of the Bombay High Court had considered the aforesaid issue and held that the word 'abetment' is required to be assigned the same meaning as under section 3(1) of the General Clauses Act, 1897. The court further opined as under:*

"31. …..Mere facilitation without knowledge would not amount to abetting an offence. Parliament has specifically included abetment in Section 112(a) of the Act, to include acts done with knowledge, otherwise the first portion thereof

> *"Any person - (a) who in relation to any goods does or omits to do any act …." would cover acts done or omitted to be done on account of instigation and/or encouragement without knowledge. However, the first portion of Section 112(a) of the Act is only to make person of first degree in relation to the act or omission strictly liable. Persons who are not directly involved in the act or omission to act, which has led the goods becoming liable for confiscation cannot be made liable unless some knowledge is attributed to them. Therefore, it is to cover such cases that Section 112(a) of the Act also includes a person who abets the act or omission to act which has rendered the goods liable to confiscation. Imposing penalty upon an abettor without any mens rea on his part would bring all business to a half as even innocent facilitation provided by a person which has made possible the act or omission to act possible could result in imposing of penalty."*

40. *We respectfully concur with the aforesaid view. This view has also been consistently followed by the Tribunal.*

41. *In Commissioner of Customs (Import) v. Trinetra Impex Pvt. Ltd.: (2020) 372 E.L.T. 332 (Del.), a Co-ordinate Bench of this Court had rejected the Revenue's appeal against an order of the Tribunal setting aside the levy of penalty on a CHA under section 112(a) of the Customs Act. This Court had referred to the decision of the Bombay High Court in Amritlakshmi Machine Works v. The Commissioner of Customs (Import), Mumbai (supra) and held as under:*

> *"11. In respect of the show cause notice dated 8-7-2011, the imposition of the penalty has been made under section 112(a) of the Act in respect of the goods which have been held to be liable to be confiscated under section 111 of the Act. Here, the imposition of the penalty on the CHA is founded on the ground that he has abetted the offence. Though, for imposition of penalty in respect of the cases falling under section 112(a) of the Act, mens rea may not be required to be provided as condition precedent, however, when it comes to imposition of the penalty on an abettor, it is necessary to show that the said essential element/ingredient is present."*

7. In above case laws, it has been held show that penalty under Customs Act can be imposed on a person only if some positive Act of his involvement in fraudulent import/export is found with credible evidence. If a CHA fails to fulfill the obligation cast upon him under CBLR, 2018, appropriate action needs to be taken under those regulations. In this case, the appellant is not even a CHA. He just acted as an intermediary to forward the export documents/ KYC etc. received from M/s Mass Shipping Agency to the CHA. As discussed, the department has not adduced any evidence against the appellant establishing abetment in alleged fraudulent activity of the exporter. Also, no evidence has been brought forward to show that the appellant used false and incorrect material in the case

which led to confiscation of export goods. What has come out, is that the appellant received KYC documents, export invoices, packing lists, etc. of the exporter from some other Agency on his mail which he forwarded to CHA for filing papers with Customs. Therefore, the appelant cannot be penalised under Section 114(iii) and 114AA of the Customs Act, 1962.

8. In view of above, we find that the department has not brought out any evidence in this case to sustain allegation against the appellant. Therefore penalty has been imposed on him without credible evidence which is held unsustainable. Accordingly, appeal is allowed and order-in-appeal dated 13.02.2024 is set aside to the extent of upholding penalty upon the Appellant under Section 114(iii) and 114AA of the Customs Act, 1962.

9. The appeal is allowed with consequential benefit, if any, as per law.

(Order Pronounced in the open court on 11.04.2025)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(SATENDRA VIKRAM SINGH)
MEMBER (TECHNICAL)

Neha

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH-COURT NO. 1

CUSTOMS APPEAL NO. 50185 OF 2020

[Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/PPG/Garhi/769 / 2019-20 dated 06.11.2019 passed by the Commissioner of Customs (Appeals) New Delhi]

M/S D M MARKETING INC **Appellant**
103, No. 847/1, Mahipal Pur,
New Delhi-110037

Vs.

THE PRINCIPAL COMMISSIONER,
CUSTOMS(IMPORT) ICD PATPARGANJ **Respondent**
NEW DELHI

Appearance:
Present for the Appellant : Shri P Pathak, Consultant
Present for the Respondent: Ms. Jaya Kumari, Authorised Representative

CORAM:
HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR P. V SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51136 /2022

DATE OF HEARING/DECISION : 21/11/2022

P V SUBBA RAO:

1. M/s D M Marketing Inc, Mahipalpur, New Delhi[1] filed this appeal to assail the Order-in-Appeal dated 06.11.2019[2] passed by the Commissioner of Customs (Appeals), New Customs House, IGI Airport, New Delhi. He upheld the Assessment Order No. 16/19 dated 27.08.2019 passed by the Assistant Commissioner and rejected the appellant's appeal.

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[1] **the appellant**
[2] **the impugned order**

2. The facts of the case in brief are that the appellant imported various food supplements and filed Bill of Entry No. 3442737 dated 29.05.2019. The goods were examined 100 % by the officers on 17.06.2019. The examination report of the officers is as follows:

> "Opened and examined 100% of the goods in the presence of representative of CHA & found to contain food supplement as per invoice & B/E attached. NOC from FSSAI Accredit Lab & AQ NOC attached. COO Poland.
>
> The goods are supplied by M/s Olimp Lab Spzoo Poland. The foreign supplier is the manufacturer. The High Sea Sales agreement attached."

3. It appeared to the officers that the declared value of the goods was lower than the values in the contemporaneous data of the similar goods imported and a query was raised on 10.06.2019 on the customs EDI system. The importer neither responded to the query nor produced any document to substantiate its claim and, therefore, a personal hearing was fixed on 09.07.2019 and 10.07.2019. The appellant's representative Shri Yogesh Kumar Dahiya, attended personal hearing and submitted a letter supporting the declared values. After considering the submissions made and holding personal hearing, the Deputy Commissioner compared the value of the goods with other contemporaneous data of imports as mentioned in Table C of the Order-in-Original which reads as below:

TABLE-C

Sr No. of item in Table A under paragraph 2	Bill of Entry	B/E Dt.	Custom House Code	Unit Quantity Code	Unit Ass. Value in RS.
1 & 13	3879859	01/07/2019	INMUN1	KGS	633.49
2 & 13	4176398	22/07/2019	INSTT6	KGS	418.56
3	3761279	22/06/2019	INMUN1	KGS	947.42
4 &13	4069672	15/07/2019	INDEL4	KGS	1455.49

4. Based on the above data the Deputy Commissioner rejected the declared value and re-determined the value of the imported goods as follows:

S No.	**Item Description**	**Declared unit price (USD) (3)**	**Assessed Unit Price (in USD) (4)**
1	Food Supplement Olimp Whey Protein Complex 2.27 Kg (Chocolate Flavour)	12.00	20.2 per pcs
2	Food Supplement Olimp Gain Bolic 6000 3.5 Kg	10.00	12.92 per pcs
3	Food Supplement Olimp Pure Whey Isolate 2.2kg	14.00	29.29 per pcs
4	Food Supplement Olimp L-Carnitine Xplode Powder 300g	3.00	3 per pcs
5	Food Supplement Olimp Redweiler 480g	5.00	5 per pcs
6	Food Supplement Olimp Flex Powder 504g	4.00	4 per pcs
7	Food Supplement Olimp Collaregen 400 g	4.00	4 per pcs
8.	Food Supplement Olimp Vitamin Multiple Sports 60 caps	1.50	1.5 per pcs
9	Food Supplement Olimp Pump Xplode Powder 300g	3.00	3 per pcs
10	Food Supplement Olimp Knockout 2.0 305g	3.00	3 per pcs
11	Food Supplement Olimp BCAA Xplode Powder 280g	3.00	12.72 per pcs
12	Food Supplement Olimp Creatine Monohydrate Powder 250g	1.75	1.75 per pcs
13	FOOD SUPPLEMENT (BCAA Xplode 10g, 1440 sac, Whey Protein Complex 17g 1248 Sac, Knockout 6g, 1200 Sac, Gain Bolic 40g, 960 Sac, 1 PALLET OF FREE SAMPLES)(AS PER INVOICE) (1 Pallet)	60	1068 per pcs
14	SHAKERS(MADE OF PLASTIC) (Kgs)		1.2 per kgs
15	CATALOGUES (KGS)		0.26294 per kgs
16	T SHIRT (MADE OF 100% COTTON)(Nos.)		0.7 per kgs

5. The Deputy Commissioner rejected the declared transaction value under rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007[3] and re-determined the same under Rule 5 on the basis of the contemporaneous data of similar goods as

[3] **the Rules**

mentioned in Table C and confirmed demand of the differential duty of Rs. 18,44,211/-.

6. Aggrieved, the appellant appealed to the Commissioner (Appeals) on the grounds that the order of the Deputy Commissioner was passed without giving them an opportunity to present their case; did not provide reasons for rejection of the declared value on the enhancement of the value and that the NIDB alone cannot be a basis for rejecting the declared value. The Commissioner (Appeal) passed the impugned order in which he recorded that the contention that no opportunity was granted to the appellant for hearing was incorrect as Shri Yogesh Kumar Dahiya had appeared before the Deputy Commissioner for hearing and made his submissions. He further held that the impugned order is a very reasoned one wherein the reasons for rejecting the declared value have been given and that the value of the goods has been enhanced on the basis of the contemporaneous import data and a complete comparison chart has been made. He held that it was a well reasoned and long order which runs into 11 pages.

7. The appellant filed this appeal on the following grounds:

(i) The Commissioner (Appeals) has failed to analyse the submissions and documents made by the appellant in proper perspective;

(ii) the Order-in-Original dated 27.08.2019 is biased and it relies on the import data subsequent to the Bill of Entry filed by the appellant;

(iii) The Department has only taken selected data showing higher values;

(iv) They were no imports of similar goods; and

(v) The NIDB data alone cannot be relied upon to reject the declared invoice values as find that the Order-in-Original was passed in violation of the Valuation Rules.

8. The appellant prayed that the impugned order may be set aside and the appeal may be allowed.

9. Learned Consultant for the appellant submits that no reasons have been given by the Deputy Commissioner for rejection of the declared value in terms of rule 12. He also submits that the data of contemporaneous imports must be reckoned with respect to import of identical/ similar goods of like nature and quality during the period. While the appellant's Bill of Entry was dated 29.05.2019, the data relied upon by the Deputy Commissioner pertains to Bills of Entry filed between 22.06.2019 and 22.07.2019. No importer can be expected to anticipate the values at which goods may be imported later by other importers and based on such anticipated values, assessee value of their own goods. There is no evidence whatsoever that any amount has been paid over and above what has been declared in the Bill of Entry by the appellant. He also draws attention of the Bench to the fact that the goods whose values have been taken for comparison in Table C have not been indicated. Therefore, it is not clear as to the value of which goods were compared with value of their imported goods. It is also not clear as to what was the port of import and what exchange rate was considered. Therefore, the entire order of the Deputy Commissioner was passed without application of mind which the Commissioner

(Appeals) upheld in the impugned order only because it ran into 11 pages.

10. We have considered the submissions on both sides and perused the records.

11. Goods imported into India are chargeable to duty under section 12 of the Customs Act. This duty can be based on the quantity (specific rate of duty) or value (ad-valorem rate of duty). If the duty has to be determined based on the value, the valuation has to be done in terms of section 14 of the Customs Act, which provides that such value shall be the price actually paid or payable for the goods for delivery at the time and place of importation subject to the following conditions.

(a) Buyer and seller are not related.

(b) Price is a sole consideration of sale.

(c) Other conditions specified in the Rules made in this behalf.

12. The rules made in this behalf are the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Rule 3 states that valuation of imported goods shall be the transaction value adjusted in accordance with the provisions of Rule 10. Rule 10 indicates some costs and services whose value has to be added to the transaction value. Rule 3 further states that if the value cannot be determined as per sub-rule (1) of Rule 3, transaction value shall be determined by proceeding sequentially through rules 4 to 9. Rule 4 states that the transaction value of identical goods sold for export to India and imported about the same time as goods being valued shall be the value. Rule 5 states that the transaction value of similar goods for export to India imported at or about the same time as the goods being valued

shall be the value. Rule 7 provides for calculating the value through deductive methods and rule 8 provides for determining the value through computation. Rule 9 is a residual method to be applied if none of the value cannot be determined by other Rules. Rule 11 requires the appellant to provide accurate details relating to the imported goods.

13. Thus the scheme of the valuation is that the default method of valuation is transaction value with some adjustments, if necessary. However, the transaction value can be rejected under Rule 12 which reads as follows:

> **" 12. Rejection of declared value. -**
>
> (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.
>
> (2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).
>
> Explanation.-(1) For the removal of doubts, it is hereby declared that:-
>
> (i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.
>
> (ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.
>
> (iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -
>
> (a) the significantly higher value at which identical or similar goods imported at or about the same time

> in comparable quantities in a comparable commercial transaction were assessed;
>
> (b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;
>
> (c) the sale involves special discounts limited to exclusive agents;
>
> (d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;
>
> (e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;
>
> (f) the fraudulent or manipulated documents."

14. If the transaction value is rejected under rule 12 then the value of identical goods must be considered and if it is not available and the value of similar goods must be considered and if the value of identical or similar goods were both not available then the value can be deducted by considering the price at which such goods are sold in wholesale and after certain deductions. If such prices are also not available then the value can be computed by considering the cost of raw-material and fabrication cost plus other expenses. If none of these methods are possible then the residual method can be followed based on the above principles.

15. As may be seen, rule 12 contemplates two stages- first the proper officer must have a "reason to doubt" the truth and accuracy of the declared value. If he has such a reason he may ask the importer to furnish further information including documents and evidence. At the second stage after receiving such further information or in the absence of any response to the importer the proper officer still has "reasonable doubt" about the truth and accuracy then he can reject the transaction value. The second stage requires a higher standard of a reasonable doubt being entertained. If the officer rejects the transaction value

under Rule 12 then he has to go through sequentially Rules 4 to 9. In this case, the Deputy Commissioner rejected the transaction value under Rule 12 for the reason that the contemporaneous imports of the goods were at higher prices. These contemporaneous prices are indicated in Table C of the order which has been reproduced above. The least one would expect while comparing the prices is to specify what goods were imported in the contemporaneous Bills of Entry, their quantity, specifications, country of origin, port of import etc., so that the same can be compared with the disputed goods. Needless to say the Bills of Entry and other documents must be provided to the appellant importer so that it has an opportunity to examine them and put up a proper defence. It also needs to pointed out that in sub-rule (3) of Rule 4 which also applies to Rule 5, if more than one such transaction of identical goods/ similar goods are found, the lowest of such values should be used to determine the value of imported goods. Table C of the Order-in-Original does not indicate that the values therein were the lowest values.

16. We also find force in the argument of the learned consultant that the imported goods cannot be compared in value to those which may have been imported a month later. In this case all the four Bills of Entry based on which the declared values were rejected were imported or the Bills of Entry were filed more than a month after the disputed Bill of Entry. From the Table we cannot make out as to which Customs House the goods in these Bills of Entry were imported from and in what quantities and from which country. Further, we find that the assessable value in these Bills of Entry were given in Rupees whereas the declared values in the Bill of Entry are in US dollars. It is not clear of what rate

of exchange is applied to convert rupees into dollars to re-determine the assessable value under Rule 5.

17. In view of above, we find that rejection of the transaction value by the Deputy Commissioner is not in accordance with law. Consequently, its re-determination under Rule 5 cannot also sustain. We find that in the impugned order the Commissioner (Appeals) did not discuss any issue related to rejection of transaction value and re-determination of the values. It appears that he was only impressed by the fact that the order of the Deputy Commissioner was of 11 pages. Apart from that there is no finding whatsoever of the Commissioner (Appeals) as to why he was upholding the rejection of the transaction value and redetermination under Rule 5.

18. In view of above, the appeal is allowed and the impugned order dated 06.11.2019 is set aside with consequential relief to the appellant.

[Order pronounced in open court]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V SUBBA RAO)
MEMBER(TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 50988 of 2020

(Arising out of order-in-appeal No. D-I/Exp/NCH/188/20-21 dated 17.07.2020 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi).

M/s Royal Industries **Appellant**
C-1/119, GIDC, Phase-1, Vatva
Ahmedabad-382445, Gujarat.

VERSUS

Commissioner of Customs (Export), New Courier Terminal **Respondent**
IGI Airport, New Delhi-110037.

APPEARANCE:

Shri Akhil Krishan Maggu, Advocate for the appellant
Shri P. Juneja, Authorised Representative for the respondent

Coram:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

FINAL ORDER NO. 51048/2021

DATE OF HEARING: 02.02.2021
DATE OF DECISION: 24.02.2021

ANIL CHOUDHARY:

The appellant is in appeal against the order-in-appeal dated 17.07.2020 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi.

2. Brief facts of the case are that the appellant is a partnership firm bearing IEC No. 0803012993 and is operating in India and is in the business of import, manufacturing and export of goods. The appellant imported '10 kgs. of 1, 3-DIHYDROXYNAPHTHALENE vide

HAWB No. 772540468746 dated 12.06.2018 through FEDEX.FEDEX filed courier Bill of Entry bearing No. CBEXIII_DEL_2018-2019_2806_14398 dated 28.06.2018. As per the information on the package, FEDEX declared the value of goods at USD 900.00 (FOB), equivalent to assessable value of Rs. 75,328/- involving customs duty of Rs. 20,892, issued by Shanghai Hohance Chemical Co. Ltd., China.

3. The goods were examined and it was found that declared value of the goods appeared to be on lower side. Therefore, the appellant (through Fedex) was asked to produce value evidence. In reply, the appellant submitted the proforma invoice No. HH201805282N dated 28.05.2018 for USD 21,500.00 (CIF), covering the item imported vide above mentioned HAWB. The revised value of USD 21,500.00 (CIF) was considered as fair value of the imported goods by the Competent Authorities. Accordingly, on the basis of proforma invoice, the assessable value of the goods comes to Rs. 14,85,650/-. In view of submission of proforma invoice, it appeared that the declared value of Rs.75,328/- is liable for rejection under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Further, the value as per proforma invoice i.e. USD 21,500.00 (CIF) equivalent to assessable value of Rs. 14,85,650/- is considered as fair and reasonable value of the imported goods in terms of Section 14(1) of the Customs Act, 1962, read with Rule 3 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The total duty leviable on the goods, therefore, comes to Rs. 4,12,045/- against the declared duty of Rs. 20,892/-, on the declared value. It,

thus, appeared to Revenue that the importer has misdeclared the value of the imported goods to evade customs duty to the tune of Rs.3,91,153/-. The impugned goods therefore, appeared liable to confiscation under Section 111(m) of the Customs Act, 1962. The appellant also appeared liable to penal action under Section 112(a) of the Act, ibid. Also the appellant it appeared, has intentionally used false invoice in order to evade customs duty, ad valorem. Hence, they appeared liable to penal action under Section 114AA of the Customs Act, 1962. The appellant vide their letter dated 06.07.2018 requested that they do not want personal hearing and show cause notice in the present case and further requested to clear their goods on nominal fine and penalty.

4. As the appellant had requested to waive the requirement of show cause notice and personal hearing vide their letter dated 06.07.2018, the Adjudicating Authority held that the appellant has declared the goods as "10 kgs. of 1, 3- DIHYDROXYNAPHTHALENE", imported vide AWB No. 772540468746. The appellant declared the value of the goods as USD 900.00 (FOB), equivalent to assessable value of Rs. 75,328/-, involving customs duty of Rs. 20,892/- and submitted invoice No. 20180619 dated 20.06.2018. The declared value of the goods appeared to be very low. Therefore, the appellant was asked to submit the value evidence. The appellant submitted the proforma commercial invoice No. HH201805282N dated 28.05.2018 valued at USD 21,500.00 (CIF). Accordingly, on the basis of proforma invoice, the assessable value of the goods comes to

Rs.14,85,650/-. Further held that the declared value in the Bill of Entry does not represent true transaction value of the imported goods and therefore, liable for rejection under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and it was determined at Rs. 14,85,650/- (assessable value), on the basis of proforma invoice. The Adjudicating Authority rejected the declared value of Rs. 75,328/- of the goods, imported vide Bill of Entry No. CBEXIII_DEL_2018-2019_2806_14398 dated 28.06.2018, under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and re-determined the assessable value of goods, having re-determined assessable value of Rs. 14,85,650/- under Section 111(m) of the Customs Act, 1962. However, gave an option to the appellant to redeem the same on payment of fine of Rs.3,00,000/- in lieu of confiscation under Section 125 of the Customs Act, 1962 and also imposed penalty of Rs. 4 lakhs on the appellant under Section 112(a) of the Act, ibid and further penalty of Rs. 4 lakhs was also imposed under Section 114AA of the Act, ibid. Redemption fine and penalty was in addition to the duty applicable on the goods.

5. Being aggrieved, the appellant filed appeal before the Commissioner of Customs (Appeals), who vide order dated 17.07.2020 rejected the appeal, upholding the adjudication order. Being aggrieved, the appellant is before this Tribunal.

6. Learned Counsel for the appellant urges that the Court below have failed to appreciate the scheme of filing ‘courier Bill of Entry’,

which is filed by the 'Authorised courier' under the Customs Act read with the Customs Broker Licensing Regulation, 2013 read with the Courier Import and Export (Electronic Declaration and Processing) Regulations, 2010, as amended. Under Regulation 4(2) of Courier I&E Regulation, 2010, imported goods shall bear a declaration from the sender or consigner, regarding the contents of each of the package and total value thereof.

7. Further urges that Regulation 5(3) of Courier I&E Regulation requires, the authorised courier or his agent shall make entry of goods imported by him in an electronic declaration, by presenting to the proper officer, the 'courier Bill of Entry'.

7.1 Further urges that Regulation 12(1)(v) of courier I&E Regulation requires, the courier shall exercise due diligence to ascertain the correctness and completeness of any information which is submitted to the proper officer, with reference to clearance of imported goods.

8. Further urges that there is no case of any mis-declaration or malafide made out against the appellant-importer, and penalty have been imposed mechanically without appreciation of facts and the law.

9. Further urges that under the scheme of the Act, till the time of filing of courier Bill of Entry by the authorised courier, based on the information contained on the package, there is no communication or involvement of the importer. The authorised courier only gives an intimation to the importer of the arrival of the goods and filing of the

Bill of Entry. It is only on any objection raised by the Customs Department, the authorised courier interacts with the importer.

10. Further urges that it is an undisputed fact that the appellant-importer at the very first instance, have brought the correct value based on the proforma invoice, to the knowledge of the Department.

It is also a matter of record that the appellant have remitted the price as per the proforma invoice through 'Authorised banking channel' and have recorded such transaction in the books of account maintained in the ordinary course of business.

11. Further urges that the consigner /shipper located in China have admitted their mistake and have also regretted vide their e-mail dated 29.06.2018, enclosing the correct final invoice.

Further that there is no allegation of any collusion between the appellant and the shipper (located in China), and/or the courier (Fedex).

12. Accordingly, the learned Counsel for the appellant prays that no case of any mis-declaration is made out against the appellant-importer, and it is evidently a clerical error on the part of the shipper. The penalties imposed are fit to be set aside.

13. Learned Authorised Representative for the Revenue relies on the impugned order. He further urges that the value on the package have been declared as USD900 by the shipper, which must definitely have been done with the knowledge of the appellant-importer. He further urges that the appellant-importer is responsible for filing of

the correct courier Bill of Entry, and in the facts and circumstances a case of mis-declaration is made out under Section 111(m) of the Act. He further relies on the letter dated 06.07.2018 written by the appellant to the Customs Department, praying that they are ready to bear the fine and penalty on the shipment and do not want any personal hearing and/or show cause notice. Thus, penalties have been rightly imposed. Accordingly, he prays for dismissing the appeal.

14. Having considering the rival contentions, I find that it is the obligation of the authorised courier to file the 'Courier Bill of Entry' based on the information contained on the package. Evidently, it is a case of clerical mistake by the shipper, who has wrongly declared the lower value instead of the correct value. I further find that the appellant have at the very first instance on query raised by the Department, have come forward with the correct value based on the proforma invoice. Further, it is an admitted fact that the appellant have remitted the price of USD 21500 through authorised banking channel, and as such no case of any malafide is made out against the appellant. At best, it is the mistake of the authorised courier who was not vigilant at the time of booking of the courier parcel to ensure the correct declaration by the shipper. I further find that no case of any collusion is made out against the appellant shipper and /or against the courier. I further find that penalty have been imposed mechanically without proper appreciation of the facts and the law applicable.

15. Accordingly, I allow this appeal and set aside the order of confiscation as well as the penalties imposed under section 112(a) and 114AA of the Act. Thus, the appeal is allowed with consequential relief to the appellant.

(Pronounced on 24.02.2021).

(Anil Choudhary)
Member (Judicial)

Pant

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70395 of 2023

(Arising out of Order-in-Original No.16/Pr.Commr./NOIDA-CUS/2020-21 dated 10.11.2020 passed by Principal Commissioner of Customs, Noida)

M/s Shree Venkateswara Exports, ...Appellant
(16/87, Gali Bhattewali, Patti Mehar,
Baraut, Distt: Baghpat, U.P.-250611)

VERSUS

Principal Commissioner of Customs, Noida ....Respondent

(ICD, Tilpata, Dadari, Gautam Budh Nagar, U.P.-201311)

APPEARANCE:

Shri Nishant Mishra, Advocate for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

WITH

Customs Appeal No.70329 of 2023

(Arising out of Order-in-Original No.16/Pr.Commr./NOIDA-CUS/2020-21 dated 10.11.2020 passed by Principal Commissioner of Customs, Noida)

M/s Surya Jyoti Global Logistics, ...Appellant
(E-33/1, 1st Floor, Govindpuri,
Opposite Kalkaji Depot, New Delhi)

VERSUS

Principal Commissioner of Customs, Noida ....Respondent

(ICD, Tilpata, Dadari, Gautam Budh Nagar, U.P.-201311)

APPEARANCE:

Request for Adjournment, for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOs.- 70174-70175/2025

DATE OF HEARING : 17.02.2025
DATE OF PRONOUNCEMENT : 07.04.2025

P. K. CHOUDHARY:

The Appellant No.1, M/s Shree Venkateswara Exports and Appellant No.2, M/S Surya Jyoti Global Logistics have filed the

instant appeals against Order-in-Original No.16/Pr. Commr./NOIDA-CUS/2020-21 dated 10.11.2020 passed by the Pr. Commissioner of Customs, Noida whereby the goods meant for export of the Appellant No.1 were confiscated and released on imposition of Redemption Fine of Rs.66,63,800/-, penalty of Rs.22,21,267/- was imposed on both the Appellants under Section 114 of Customs Act, 1962[1] and penalty of Rs.22,21,267/- was also imposed under Section 114AA of the Act on both the Appellants.

2. Briefly stated, the facts of the case are that the Appellant No.1 is engaged in export of readymade garments which were either procured from the open market or got manufactured by them on job work basis. The Appellant filed 35 shipping bills for export of readymade garments at ICD Pantnagar on 08.03.2017 & 09.03.2017 through M/s Surya Jyoti Global Logistics, (CHA), Appellant No.2. Against said 35 shipping bills, 3,25,051 pcs of readymade garments viz. cotton and polyester man's jeans, man's T-shirt, ladies long dress, ladies top, knitted pcs. Assembled baby, men's pajama, ladies lagging, boy's T-shirt, men's trunk, ladies scarf etc. of FOB value Rs.19,93,30,002/- were to be exported under claim of drawback amounting to Rs.1,84,34,085/-. On the basis of an intelligence that the Appellant No.1 was availing inadmissible drawback by way of over invoicing his export goods, a team of DRI officers from Noida Regional Unit visited ICD Pantnagar on 16.03.2017 and it was found that the goods of the Appellant for export against 35

[1] The Act

shipping bill on 08.03.2017 and 09.03.2017 were being processed for export. It was further found that LEO had already been given by the Customs and 3 containers were already stuffed and sealed. However, remaining goods intended to be stuffed in 4th container were lying in examination shed. Goods were physically examined by the visiting Officers and it was found that they were of inferior quality and their values were declared very high. Samples were drawn of each variety of readymade garments for ascertainment of market value of the said goods. It was further found that in respect of shipping bill No.4616900 dated 08.03.2017, the declared quantity and its FOB value was 10 times higher than the quantity and FOB value shown in the corresponding invoice and packing list. Statement of Shri Raman Goel, Proprietor of the Appellant firm was recorded who stated that the readymade garments in question were purchased from traders of Delhi, Tirupur, Surat and Muzaffarnagar and payments were made through RTGS in supplier's Bank Account. As regards, inferior quality of ladies scarf made of MMF, he explained that out of 279 cartons, goods of 79 cartons were manufactured by him and rest of the goods were procured from his clearing agent Shri Shamsher Singh @ 8.50 per piece. The said lady scarf made of MMF were declared at FOB value of 4.25 US$ per piece and drawback on the same was claimed at Rs.28 per piece which is much higher than the value of Rs.8.50 per piece. It was observed by the Department that comparable goods were not exported by any other exporters. So, value of goods of the Appellant was ascertained

by way of costing by showing sample of goods to two manufacturers of readymade garments of Noida. On the basis of reports of costing received from the said two manufacturers, it was found that the actual value of the goods were quite less than the declared FOB value. Searches were also conducted in the declared premises of suppliers and two suppliers were found none existing. With regard to purchases from the said firms, Shri Raman Goel, Proprietor of the Appellant's firm, stated that he purchased the goods through agent and did not have direct acquaintance with the said suppliers. Statements of the agent, suppliers and CHA were also obtained. Finally, the Department seized the said goods on the ground that they were liable for confiscation under section 113 of the Act. The Appellant requested to release the goods on provisional basis and submitted that he would not claim any drawback on the said goods and all drawback shipping bills may be converted into free shipping bills. The goods were provisionally released and export was allowed thereafter. On the basis of above investigations, a Show Cause Notice[2] was issued for confiscation of goods on the allegations that goods were overvalued with intention to avail inadmissible drawback. The value was re-determined in accordance with provisions of Rule 5 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007[3]. The re-determined value was said to be Rs.4,44,25,235/- in place of Rs.19,93,30,002/- as declared by the Appellant. Penalty under section 114 and 114AA of the Act was also proposed. The SCN

[2] SCN
[3] CVR, 2007

was adjudicated vide the impugned order and goods were confiscated with option to redeem and redemption fine, penalties were also imposed. Being aggrieved with the impugned order, the Appellants filed the instant appeals.

3. Learned Counsels pleaded the case on behalf of the Appellants and contended that the impugned order was passed *ex-parte* without affording appropriate opportunities of hearing which is in violation of the principles of natural justice. Explaining the details of opportunities given for personal hearing, he submitted that first opportunity was given as on 02.06.2020 when there was pandemic of Covid-19 and the whole city of the Appellant was under complete lockdown and hence the Appellant could not attend the said hearing. Vide said PH letter, the Appellant was not granted opportunity for virtual hearing as provided under the Board's Instruction No.390/Misc/3/2019-JC dated 27.4.2020. Next personal hearing was granted vide letter dated 11.8.2020 fixing the date of hearing on 18.8.2020, but letter was received only on 21.8.2020. The Appellant informed about the late delivery of the letter by email dated 24.09.2020. He submitted that no further opportunity was granted for personal hearing while as per the provisions of Section 122A of the Act, at least three opportunities for personal hearing is required to be given before the adjudication of the case. In this case, he submitted that in violation of the provisions, the adjudication order was passed on 01.10.2020, therefore, the said impugned order is liable to be set aside. He further submitted that the Appellant had not taken any drawback benefit

with regard to all the 35 shipping bills and therefore, the issuance of SCN and subsequent passing of the impugned order is un-warranted. Learned Counsel has submitted that market enquiry for ascertaining the market value of the goods which were exported by the Appellant, was initially conducted by the Officers of the ICD, Pantnagar. He submitted that copy of enquiry report was obtained through RTI from the Office of ICD Pantnagar. He pointed out that the value ascertained in respect of different varieties of goods exported viz-a-viz their market prices, ascertained by the ICD Pantnagar, indicated that market price was higher than FOB value of exported goods. Learned Counsel of the Appellant submitted that the DRI Officers resorted to costing method to determine value of the export goods, which was carried out by enquiring a couple of manufacturers of Noida. He argued that the costing should be duly certified by the Chartered Accountant or Cost Accountant as per Standing Order No.41/2007 dated 10.10.2007 issued by JNPT, but in this case, no such certificate was taken. He referred to the decision of the Tribunal in the case of BARD Export [2018 (363) E.L.T. 103 (T)] wherein it has been held that market enquiry is not a substantial evidence to prove overvaluation if it was carried out in respect of comparable goods. In the present case, he contended that the Department had not produced any evidence to show that value of comparable goods was taken into consideration but the Department had taken the opinion of a couple of manufacturers of garments on costing basis and arrived at a baseless conclusion regarding the market value of the goods in question.

Learned Counsel further submitted and vehemently raised the point that subsequent to export of said goods, the remittances received was equal to FOB value of goods. He, therefore, argued that there was no artificial fixation of price of goods to avail bogus drawback, the overvaluation allegation thus could not be substantiated. In this regard, he placed reliance on the decision of the Tribunal in the following cases:-

(i) Essar Automotive Pvt Ltd [2018-TIOL-3071-CES-ALL],

(ii) Pawan Kumar Singh [2017-TIOL-389-CESTAT-ALL],

(iii) Tex-Age [2016-TIOL-188-SC-CUS]

(iv) Nazir Makca [2017-345-ELT-674-Tribunal]; and

(v) S.Chandrashekharan [2001-132-ELT-751-Tribunal]

In the above cases, it has been consistently held by the Tribunal that in case foreign remittances are received equal to FOB value of export goods, charges of overvaluation do not sustain. As regard allegation of sham transactions with allegedly non-existing suppliers, the Learned Counsel pleaded that all invoices vide which goods were purchased by the Appellant for the export were produced before the Department and also details of Bank statement showing payment for such supplies have been submitted. He further submitted that the Department obtained the statement of representatives of various suppliers who categorically admitted that they had supplied garments to the Appellant. He, therefore, rebutted the allegation of sham transactions. On the issue of declaring excess quantity of goods in Shipping Bill No.4616900 dated 08.03.2017 where the

quantity of goods was declared 123000 pcs. in place of 12300 and thereby excess drawback was also claimed, the Learned Counsel submitted that it was typographical mistake only as all export documents like invoice, packing list were clearly showing correct quantity of goods i.e. 12300/-. Representative of CHA also accepted in his statement recorded during the course of investigation that the said action was only a typing mistake, as submitted by the Learned Counsel. He further pleaded that before export of the said goods, the Appellant had exported goods from ICD Pantnagar many times and in all cases remittance in foreign currency equal to FOB value were received. He finally prayed to set aside the impugned order.

4. Learned Authorized representative of the Department re-iterated the point already discussed in the impugned order. He submitted that the Appellant acted in such a way and in violation of the provisions of Customs Law to avail excess drawback by deliberately over invoicing the goods. Therefore, confiscation and impositions of penalty on the Appellants is legally sustainable. He has referred to various judicial decisions in support of his contention which are already discussed in the impugned order.

5. Heard both the sides and perused the appeal records.

6. We find that contentious issue in the case is only allegation of over invoicing of goods exported under cover of 35 shipping bills from ICD Pantnagar. The evidences collected by the Department are only value of goods determined on the basis of costing and non existence of few suppliers. It is interesting to note that market enquiry carried out by the Officers of ICD

Pantnagar shows entirely different result from the report of DRI Officers in respect of value of export goods. As per report of ICD Customs Pantnagar, the value of goods exported was at par or at higher side than FOB value of the respective goods. The outcome of the enquiry was very much in the knowledge of the DRI but it was deliberately ignored. DRI Officers got the enquiry conducted, not from the market but by way of costing given by a couple of manufacturers of garments and applied Rule 5 of the CVR to determine value of export goods. It is well established fact that market price of a product does not depend on the value arrived by way of costing. Many times market price is substantially higher than the costing value. It is observed that the Department has issued instruction on the method of costing vide Standing Order No.41/2007 dated 10.10.2007 issued by Jawahar Lal Nehru Customs House, Nhava Sheva where in para-9, it is mentioned as below:-

> *"9. Where the value has to be determined by Computed value method under Rule 5, the proper officer shall give due consideration to the cost-certificate issued by a Cost Accountant or Chartered Accountant or Government approved valuer, as produced by the exporter."*

No such certificate was demanded by the Department in the instant case but the costing done by some manufacturers was accepted without considering the actual cost of raw materials etc.

7. In view of the above, we are of the view that costing certificate on which the department relies does not have any evidentiary value for determining the cost of the exported goods. It is found that the Appellant has produced all bills/invoices of purchases of goods with payment details thereof. The Department did not challenge its authenticity. In the case of *M/s Peerless Consultancy Services Private Limited vs. Commissioner of Customs (PORT), Kolkata; 2013-(291) E.L.T. 201 (Tri.-Kolkata),* it has been held by the Tribunal that the burden of proof is on the Department regarding overvaluation in absence of flow back of payment made to the merchant-exporters. Moreover, we find that the Appellant had undoubtedly received remittances equal to the FOB value of the exported goods. The department has not proved any flowback of the money from foreign buyers to exporter or vice versa. There is no proof at all that any transaction of money was carried out other than the payment of FOB value of goods. We find support from the decision of Siddachalm Export Pvt. Ltd. [2011 (266) E.L.T. 3 (SC)] regarding acceptance of FOB value when bank realization produced. In the case of Vishal Exports Overseas Ltd. [2007 (209) E.L.T. 331 (S.C.), the FOB value cannot be rejected when foreign remittances equal to FOB value is received.

We are, therefore, of the considered view that there is no case of over invoicing of export goods in the present case.

8. Other issue in the present case is declaration of higher quantity of goods and drawback in shipping bill No.4616900 dated 08.03.2017. In place of 12300 Pcs, in shipping bill it was

mentioned 123000 Pcs. We find that all export documents like invoice, packing list etc were showing correct quantity of export goods. We thus find sufficient force in the contention of the Appellant that in shipping bill, quantity of goods was shown on higher side due to typographical mistake. It is a well settled principle that no penalty can be imposed for typing error. As regards penalty imposed on the CHA M/s Surya Jyoti Global Logistics (Appellant No.2) under Section 114 and 114AA of the Act, it is submitted that the Appellant has only acted as a Customs Broker in filing of shipping bills on behalf of the exporter on the basis of information provided by the exporter and presented the impugned goods for examination. Apart from handling the customs clearance of these impugned consignments as Customs Broker, the Appellant had no other role in the impugned exports. It is submission of the Appellant that allegation of facilitating the export of overvalued goods is based on presumptions only and not backed by any evidence. It is further submitted that impugned goods have been confiscated under Section 113(i) and 113(ia) of the Act being overvalued. It is the case of the Appellant that in this case, the Appellant did not have any role in either finalization of value of the impugned goods for the purpose of their export or preparation of export invoices. The exporter and overseas buyer had themselves finalized FOB values of the subject goods and the Appellant has no role in it. The Appellant received export invoices for filing of shipping bills wherein the FOB values were already declared. It is also submitted that the Appellant has acted only as a Customs

Broker and was not required to verify the value of the subject goods.

9. In view of the facts as stated above, we find that there is no role of the CHA (Appellant No.2) in deciding valuation of the subject goods and the Appellant is also not responsible for verification of declared FOB values of the subject goods. It is our considered view that the Customs Broker i.e. Appellant No.2 has not done any act of commission or omission which would render the goods liable for confiscation under Section 113(i) or under Section 113(ia) of the Act.

10. In view of the above discussions, the Redemption fine and the penalties imposed under Section 114 and 114AA on both the Appellants are set aside. Both the appeals filed by the Appellants are allowed with consequential relief, as per law.

(Order pronounced in open court on - **07.04.2025**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

LKS

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

REGIONAL BENCH-COURT NO.3

CUSTOMS Appeal No. 10228 of 2024

(Arising out of OIO-AHM-CUSTM-000-PR-COMMR-11-2024-25 dated 18/04/2024 passed by the Principal Commissioner of Customs, Ahmedabad)

CHIRIPAL POLY FILMS LTD **.....Appellant**
Chiripal House, Shivranjani Cross Road,
Satellite, Ahmedabad-380015

VERSUS

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD **.....Respondent**
Customs House, Nr. All India Radio,
Navrangpura, Ahmedabad-380009

WITH

CUSTOMS Appeal No. 10229 of 2024

(Arising out of OIO-AHM-CUSTM-000-PR-COMMR-12-2024-25 dated 18/04/2024 passed by the Principal Commissioner of Customs, Ahmedabad)

CHIRIPAL POLY FILMS LTD **.....Appellant**
Chiripal House, Shivranjani Cross Road,
Satellite, Ahmedabad-380015

VERSUS

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD **.....Respondent**
Customs House, Nr. All India Radio,
Navrangpura, Ahmedabad-380009

AND

CUSTOMS Appeal No. 10230 of 2024

(Arising out of OIO-AHM-CUSTM-000-PR-COMMR-13-2024-25 dated 18/04/2024 passed by the Principal Commissioner of Customs, Ahmedabad)

CHIRIPAL POLY FILMS LTD **.....Appellant**
Chiripal House, Shivranjani Cross Road,
Satellite, Ahmedabad-380015

VERSUS

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD **.....Respondent**
Customs House, Nr. All India Radio,
Navrangpura, Ahmedabad-380009

APPEARANCE:
Shri P M Dave, Advocate with Shri P P Jadeja, Consultant for the Appellant
Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent

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

Final Order No.11628-11630/2024

DATE OF HEARING: 14.06.2024
DATE OF DECISION: 23.07.2024

RAMESH NAIR

These 3 appeals are filed by Appellant M/s. Chiripal Poly Films Ltd, Ahmedabad against 3 orders-in-original dated 18-04-2024, passed by the Principal Commissioner of Customs, Ahmedabad. The issue involved in these Appeals is whether Appellants is liable to pay duty, Interest, Redemption Fine and penalty for violation of "Pre-Import Condition" in connection with imports made under Advance Authorization scheme (referred to as the AA scheme) during the period from 13-10-2017 to 09-01-2019. Since these appeals involved common issues, all the appeals are taken up for disposal. The duty, Interest, fine and penalty involved are as under :-

SCN date	Port of Import and O-I-O. dtd 18-04-2024	Duty paid & Confirmed by OIO - Rs.	Interest paid by appellant- Rs.	Penalty imposed u/s 114A- Rs.	R/Fine imposed - Rs.
20-04-2021	Mundra-OIO-11	1,39,38,827	1,43,38,992	1,39,38,827	23,00,000
17-08-2021	JNCH - OIO-12	1,41,04,014	1,06,36,235	1,41,04,014	23,00,000
16.09.2022	A'bad--OIO-13	11,10,26,373	10,42,86,757	11,10,26,373	1,85,00,000
Total		13,90,69,214	12,92,61,984	13,90,69,214	2,31,00,000

2 Appellant is a manufacturer importer and exporting their manufactured goods like, 1.Bi-Axially Oriented Polypropylene (Bopp) Film, 2. Aluminum Metalized Bopp Film, 3.Polyester Metalized Film, 4.Polyester Film, 5. Polyester (Pet) Chips (High Pressure Moulding Grade/Bottle Grade) Other Polyethylene Terepthalate, etc. (Export Products) since January, 2009. For manufacturing goods for export, Appellant have imported inputs viz. Plastic granules, Additives etc. under Advance Authorization, availed exemption of Notification No.18/2015-Cus dt. 1.4.2015 issued u/s 25(1) of Customs Act. The said Notification No. 18/2015-Cus was amended by Notification No.79/2017-Cus on 13.10.2017 allowing such exemption, subject to "pre-import condition" against producing a valid Advance Authorisation issued by Regional DGFT Authority in terms of paragraph 4.03 of Foreign Trade Policy, from the whole of duty of customs leviable, which is specified in the First Schedule to Customs Tariff Act 1975 and from the whole of additional duty,

safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable, respectively, under sections 3, 8B, 8C and 9A of Customs Tariff Act 1975. The Notification allowed exemption with pre-import condition from 13.10.2017 to the import duties in the nature of IGST leviable under sub section 3(7) of Customs Tariff Act 1975. The "pre-import condition" was inserted as a condition "(xii)" to the said Notification No. 18/2015-Cus for allowing exemption also from integrated tax leviable thereon under Section 3(7) of Customs Tariff Act 1975 and the exemption shall be subject to the Pre-Import Condition and physical exports of goods only.

2.1 Paragraph 4.14 of Foreign Trade Policy of 2015-20 (FTP) and Handbook of Procedures 2015-20 (HBP) incorporated "Pre-import condition" by Notification No. 33/2015-20. Thereafter, the amending Notification No. 1/2019-Cus., dated 10-1-2019 provided that the above mentioned condition "(xii)" i.e. 'pre-import condition' shall be omitted. Pre-import condition inserted by Notifications dated 13-10-2017 was to be complied with before its withdrawal with effect from 10-1-2019. The dispute remains for the period from 13-10-2017 to 09-01-2019.

2.2 Appellant have also imported various materials which were in the nature of their raw materials under Advance Authorizations during the period from 13-10-2017 to 09-01-2019. The proper Custom officers in Customs Stations at Mundra, JNCH and Ahmedabad, where such imports were made had allowed exemption of IGST under the Notification on final assessment. Appellant had not paid any amount towards IGST on imports during 13-10-2017 to 09-01-2019.

2.3 DRI, Kolkata had raised objection about non-compliance of pre-import condition. Appellant filed SCA No18097/2018 before Hon'ble Gujarat High Court, challenged validity of the said pre-import condition. The Hon'ble Gujarat High Court granted stay initially and allowed SCA along with SCA by Maxim Tubes Co. Pvt. Ltd. V/s. UOI 2019 (368) ELT 337 (Guj.). However, Union of India challenged judgment of the Hon'ble Gujarat High Court before the Hon'ble Apex Court, wherein orders dt. 04-02-2019 by Gujarat High Court are over ruled with directions in para 75 of decision dated 28-04-2023 by the Hon'ble Apex Court, as reported inUOI vsCosmo Films Ltd- 2023 (385) E.L.T. 66 (S.C.) / (2023) 5 Centax 286 (S.C.). Revenuewas also directed to permit all importers to claim refund or input credit, whichever is applicable. Appellant computed details and quantified their liabilities in

imports made during the period from 13-10-2017 to 09-01-2019 i.e. amount of IGST payable for such imports made in that period.

2.4 CBIC issued Circular No.16/2023-Cus dated 07-06-2023 directing field officers to allow all such importers in India to make payments of duty (IGST), who had not satisfied the Pre-Import Condition during the such period from 13-10-2017 to 09-01-2019. Since Appellant had interim stay from the Hon'ble Gujarat High Court against payment of IGST till issue was finally decided by the Hon'ble Supreme Court on 28-04-2023, Appellant had not deposited the IGST during the period in question. Appellant approached concerned assessment group at the Port of Import (POI) with relevant details for payment of the duty(IGST) and to Re-assess such Bill of Entry and to generate the electronic challan in Customs EDI System for enabling to make due payment of duty[IGST]. This Circular dt. 07-06-2023 also provided that on completion of above payment, POI should make a notional out of charge (OOC) for B/E on Customs EDI System enabling transmission to GSTN Portal to avail Input Tax Credit as per GST provisions. The procedure under Circular No.16/2023-Cus dated 07-06-2023 was followed by the appellant for paying IGST tax in those cases only, where pre-import condition was not fully complied or partly complied in respect of the goods imported under Advance Authorisation Scheme for the period from 13.10.2017 to 09.01.2019. Since Customs EDI System did not allow payment of duty[IGST] without depositing applicable "interest", Appellant has paid differential duty along with interest amount as per EDI System.

2.5 During the time when above referred developments took place (i.e. inquiry by DRI/custom, judgments on 04-02-2019 reported in 2019 (368) ELT 337 (Guj.) bythe Hon'ble Gujarat High Court and by the Hon'ble Supreme Court on 28-04-2022.), Show Cause Notices were issued to appellant on 20-04-2021[signed on 22-04-2022] for Mundra, on 17-08-2021 for JNCH and on 16.09.2022 for Ahmedabad in respect of duty free imports made alleging wrong availment of exemption for imports made under Advance Authorisation Scheme at Ports of Mundra, JNCH and Ahmedabad. Show Cause Notices, alleged that "pre-import condition" was violated for the goods imported, and therefore duties foregone on such imports were recoverable with interest, Fine and Penalty for breach of the pre-import condition, invoking extended period under Section 28(4) of Customs Act, 1962 and section 28AB, 111(O), 112, 114A and 125 of Customs Act 1962 for demanding duties along with interest and proposing to confiscate imported

goods at Ports of Mundra, JNCH and Ahmedabad and to impose Fine & penalties.

2.6 The Principal Commissioner took up the Show Cause Notices for adjudication. Appellant filed reply to 3 SCNs stating that the appellant has deposited the amounts towards IGST and interest thereon, and credit (i.e. ITC) of amount of IGST paid by appellant on reassessment of Bills of Entry has been availed by appellant as permitted/allowed. Accordingly, procedure provided by the Board under the above Circular is complied with by Appellant, and no further liability remained to be recovered/discharged. Appellant further submitted that amount deposited and recovered towards interest was without authority of the law, hence, unsustainable. There was no justification in facts of this case nor any authority in law for the assessment of interest during such Re-assessment and collection and recovery thereof from the Appellant.

2.7 The respondent Principal Commissioner has passed the adjudication orders in the Show Cause Notices, and while confirming the demand of duty (i.e. IGST) with interest, he has also held that the goods imported by the appellant were liable for confiscation and that the appellant is liable for paying redemption fine in lieu of confiscation under Section 125 of Customs Act 1962, Penalty under Section 114A of Customs Act 1962 and interest under Section 28AA of Customs Act 1962 and that the amount deposited towards duty [IGST] and interest are appropriated under the 3 impugned Orders-In-Original dated 18.04.2024 and quantification thereof are reflected in the Table in Para 1 above.

2.8 Therefore, the said Orders are challenged by Appellant in the Customs Appeal NosC/10228/2024 to C/10230/2024.

3. Shri Paresh M. Dave, Advocate and shri P. P. Jadeja, Authorised representative appearing on behalf of the appellant, while reiterating submissions in the grounds of Appeals, made the following submissions with relevant dates on the facts and the law which have also been taken on record. They submit that all the goods imported under the Advance Authorisation scheme were actually utilised by the appellant for manufacture of the final products which were exported upon following the normal procedure of filing Shipping Bill, export invoices etc. Therefore, there is no breach of the fundamental condition of the Advance Authorisation scheme about utilization of goods imported under Scheme for manufacture of finished goods exported, and physical incorporation of the goods imported under the scheme in such export of the goods. There is no breach or

violation of the core condition of the Advance Authorisation Scheme for any of the goods imported by appellant under any of the bills of entry. , because all goods imported tax free have been used by the appellant for production of the final/finished goods which were exported by appellant.Thus the prime condition of Advance Authorisation scheme is satisfied in respect of goods imported under Advance Authorization scheme in appellant's case. Consequently, the impugned order regarding interest, confiscation, imposition of redemption fine and penalty are liable to be set aside. They mainly submit that imposing additional financial liability by imposing undue interest, redemption fine and penalty are not sustainable in law, particularly when there is no statutory provision for imposing the same. They have mainly made following submissions to support their view points in respect of confirmation of duty, interest and imposing Redemption Fine and penalty :-

3.1 Submissions on demand/payment of Duty[IGST] :-

i. The appellant's submission is that duty[IGST] has been paid as a bonafide citizen, as per directions of the Hon'ble Supreme Court, in para 75 of the judgment dated 28-04-2023 and CBIC Circular No.16/2023-Cus dated 07-06-2023,

ii. In the present case, the entire situation was admittedly revenue neutral, at the time of import during period in question and while making payment of such duty[IGST] in 2023. The Hon'ble Supreme Court has also allowed all the importers including appellant to pay tax and claim its credit and/or refund as the case may be. The appellant has been actually allowed credit of the entire amount of tax paid on reassessment of Bills of Entry, and such credit also stands completely utilized by the appellant within a month or two from date of allowing such credit.

iii. The voluntary payment of duty[IGST] tax was made after 07-06-2023 as it was and it has been allowed as input credit of such tax if paid even at this stage.

iv. The said demand of duty, though, may not be sustainable on other grounds, like availability of exemption, revenue neutral situation, demand being time barred etc, but, since Appellant has already been allowed to take credit of the duty paid, Appellant is not seriously objecting the demands of the duty[IGST] deposited after 7-6- 2023 in this cases.

3.2 Submissions against Interest, Redemption Fine & Penalty imposed :-

a) In facts of this case, Appellant is contesting Interest, Redemption Fine and Penalty imposed by the impuged Order-In-Originals dt. 18-04-2024. The appellant's submission is that in this case interest cannot be levied, penalty cannot be imposed and redemption fine can not be charged as goods[not available for confiscation] cannot be confiscated andno provisions exist under Customs Tariff Act 1975 for interest, penalty, confiscation and redemption fine.

b) Integrated tax [IGST], is the duty involved in the present case, which is a levy imposed under Section 3(7) of the Customs Tariff Act 1975 like Additional Customs Duty (CVD) is imposed as a separate levy under Section 3(1) of the Customs Tariff Act 1975, and Additional CVD is a levy imposed under Section 3(3) of the Customs Tariff Act 1975.

c) Levies imposed under Section 3 of Customs Tariff Act 1975 are other duties imposed under other Acts on import are in addition to "Customs duty" levied under Section 12 of the Customs Act, 1962. For Integrated tax imposed and levied under Section 3(7) of the Customs Tariff Act 1975, there is no specific provision incorporated under Customs Tariff Act 1975 for levying interest, penalty and redemption fine. The provisions of the Customs Act are made applicable for the duties and taxes levied under Section 3 of the Customs Tariff Act 1975 to a limited extent, by virtue of sub-section (12) of Section 3 of the Tariff Act. There is no charging provision for interest, penalty and fine under sub section (7) of Section 3 or any other provision of the Customs Tariff Act 1975.

d) It is a settled legal position that interest, penalty and fine are separate levies, and such levies cannot be imposed without any specific and clear charging provision in the statute. Provision like sub section (12) of Section 3 of the Tariff Act 1975 cannot serve the purpose of a charging provision for such levies by relying upon provisions of the Customs Act 1962. A separate and specific charging section like sub section (7) of Section 3 of the said Tariff Act is required for other levies like interest, penalty etc. Hence, charging provisions for interest, penalty and fine must exist in a taxing statute, and such provisions for interest, penalty and fine must be specific and clear; and mere adoption of few provisions of other Act like Customs Act would not mean that charging provisions of such Act for levies like interest, penalty and fine were also adopted.

e) Like sub section (8) of Section 9A of the Customs Tariff Act, (for Anti-Dumping Duty) specific words like "interest, penalties and offences"

must be inserted while adopting provisions of any other Act; as otherwise, consequences of absence of such expressions may be grave for the Revenue, but then Article 265 of the Constitution mandated that no tax shall be levied and collected except by authority of law. There is no authority of law to levy penalty, interest and fine under Section 3 of the Customs Tariff Act 1975 and there is no charging provision for such levies under the Customs Tariff Act 1975. Procedural provisions of the Customs Act and even the definitions given under the Customs Act may be applicable by virtue of Section 3(12) of Customs Tariff Act 1975, but the charging provisions for interest (Section 28AA), penalty (Section 114A) and fine (Section 125) are not applicable to Tax levied under sub section (7) of Section 3 of the Customs Tariff Act 1975.

f) The impugned Orders have applied provisions of the Customs Act for levying interest (Section 28AA), for Penalty (Section 114A) and for Confiscation and Redemption Fine (Section 111(o) and 125); but these provisions of the Customs Act 1962 are not made applicable for interest, penalty and fine in respect of Integrated tax, levied under Section 3(7) of the Customs Tariff Act 1975, which is a separate enactment and for separate levy. There is no charging provision for interest, penalty and fine in Section 3(7) or 3(12) of Customs Tariff Act 1975. In law, a specific provision for interest, penalty and fine has to be there in the taxing statute; and in absence of any specific charging provision, the levies of interest, penalty and fine cannot be imposed and levies cannot be recovered.

g) Accordingly it is the submission of Appellant that <u>Interest, Redemption Fine & Penalty imposed by the adjudicating authority can not be sustained in law.</u>

h) Appellant has relied upon the following judgments to support their view :-

- CCE Suratvskai Pradesh SahkariKhandUdyogMandli Ltd. 2011 (271) ELT 32 (Guj.)
- Mahindra & Mahindra Ltd – (2023) 3 Centax 261(BOM.) and 2022 (10) Tax Management India 212 – Bombay High Court
- Revenue’s SLP against the judgment of the Hon’ble Bombay High Court in case of Mahindra& Mahindra Ltd was dismissed by the Hon’ble Apex Court and even the review petition of Revenue was

rejected. Relied 2023 (386) E.L.T. 11 (S.C.) - UOI vs Mahindra & Mahindra Ltd.

- DEVI DASS GOPAL KRISHAN LTD vs UOI - 2002 (140) E.L.T. 56 (P & H)
- Acer India (Pvt.) Ltd. vs CC(Audit) - Chennai CESTAT's FINAL ORDER No.40534/2024 dated 08-05-2024
- Khemka and Co. (Agencies) Pvt. Ltd. v. State of Maharashtra — 1975 (2) SCC 22
- Pioneer Silk Mills Pvt. Ltd. v. U.O.I. — 1995(80)ELT-507(Del) [approved by Apex Court in Union of India v. Pioneer Silk Mills Pvt. Ltd. – 2002(145)ELT-A74(SC)]
- CCE, Ahmedabad vs ORIENT FABRICS PVT. LTD-2003 (158) E.L.T. 545 (S.C.)
- Indo Swiss Embroidery Industries Ltd vs CCE, Vapi-2017 (356) E.L.T. 226 (Bom.)

3.3 Revenue Neutral Situation at the time of import & in the year 2023 :

1) The most important factor for considering whether the Appellant had malafide intention to evade duty in revenue neutrality; and this Hon'ble Tribunal has considered this factor in a long chain of decisions in favour of the assessees. In the present case, the entire situation was admittedly revenue neutral, and the Hon'ble Supreme Court has also therefore allowed the appellant to pay duty and claim its credit and/or refund as the case may be. The appellant has been actually allowed credit of the entire amount of duty paid on reassessment of bills of entry, and such credit stands completely utilized by the appellant within a month or two from date of allowing such credit.

2) If the proper Custom officers were aware about pre-import condition and its scope and exemption for imports under Authorization had not been allowed, then the appellant would have paid Integrated tax leviable under Section 3(7) of the Customs Tariff Act, and its credit under the GST law would have been taken at that time of import itself; and such credit would have been utilized for payment of GST on other goods or the appellant would have been allowed refund of such credit because GST law permits for refund of credit of tax paid on goods utilized for export transactions. Considering this legal position, the Hon'ble Supreme Court has also observed at para 75 of the judgment rendered on April 28, 2023 for permitting the importers to

claim refund or input credit upon paying integrated tax, and the Revenue was directed for the appropriate procedure to be followed in this regard.

3) The situation thus being revenue neutral, the intention to evade payment of tax can never be attributed to the appellant; and the Commissioner's order upholding invocation of extended period on the basis that the appellant had intention to evade tax is on face of it illegal and impermissible.

3.4 Undue reliance on Bond furnished at the time of Imports :-

a) There are error on the part of Principal Commissioner in justifying liability of "interest" on the basis that interest liability automatically arose upon confirmation of duty under Section 28 of Customs Act 1962. The Principal Commissioner has also committed error in justifying liability of "interest" with reference to the Bond furnished by appellant at the time of import of the goods. A bond furnished in terms of an exemption notification does not create a liability, per se, if no such liability is created under Statute. The bond is only agreement, or undertaking, for binding a person to discharge his liabilities in law; but no new liability other than those created under the statute could be fastened on an assessee by a bond. In this case, the bonds furnished by the appellant at the time of import were in the nature of an undertaking to fulfil all legal liabilities, including the liability of "interest" if such interest liability validly existed under the statute. However, if there was no levy of interest under the statute, then a bond referring to payment of tax with interest cannot create a new charge or a new levy like interest.

b) Appellant's undertaking in bond to pay IGST with interest could have resulted in the interest liability if such interest was chargeable under any provision made by the statute. In this case, there is no provision in Customs Tariff Act 1975, like Section 28AA of Customs Act 1962 for interest on customs duty, and therefore Principal Commissioner had no jurisdiction to fasten interest liability on appellant on the basis that a bond was furnished by the appellant binding themselves to pay tax with interest in certain eventualities. Section 28AA of the Customs Act 1962 is a charging section for interest on delayed payment of customs duty levied u/s 12 of the Customs Act 1962. However, IGST on the goods imported into India is

not a "duty" leviable under Section 12 of the Customs Act 1962. Therefore, Principal Commissioner had no jurisdiction to hold that interest liability automatically arose any duty was confirmed/determined under Section 28 of the Customs Act 1962.

c) Appellant relied upon the cases of Sterlite Optical Technologies Ltd. V/s. CCE, Aurangabad 2011 (270) ELT 266 (Tri-Mum), Emcure Pharmaceuticals Ltd. 2014(307) ELT 180, and M/s. Madhu Silica Pvt. Ltd-2016 (344) E.L.T. 1072 (Tri. – Ahmd.)theHon'ble Tribunal has firmly settled the legal principle that the provisions for issuing Notice to Show Cause were applicable even when a bond was furnished by the assessee, and the time limitation provided under these provisions was also applicable for such demand notwithstanding the bond furnished by assessee. It is settled that for recovery, following the mandatory procedure of Section 11A of Central Excise Act 1944 and/or Section 28 of the Customs Act 1962, as the case may be though Bond was furnished by Appellant.

3.5 Submissions against confiscation and Redemption Fine imposed:-

- The impugned Orders has applied provisions of the Customs Act for Confiscation and Redemption Fine (Section 111(o) and 125); but it is the appellant's submission that there is no charging provision for Confiscation and Redemption Fine in Section 3(7) or 3(12) of Customs Tariff Act 1975. In absence of any specific charging provision, charges of Confiscation and Redemption Fine cannot be imposed and levies cannot be recovered.

- The Principal Commissioner has committed a further grave error in ordering confiscation of goods and imposed Redemption Fine, when, the goods imported by the appellant were not physically available for confiscation/release, and all imported goods were allowed clearance for home consumption on Final Assessment orders made by the proper Custom officers in charge of the Port of Import. Notional confiscation of the goods is impermissible in law.

- The Larger Bench of the Hon'ble Tribunal in the case of Shiv KripaIspat Pvt. Ltd-2009 (235) ELT 623 has also upheld this principle. Confiscation of goods is without jurisdiction because section 111 of Customs Act,1962 is not applicable under Customs Tariff Act, 1975.

Consequently, liability of redemption fine imposed is equally unauthorised.

3.6 Invocation of extended period of time limitation for issuance of SCN

a) The invocation of extended period of time limitation for issuance of SCN is incorrect, as ingredients required invoking extended period are not existing in this case.

b) The case may be of section 28(2) hence, confirming demand of IGST underSection 28(4) of Customs Act 1962 is incorrect. The learned Principal Commissioner has committed a grave error in confirming demand of tax under Section 28(4) of the Customs Act, 1962 in the facts of the present case.

c) Appellant was legally allowed to avail ITC of IGST, if paid at the time of import of the goods in question, and even refund of such tax, was admissible under the scheme of GST laws; and it was a complete revenue neutral situation at the material time and now also. Thus, there was no intent to evade payment of IGST by the Appellant in this case.

d) Customs Authorities have conducted inquiry and investigation in this case before issuing Show Cause Notices, but, no evidence is found by Revenue officers for even remotely suggesting that appellant knew about scope and coverage of pre-import condition.

e) Appellant has deliberately not kept any facts or information hidden from the Revenue officers while importing and clearing goods under exemption; or exporting goods in fulfilment of export obligations under the said Advance Authorisation Scheme.

f) It is also settled that Revenue cannot invoke larger period of time limitation for duty demands in cases involving serious interpretation and resolution of the issues by higher courts and in a Revenue Neutral situation. Appellant never had any intent to evade payment of tax in such issues of interpretations or revenue neutral situation.

3.7 Penalty imposed under Section 114A of the Customs Act 1962

- The impugned Orders have applied of the Customs Act for Penalty (Section 114A); but it is the appellant’s submission that there is no

charging provision for Penalty in Section 3(7) or 3(12) of Customs Tariff Act 1975. In absence of any specific charging provision, Penalty cannot be imposed and levies cannot be recovered.

- Penalty imposed on the appellant is also an action illegal and without jurisdiction because Section 114A of the Customs Act is not applicable for alleged violation or non-payment of IGST, which is an independent levy and this levy is imposed under a separate statute. Even in the facts of the present case, no penal action could have been taken against the appellant; and therefore also penalty on the appellant is unauthorized and is unjustified. The impugned order imposing penalty on the appellant is unsustainable and unjustified in facts as well as in law. The situation in the present case was actually revenue neutral, and therefore there cannot be any penal liability only because the amount of IGST is paid now owing to the litigation about the legality and validity of the pre-import condition. Amount of IGST, if paid at the time of import, was fully admissible as ITC and as refund; and the amount of IGST now paid is also fully admissible as ITC and refund. Penalty could not be imposed or justified in this case of a totally revenue neutral situation.

3.8 The prayer:

A. It is therefore prayed that the appeals may kindly be allowed and interest recovered/collected from the appellant may be ordered to be refunded;
B. The other liabilities on confiscation of goods and imposition of Redemption Fine and Penalty, may kindly be set aside, in the interest of justice.

4. Shri Tara Prakash, learned Deputy Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned orders and submits to upheld the Orders.

5. We have carefully considered submissions made by both sides and perused the records. We find that the issue involved is whether Appellants is liable to pay the Duty[IGST], Interest, Redemption Fine and Penalty confirmed by the impugned Orders in connection with alleged violation of “Pre-Import Condition” in the imports made against Advance Authorisation scheme during the period from 13-10-2017 to 09-01-2019. The following questions need consideration.

i) Whether customs duty (in nature of Integrated Tax) was recoverable from the appellant, in view of time-bar demands under extended period (though Input Tax Credit i.e. ITC) of the entire duty amount is allowed to the appellant ?

ii) whether interest is chargeable, whether goods are liable to confiscation entailing imposition of redemption fine, and whether penalty is imposable, in facts of this case ?

iii) Whether in law the above liabilities of interest, confiscation/redemption fine and penalty imposed are without jurisdiction and untenable, because there is no provision under the law for imposing such liabilities which are in the nature of separate levies?

iv) Whether the amount deposited towards interest is liable to be refunded, and whether liabilities of penalty and confiscation/redemption fine are liable to be set aside?

5.1 We find that adjudicating authority has passed impugned Orders in the cases and (i) confirmed total Customs Duty Rs. 13,90,69,214/- under Section 28(4) of Customs Act, 1962 in the form of IGST saved in imports of goods under Advance Authorizations and has ordered appropriation of deposited duty of Rs. 13,90,69,214/-.
(ii) Ordered to recover "interest" in respect of demand confirmed in (i) and ordered to appropriate paid interest of Rs. 12,92,61,984/-towards interest liability.
(iii)hold that goods imported under Advance Authorizations are liable to confiscation under Section 111(o) of Customs Act, 1962 and imposed total Redemption Fine of Rs. 2,31,00,000/- in lieu of confiscation under the Section 125 of Customs Act, 1962.
(iv)imposed a total penalty of Rs. 13,90,69,214/- equal to the duty demanded and confirmed at (i) above under Section 114A of the Customs Act, 1962.

5.2 We find that an Advance Authorisation is issued in terms of Para 4.03 of the Foreign Trade Policy (2015-20) to allow duty free import of inputs, which are used in manufacture of goods which are physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts which are consumed/ utilised to obtain

export product, may also be allowed. Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Safeguard Duty etc, applicable. Imports under Advance Authorisation for physical exports are also exempt from whole of integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975.

5.3 Notification No.- 18/2015 - Customs, Dated: 01-04-2015 issued in exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962, exempted materials imported into India against Advance Authorisation issued by the Regional Authority in terms of paragraph 4.03 of the Foreign Trade Policy from the whole of the duty of Customs leviable, which is specified in the First Schedule to the Customs Tariff Act, 1975 and from the whole of the additional duty, safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable thereon, respectively, under sections 3, 8B, 8C and 9A of the said Customs Tariff Act 1975, subject to the conditions mentioned therein,

5.4 Thereafter, on introduction of Goods and Service Tax Act 2017 w.e.f 01-07-2017, Additional Customs Duties (CVD & SAD) subsumed into the newly introduced Integrated Goods and Service Tax (IGST). Thus, at the time of imports, in addition to Basic Customs Duty, IGST was made payable instead of such Additional Duties of Customs. Government decided to impose IGST at the time of import, however, at the same time, importers were allowed to either take credit of such IGST for payments of Duty during supply to DTA, or to take refund of IGST amount paid within a specified period on certain situation for not being able to utilise credit. However, as trade facilitation on representations, Notification No.18/2015-Cus dated 01-04-2015 was amended by the Notification 79/2017-Cus dated 13-10-2017 to extend exemption from the payment of IGST at the time of import of input materials, under Advance Authorizations, subject to the pre-import condition.

5.5 The Director General of Foreign Trade issued one Notification No. 33/2015-20 dated 13-10-2017, which amended Para 4.14 of Foreign Trade Policy (2015-20), to incorporate exemption from IGST, subject to compliance of the pre-import and physical export conditions. Thus, in post GST regime, amended Notification No. 18/2015-Cus., dated 01-04-2015,

provided for levy of the following duties in addition to duty levy u/s of Customs Act 1962 :-

(1) levy of a duty (referred to as additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India [Section 3(1) CTA 1975];

(2) levy of such additional duty as would counter-balance the excise duty leviable on any raw materials, components, and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article [Section 3(3) CTA 1975];

(3) levy of additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India [SAD, under Section 3(5) CTA 1975];

(4) levy of integrated tax as leviable under Section 5 of the Integrated Goods and Services Tax Act, 2017; [under Section 3(7) CTA 1975] and;

(5) levy of GST compensation cess at such rate as is leviable under Section 8 of the Goods and Services Tax (Compensation to States) Cess Act, 2017 [under Section 3(9) CTA 1975].

5.6 Thus, in post GST regime, benefit of exemption were available from payment of IGST in terms of the Foreign Trade Policy (2015-20) and the corresponding Customs Notification No. 18/2015-Cus dated 01-04-2015 as amended by Notification No.79/2017-Cus dated 13-10-2017, subject to the pre-import condition as well as physical export condition. However, we also find that the Central Government has omitted pre-import condition on 10.01.2019 by issuing further Notification No. 01/2019-Cus dated 10-01-2019. Such pre-import condition from para 4.14 of the FTP 2015-20 has also been omitted/removed by Government. Thus, exemption from payment of integrated tax was effective subject to pre-import condition and physical export condition for the period from 13.10.2017 to 09.01.2019, which also is in question in these cases.

5.7 As regards payment of duty[IGST] as per the Hon’ble Supreme Court’s judgment dated 28-04-2023, all the importers who did not satisfy the “Pre-import Condition” were made liable to pay duty[IGST]. The Hon’ble Apex Court in case of UOI vs COSMO FILMS LTD -2023 (385) E.L.T. 66 (S.C.)- in the Pare 75 has passed Orders to the effect that since the respondents i.e. Importers were enjoying interim orders, till judgment was delivered, Revenue is directed to permit them to claim refund or input credit

(whichever applicable and/or wherever customs duty was paid). For doing so, importers shall approach jurisdictional Commissioners, and apply with documentary evidence. The claim for refund/credit, shall be examined on merits, on a case-by-case basis. The Hon'ble Supreme Court directed that for the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular, in this regard. Accordingly, CBICissuedCircular No.16/2023-Cus dated 07-06-2023. Therefore, wherever, the "Pre-Import Condition" was not satisfied, the duty[IGST], foregoneat the time of Import for the period from 13.10.2017 to 09.01.2019, became payable by Importers. Accordingly, Appellant[importer] has also obeyed the directions of the Hon'ble Apex Court and CBIC Circular dated 07-06-2023. Appellant has paid such duty[IGST] and allowed Credit of such duty[IGST]. Therefore, Appellant has also not objected the duty [IGST] payment seriously. There is no requirement to pass any detailed order on such payment of duty[IGST], which is paid and its credit is allowed to Appellant. The Situation has become Revenue Neutral for Appellant, Hence, we also refrain from passing any order on such confirmation of duty, which is allowed as credit by Revenue, though duty may or may not be sustainable on other grounds in these cases.

5.8 In the present cases, confirmation of interest demand, confiscation of goods, imposition of Redemption Fine and Penalty are objected claiming it to be illegal and unjustified. This Hon'ble Tribunal in case of Commissioner V/s. GNFC Ltd. 2010 (262) ELT 829 has held that even in case of voluntary payment of time-barred duty, it was open to contest liability of interest when department proposed to charge duty with interest which assessee paid voluntarily. This decision is upheld by a detailed judgment by the Hon'ble Gujarat High Court in Tax Appeal No. 56 of 2011 in case of GNFC Ltd. V/s. Commissioner, Vadodara 2012 (285) ELT 336 (Guj). Thus, it is open for Appellant to contest liability of Interest, confiscation, Redemption Fine and Penalty, even though the entire amount of Integrated tax is voluntarily paid by this Appellant.

5.9 We find that the Appellant has vehemently made submissions against the Orders for recovery of the amount of Interest, Redemption of Fine and Penalty on the main ground that there is no statutory provision made under section 3(7) or 3(12) of Customs Tariff Act, 1975 for such recoveries on delayed payment of duty[IGST] in Imports. Therefore, we also critically examine this contention. The amount of such duty[IGST] and "Interest" deposited by Appellant have also been ordered to be appropriated.

The demand/recovery in this case is of duty[IGST] leviable under Section 3(7) of Customs Tariff Act 1975 and charging section for levy/recovery of such duty[IGST] on goods imported into India and it is a separate and independent levy of duty. We find that Customs Tariff Act 1975 has made the following provisions for recovery of duty :-

> "Section 3(7) :- Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding forty per cent. as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8) [or sub-section (8A), as the case may be]."

Section 3(12) of Customs Tariff Act 1975 has provided as under

> "Section (12):- The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to the duties leviable under that Act.]"

SECTION 8B of Customs Tariff Act 1975 provides Power of Central Government to apply safeguard measures. SECTION 8B(9) ibid has provided as under :-

> "(9) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short-levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."

SECTION 9Aof Customs Tariff Act 1975 provides for imposing "Anti-dumping duty". Section 9A(8) ibid has provide as under :-

> "[(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.]"

5.10 We find from above provisions that for recovery of IGST on import of goods, provisions are made under section 3(7) of Customs Tariff Act 1975. However, no specific provision is made for recovery or charging of Interest, Fine and Penalty u/s 3(7) or 3(12) of Customs Tariff Act 1975 as compared to such similar provisions made under the Section 8B(9) and Section 9A(8) of Customs Tariff Act 1975. Such provisions u/s 9A(8) were introduced in Statute by The Finance (No. 2) Act, 2009 way back on 19-08-2009. However, while introducing similar provisions post GST Regime under Section 3(7) or 3(12) of the Customs Tariff Act 1975, Government of India has not incorporated such provisions for recovery of the Interest, Fine and Penalty under Section 3(7) or Section 3(12) of Customs Tariff Act 1975. We are of the view that Interest, Fine & Penalty are separate/independent financial levies, and hence charging provision must be there in statute levying interest, fine, penalty is the mandate of settled law established by provisions for such separate and independent levy and decisions by the courts. Accordingly, we do not find and revenue has also not been able to show us such charging provision for levy and collection of "interest, Fine and Penalty" for late payment of IGST leviable under Section 3(7) or under Section 3(12) of Customs Tariff Act 1975. Therefore, the orders for recovery of interest, fine and Penalty on late payment of the IGST during Re-assessment process of Bill of Entry for the period from 13-10-2017 to 09-01-2019 are without authority of law and the same are unsustainable.

5.11 In case of J.K. Synthetics Ltd. v/s Commercial Taxes Officers - (1994) 4 Supreme Court Cases 276, theHon'ble Apex Court has held in Para 7 that "interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf." In case ofKhemka and Co. (Agencies) Pvt. Ltd. v/s State of Maharashtra — 1975 (2) SCC 22, theHon'ble Apex Court in para 25 & 26 of the decision has held as under :-

> *"25. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to Section 28 of the Indian Income-tax Act, 1922 where penalty is provided for concealment of income. Penalty is in addition to the amount of income-tax. This Court in Jain Brothers v. Union of India., 1970 (77) ITR 107 : 1969 (3) SCC 311, said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax.*
>
> *26. The Federal Court in Chatturam v. C.I.T., Bihar, 1947 (15) ITR 302, said that liability does not depend on assessment. There must be a charging section to create liability. There must be first a liability created by the Act. Second, the Act must provide for*

assessment. Third, the Act must provide for enforcement of the taxing provisions. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State Act does not mean that the provision for penalty in the State Act is treated as penalty under the Central Act. The meaning of penalty under the Central Act cannot be enlarged by the provisions of machinery of the State Act incorporated for working out the Central Act."

5.12 In case of - Pioneer Silk Mills Pvt. Ltd vs UOI- 1995 (80) E.L.T. 507 (Del.), Section 3(3) of Additional Duties of Excise (Goods of Special Importance) Act, 1957 was for consideration before the Hon'ble Delhi High Court. Section 3(3) of Additional Duties Act 1957 was similar to Section 3(12) of Customs Tariff Act, 1975 which is involved in the present case. The provisions of the Central Excise Act and the Rules made thereunder were adopted by virtue of Section 3(3) of Additional Duties Act, whereas provisions of Customs Act and Rules made thereunder are adopted by virtue of Section 3(12) of Customs Tariff Act 1975 in present cases.Having recorded the core question in para 8 of judgment, the Hon'ble Delhi High Court conclusively held in para 37 that when penalty was additional tax, constitutional mandate required a clear authority of law for imposition thereof. In para 38, the Hon'ble High Court has held that a penal liability cannot be created by implication or intendment; and that the provision levying penalty must be explicit. Para 39 is important, where the Hon'ble High Court has recorded that interpretation put on Section 3(3) of Additional Duties Act had grave consequences for Revenue as similar terminology had been used in various other Acts and other enactments, but Article 265 of the Constitution has mandated that no tax shall be levied and collected except by authority of law. The Hon'ble Delhi High Court has also referred to a Larger Bench decision of the Hon'ble Supreme Court in case of Ujjagar Prints & others in paras 25 to 28 of this judgment and held that provisions of an Act may be adopted including definitions, but not penal provisions or provisions for imposing additional duties like interest and penalty without a specific provision for additional liabilities. Relevant Para are reproduced as under :-

"37. When penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. If long-drawn arguments are needed to explain if the Act by referential legislation or legislation by incorporation levies penalty or not, it is better for the court to lean in favour of the tax payer. There is no room for presumption in such a case. The mere fact that all these years the Additional Duty Act has not been challenged on this ground is of no consequence if authority of law as mandated by the Constitution is lacking. We may also note in the passing that it was submitted before us that penalty so realised earlier has never been

distributed among the States as part of net proceeds of the collection of the additional duties of excise under the Additional Duties Act. This statement made at the Bar was not challenged. Since, however, this point was not raised in the writ petition and the revenue had no opportunity to reply in its counter-affidavit, we leave the matter at that. Levy of penalty which is an additional tax has to be under the authority of law which should be clear, specific and explicit.

38. In Dr. Pratap Singh and Another v. Director of Enforcement, Foreign Exchange Regulation Act and Others, AIR 1985 Supreme Court 989, with reference to the expression "so far as may be", the Supreme Court said that the expression had always been construed to mean that those provisions may be generally followed to the extent possible and it is not that those provisions have been incorporated by pen and ink (like in Section 3(3) of the Additional Duties Act). This expression, therefore, negatives any plea that the whole of the provisions of the Central Excises Act have been incorporated by virtue of Section 3(3) of the Additional Duties Act. We have already held that the term "levy and collection" has restricted meaning and inclusive provisions have been made only in relation to the refunds and exemptions. It cannot be interpreted to cover penalty and offences as well. In Statutory Interpretation by F.A.R. Bennion (1984 Edition), it is said "where it is doubtful whether a stated term does or does not include a certain class, and words of extension are added which cover some only of the members of the class, it is implied that the remaining members of the class are excluded" (Expressiouniusprinciple : words of extension). Again we have also referred to certain enactments wherein provisions of another enactment have been specifically borrowed in their entirety, and also the enactments where though the terminology used is the same as used in Section 3(3) of the Additional Duties Act, yet separate provisions have been made for levy of penalties. The Supreme Court has construed the expression "levy" and "collection" in National Tobacco Company's case which would show that levy refers to imposition of tax as well as assessment and that the term "imposition" is generally used for levy of a tax or duty by the legislative provision, and further collection is equated to the recovery of the tax or duty imposed and assessed. Collection is stage subsequent to levy. In the absence of any provision for levy of tax or duty, the process of collection itself cannot create a levy and more so penalties. A statute must be regarded as penal for purposes of construction if it imposes a fine, penalty or forfeiture other than a penalty in the nature of liquidated damages, or other penalties which are in the nature of civil remedies (para 909, Halsbury Laws of England, Vol. 44, 4th Edition). As a general rule penalty enactments are to be construed strictly. That stage, however, does not arise in the present case. But a penal liability cannot be created by implication or intendment. We have already observed that provision levying penalty must be explicit.

39. We have given our considerable thought to various arguments raised by the parties. We find there is no mandate in the Additional Duties Act for levy of penalty and the Central Excises Act and the Rules made thereunder cannot be imported in the Additional Duties Act for the purpose of levy of penalty. We have spent anxious moments as the interpretation we have put has grave

consequences for the revenue as similar terminology as used in Section 3(3) of the Additional Duties Act has been used in various Acts and other enactments, but then Article 265 of the Constitution mandates that no tax shall be levied and collected except by authority of law. There being no such authority of law to levy penalty, we have to hold so."

The above decision in Pioneer Silk Mills Pvt. Ltd. vs. Union Of India 1995 (80) ELT 507 (Del.)was Maintained by the Hon'ble Supreme Court in 2002 (145) ELT A74 (Supreme Court)and Approved in 2003 (158) ELT 545 (Supreme Court).

5.13 In the case reported in CCE, Ahmedabad vs ORIENT FABRICS PVT. LTD-2003 (158) E.L.T. 545 (S.C.), in para 20 of this judgment, the Hon'ble Supreme Court has also referred to an amendment made in year 1994 by inserting the expression "offences and penalties" in Section 3 (3) of the Additional Duties Act and held that such amendment was required to remedy the defect contained in the unamended provisions.

In absence of specific insertion of words like offences, penalties and interest, such levies could not be assumed and such additional tax cannot be charged.

The Hon'ble Apex Court has held as under :-

"1 The short question that arises for our consideration in these appeals, which arises from the judgments and orders dated 10-2-1997 and 26-3-1996, as regards jurisdiction of the authorities under the Central Excise Act, whether it is permissible to resort to penalty proceedings or forfeiture of goods for non-payment of additional duty in terms of the Additional Duties of Excise (Goods of Special Importance) Act , 1957 (for short 'the Act') by taking recourse to the provisions of the Central Excise Act and Rules framed thereunder.

…

8. A comparison of the amended provisions with the unamended ones would clearly demonstrate that the words 'offences and penalties' have consciously been inserted therein. The cause of action for imposing the penalty and directions of confiscation arose in the present case in the year 1987. The amended Act, therefore, has no application to the facts of this case.

…..

20. The matter may be considered from another angle. The Parliament by reason of the Amending Act 32 of 1994 consciously brought in the expression offences and penalties' in sub-section (3) of Section 3 of the Act. The mischief rule, if applied, would clearly show that such amendment was brought with a view to remedy the defect contained in the unamended provisions of sub-section (3) of Section 3 of the Act. Offences having regard to the provisions contained in Article 20 of the Constitution of India cannot be given a retrospective effect. In that view of the matter too sub-section (3) of Section 3 of the Act as amended cannot be said to have any application at all.

21. In view of the aforesaid decisions, it must be held that the confiscation proceedings taken against the respondents and the penalty imposed upon them were totally without the authority of law and were rightly set aside by the Tribunal.

22. For the aforesaid reasons, we do not find any merit in the appeals. They fail and are, accordingly, dismissed. No costs."

5.14 In Civil Appeal Nos. 1354 of 1980 reported in -1999 (108) E.L.T. 321 (S.C.) - HYDERABAD INDUSTRIES LTD vs UOI, the Constitution Bench of the Hon'ble Supreme Court has observed that on a correct interpretation of the relevant provisions of the two Acts there can be no manner of doubt that additional duty which is levied under Section 3(1) of the Tariff Act is independent of the customs duty which is levied under Section 12 of Customs Act, and held that Section 3 of Customs Tariff Act was the charging provision for levying additional duty, and such duties were not Customs duty levied under Section 12 of the Customs Act. (Paras 10, 12, 13, 14 of the judgment are reproduced as under :-

"10. Section 3(1) of the Customs Tariff Act, 1975 provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty leviable under Section 12 of the Customs Act read with Section 2 of the Customs Tariff Act. Secondly this duty is leviable at a rate equal to the excise duty for the time being leviable on a like article to the one which is imported if produced or manufactured in India. The explanation to this sub-section expands the meaning of the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India". The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under sub-section (1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation is that the article is produced or manufactured in India. The second limb to the explanation deals with a situation where "a like article is not so produced or manufactured" The use of the word "so" implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced of manufactured in India.

….

12. Section 12 of the Customs Act levies duty on goods imported into India at such rates as may be specified in the Customs Tariff Act, 1975. When we turn to Customs Tariff Act, 1975, it is Section 2 which states that the rates at which duties of customs are to be levied under Customs Act, 1962 are those which are specified in the First and Second Schedules of the Customs Tariff Act, 1975. In Section 12 of the Customs Act there is no reference to any specific provision of the Customs Tariff Act, 1975. In other words for the purpose of determining the levy of customs duty on goods imported into India what is relevant is Section 12 of the Customs Act read with Section 2.

13. On the other hand levy of additional duty under Section 3 is equal to the excise duty for the time being leviable on the like article which is imported into India if produced or manufactured in India. The rate of additional duty under Section 3(1) on an article imported into India is

not relatable to the First and the Second Schedule of the Customs Act but the additional duty if leviable has to be equal to the excise duty which is leviable under the Excise Act. This itself shows that the charging section for the levy of additional duty is not Section 12 of the Customs Act but is Section 3 of the Customs Tariff Act, 1975. This apart sub-sections (3), (5) and (6) of Section 3 refer to additional duty as being leviable under sub-section (1). In sub-section (5), for instance, it is clearly stated that the duty chargeable under Section 3 shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

14. There are different types of customs duty levied under different acts or rules. Some of them are; (a) a duty of customs chargeable under Section 12 of the Customs Act, 1962 : (b) the duty in question, namely, under Section 3(1) of the Customs Tariff Act; (c) additional duty levied on raw-materials, components and ingredients under Section 3(3) of the Customs Tariff Act; and (d) duty chargeable under Section 9A of the Customs Tariff Act, 1975. Customs Act, 1962 and the Customs Tariff Act, 1975 are two separate independent statutes. Merely because the incidence of tax under Section 3 of the Customs Tariff Act, 1975 arises on the import of the articles into India it does not necessarily mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act."

5.15 The case of CCE, Surat-I V/s. Ukai Pradesh SahkariKhandUdyogMandli Ltd - 2011 (271) ELT 32 (Guj.) shows thatthe Hon'ble Gujarat High Court while considering demand of "Cess" under Sugar Export Promotion Act, 1958 has held that interest can be levied and charged on delayed payment of "Cess", if statute that levies and charges the tax makes a substantive provision in that behalf. Section 7(4) Sugar Export Promotion Act, 1958 were similar to Section 3(12) of the Customs Tariff Act, 1975; and provisions of Central Excise Act, 1944 and rules made were made applicable for levy of sugar Cess by Section 7(4) of Sugar Export Promotion Act, whereas provisions of Customs Act, 1962 are made applicable by Section 3(12) of Customs Tariff Act 1975. Revenue demanded interest on late payment of Sugar Cess under Section 11AA of Central Excise Act on ground that provisions of Central Excise Act and the Rules made, including those relating to refund and exemptions from duty were adopted for levy of Sugar Cess, and interest for late payment of Sugar Cess.

The Hon'ble Gujarat High Court has conclusively held that interest was a separate levy and interest could be charged on delayed payment of tax only if the statute levying and charging the tax made a substantive provision in this behalf. The demand for interest under provisions of Central Excise Act has been set aside on the legal proposition that charging provision for interest cannot be adopted from the Central Excise Act. The appeal filed by

Revenue was dismissed. This decision on "Cess" of Gujarat High Court is squarely applicable in this case.

5.16 The above mentioned decision in the case of CCE, Surat-I V/s. Ukai Pradesh SahkariKhandUdyogMandli Ltd. 2011 (271) ELT 32 (Guj.) is also based upon judgments of Punjab & Haryana High Court in the case of *Devi DassGopalKrishan Ltd*. v. *Union of India*, 2002(140)ELT-56 (P&H), dealing with case wherein demand of "interest" had been challenged on the ground that there was no provision under Produce Cess Act 1966 as well as under Vegetable Oils Cess Act 1983 for charging "interest" on delayed payment of cess. Before the Hon'ble Punjab & Haryana High Court, Section 15 (2) of Produce Cess Act, 1966 and Section 3(4) of Vegetable Oils Cess Act, 1983 were for consideration. By virtue of both these provisions of 1966 Act and 1983 Act, provisions of the Central Excise Act and Rules made thereunder, including those relating to refunds and exemptions from duty, were made applicable to levy and collection of duties under the 1966 Act and the 1983 Act. But the Hon'ble High Court had conclusively held that provisions of the Central Excise Act for levying interest cannot be adopted and made applicable for interest in respect of late payment of Cess and Taxes under the 1966 Act and the 1983 Act as interest was a separate levy, and interest cannot be charged without specific charging provision in statute that levied tax and cess. The Punjab & Haryana High Court, following the decisions of the Supreme Court in Para 7 in the cases of J.K. Synthetics Ltd. v/s Commercial Taxes Officer - (1994) 4 SCC 276. Thus, the decision in CCE, Surat-I V/s. Ukai Pradesh SahkariKhandUdyogMandli Ltd. 2011 (271) ELT 32 (Guj.) is the binding decision to be followed in Gujarat, but, adjudicating authority has not followed the same and passed Orders, which are not sustainable and deserves to be set aside in this case. Adjudicating authority who passed Orders has not followed judicial discipline laid down by the Hon'ble Supreme Court in 1991 (55) E.L.T. 433 (S.C.)- UOI vs KAMLAKSHI FINANCE CORPORATION LTD, wherein it is held that decisions of higher authorities should be followed by all authorities in department. In case of 2016 (340) ELT- 193(Tri.–LB) -J.K. Tyre& Industries Ltd v/s CCE, on binding Precedent of the decision, it has been held that Precedent where Conflicting judgments of the various High Courts are available on the issue, Judgment of jurisdictional High Court shall prevail following the Judicial discipline, as held by Tribunal Larger Bench of five Member in 1997 (96) E.L.T.257 (Tribunal) resolving the issue of binding precedent in case of conflicting judgments of High Courts. It has been ordered to follow judgment of jurisdictional High Court in such cases. Accordingly, in the facts of this case,

decisions of the Hon'ble Gujarat High Court in case of CCE, Surat-I V/s. Ukai Pradesh SahkariKhandUdyogMandli Ltd reported in 2011 (271) ELT 32 (Guj.) needs to be followed.

5.17 The case of Mahindra & Mahindra Ltd. V/s. Union of India reported in 2022 (10) Tax Amendment India 212–Bombay High Court = (2023) 3 Centax 261 (Bom.) - is a case relating to Section 3 of the Customs Tariff Act, 1975, which is the provision involved in present case also. In this case before the Hon'ble Bombay High Court, the provisions of the Customs Act and the Rules and Regulations made thereunder were adopted and made applicable for duty, tax and cess levied under Section 3 of the Customs Tariff Act 1975 by sub section (8), (which has now been renumbered as sub section (12) with effect from 1.7.2017 in view of the new levy of Integrated tax and Cess. In this case also, the Hon'ble High Court has held that imposing interest and penalty on the demand pertaining to surcharge or additional duty of customs or special additional duty of customs was without jurisdiction.

The Hon'ble High Court has considered the relevant provisions of a few other statutes where the Statute had consciously inserted words like "offences, penalties and interest" while applying provisions of other Acts like the Customs Act and the Central Excise Act, for independent levies imposed under some other enactments. In para 23 of this judgment, the case law of Orient Fabrics Pvt. Ltd. is referred to, and it is recorded that an amendment was made by the Finance Act, 1994 in the Act considered by the Hon'ble Supreme Court, in that case wherein the words "offences and penalties" were consciously inserted. Similarly, in para 26 of judgment by Hon'ble Mumbai High Court, provision of Section 9(8) of the Customs Tariff Act, 1975 is also considered because, for levy of Anti-Dumping Duty imposed under Section 9A of the Customs Tariff Act, provisions of Customs Act for "interest and penalties" are specifically made applicable by Section 9A(8) of Tariff Act. It is held by the Hon'ble Mumbai High Court that there being no specific provision for imposing interest and penalty on CVD levied under Section 3(3) of the Tariff Act 1975, imposing interest and penalty on the demand on surcharge or additional duty of customs or special additional duty of customs was incorrect and also without jurisdiction. The Revenue's Special Leave Petition against the judgment in case of Mahindra & Mahindra Ltd. is dismissed by the Hon'ble Supreme Court on 28.7.2023, and Review Petition of the Revenue has also been dismissed on 09-01-2024. The Hon'ble High Bombay Court in relevant para has held as under :-

"13. Therefore, the issue that requires to be decided by this Court in this petition is limited to leviability of interest and penalty in relation to amounts payable as duty other than basic customs duty.

….

19. When a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. As held by the Apex Court in the matter of J.K. Synthetics Ltd. v. Commercial Tax Officer [1994] 1 SCC 276 relied upon by Mr. Sridharan, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law.

20. Section 28AB of the Customs Act, 1962 is a taxing provision which creates and fastens the liability on a party. The provision has to be strictly construed and will be governed by the language employed in the section. The Apex Court in the matter of Indian Carbon Ltd. v. State of Assam 1994 SCC (4) 276/1988 taxmann.com 1764 (SC), relied upon by Mr. Sridharan, after quoting paragraph 16 of J.K. Synthetics Ltd. (supra), held that the proposition that may be derived from J.K. Synthetics Ltd. (supra) is interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. The Court held that where there is no substantive provision requiring the payment of interest, the authorities cannot, for the purpose of collecting and enforcing payment of tax, charge interest thereon.

21. It is petitioner's case, as noted earlier, that provision relating to interest and penalty are not borrowed under Finance Act, 2000 and under section 3 and 3A of the Customs Tariff Act, 1975, and hence no interest and penalty can be levied on the portion of demand pertaining to surcharge, additional duty being countervailing duty (CVD) and special additional duty (SAD) being levied under section 3 and Section 3A of the Customs Tariff Act, respectively. The total duty demand raised in the show cause notices consist of the demand of basic customs duty under section 12 of the Customs Act, 1962, surcharge of customs duty under section 90 of the Finance Act, 2000, additional duty of customs equal to excise duty under section 3 of the Customs Tariff Act, 1975 (CVD) and special additional duty of customs under section 3A of the Customs Tariff Act, 1975 (SAD).

It is also petitioner's case that Section 28AB of the Customs Act, 1962, interest on delayed payment of duty is applicable only for customs duty leviable under section 12 of the Customs Act, 1962. Section 90 of the Finance Act, 2000 relating to surcharge, Section 3 of the Customs Tariff Act, 1975 relating to additional duty of customs and Section 3A of the Customs Tariff Act, 1975 relating to special additional duty of customs do not borrow the provisions of Customs Act, 1962 relating to interest.

…

26. Sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975 does not provide for any interest or penalty. Neither Section 90 of the Finance Act, 2000 provides for the same. Therefore, no interest and penalty can be levied on the portion of payment pertaining to surcharge, CVD and SAD.

…

30. As stated earlier, sub-section (6) of Section 3 and sub-section (8) of Section 3A of the Customs Tariff Act, 1975 referred to the procedural aspect and machinery provisions under the Customs Act, 1975 and not the charging provisions. So also Section 90 of the Finance Act, 2000. As held by the Apex Court in Jain Brothers v. Union of India AIR 1970 SC 778, which was also cited by Mr. Sridharan, penalty was not a continuation of assessment proceedings and penalty partook all the character of the additional tax. There is no provision under section 3 for additional duty or Section 3A for special additional duty under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 that creates a charge in the nature of penalty or interest.

…

36. We find support for our view in Hyderabad Industries Ltd. v. Union of India 1999 (108) E.L.T. 321 (SC) relied upon by Mr. Sridharan. The Apex Court considered Section 12 of the Customs Act, 1962 and went on to hold that the charging section to impose CVD is Section 3 of the Customs Tariff Act, 1975. Paragraphs 12, 13 and 14 of Hyderabad Industries Ltd. (supra) read as under:

37. In view of the above, imposing interest and penalty on the portion of demand pertaining to surcharge or additional duty of customs or special additional duty of customs is incorrect and without jurisdiction.

39. The finding of respondent no. 2 that it has the inherent authority or power to determine the terms of settlement covering not only the amount of duty but also interest and penalty as well is ex-facie untenable. Reliance by respondent no. 2 upon Section 127C of the Customs Act, 1962 to direct payment of interest is totally misplaced in the case at hand. Section 127C of the Customs Act, 1962 itself provides that the order of the Settlement Commission has to be in accordance with the provisions of the Customs Act, 1962. Respondent no. 2 certainly cannot pass an order beyond the provisions of the Customs Act, 1962. The provisions relating to interest contained in Section 28AB of the Customs Act, 1962 are not borrowed in the legislation imposing levy of surcharge or CVD or SAD. Respondent no. 2 cannot include interest in the settlement arrived at by it on the ground that petitioner has derived financial benefits by not paying the correct rate of duty when it was due. Deriving financial benefits itself cannot be a ground to order payment of interest in the absence of any statutory provisions for payment of interest."

5.18 In the Customs Appeal No. 41786 of 2019 filed by Acer India (Pvt.) Ltd reported in 2024(5) TMI 478-CESTAT Chennai, the Tribunal Chennai vide Final Order No.40534/2024 dated 08-05-2024 has passed decision recently and held that interest demand, penalty and redemption

fine cannot be imposed in relation to CVD leviable under Section 3(1) of the Customs Tariff Act, because there was no charging provision for such levies in the Tariff Act and provisions of the Customs Act for such levies like interest, penalty and fine were not applicable for duty levied under Section 3(1) of the Tariff Act. The judgment of the Hon'ble Mumbai High Court in case of Mahindra & Mahindra Ltd.(supra) is referred to in para 30 by the Tribunal at Chennai which has passed the Order as under :-

> *"The appellant has argued that confiscation of goods, interest demand, penalty and redemption fine imposed cannot be sustained in relation to CVD leviable under Section 3 (1) of Customs Tariff Act, 1975. The Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. v. Union of India (supra) had considered the said issue and held that interest and penalty in relation to CVD cannot be demanded in the absence of specific provisions for levy of interest, penalty in the Customs Tariff Act, 1975. The said decision was upheld by Hon'ble Apex Court as reported in 2023 (8) TMI 135-SC. Following the same, we hold that the confiscation of goods, interest on CVD, redemption fine and penalties cannot sustain on this ground also."*

5.19 In Final Order No.40846/2023 dated 25.09.2023 passed by the Tribunal, Chennai in case of M/s. Acer India Pvt.Ltd the Chennai Bench of this Hon'ble Tribunal also, the same legal issues arose whether demand of interest on additional duty of customs (CVD) and SAD was sustainable by applying provisions of Customs Act, 1962 ? The Tribunal has held in paras 21, 24, 25, 26 and 28 that penalty, interest etc. cannot be levied in regard to collection of CVD and SAD. The Tribunal has also observed in para 26 of decision that the entire situation was revenue neutral; and therefore the demand for interest, Confiscation of goods, imposition of redemption Fine and penalty was unsustainable. In Para 29, the Tribunal Chennai has concluded and has held as under :-

> *"In the result, the impugned order is modified to the extent of setting aside, the demand of interest, the order of confiscation of goods, the imposition of Redemption fine, penalties imposed and the appropriation of interest paid by the appellant without disturbing the confirmation of duty."*

In the present Appeal cases herein also, the appellant has challenged the demand of interest, order of confiscation of goods, imposition of Redemption fine and penalty imposed and the appropriation of interest paid by the appellant.In the present case also the entire situation is revenue neutral, as Revenue has also allowed credit of entire amount of Integrated tax with interest paid by the appellant, pursuant to Re-assessment of Bill of Entry in

question after following the procedure laid down under Circular No.16/2023-Cus. dated 7.6.2023.

5.20 We find that interest is recovered as per Para 5.2(c) of Circular No. 16/2023-Cus dated 07-06-2023, Appellant had no option, but, to pay "Interest" along with IGST, if they wish to avail option to pay IGST in compliance to para 75 of decision dt. 28-04-2023 by Apex Court. We find that in this case, issue is IGST leviable under Section 3(7) of Customs Tariff Act 1975. Section 3(7) is charging section for IGST on goods imported into India, and it is a separate levy independent of Customs Duty leviable under Section 12 of Customs Act. Thus, the Circular No. 16/2023-Cus dated 07-06-2023 directing to charge applicable interest is ex-facie, contrary to provision for charging "interest" u/s 3(7) of Customs Tariff Act 1975 and decisions of the Hon'ble Supreme Court, Punjab & Haryana High Court, Gujarat High Court, Bombay High Court and other decisions, as mentioned above. We observe that any Circular issued by CBIC would reflect only the views of Officers on any issue, but, law is also settled that decision by Court will always prevail over the views expressed in a CBIC Circular. The decisions of Hon'ble Supreme Court in the cases of 2002 (139) ELT-3(SC) - CCE, Vadodara vsDhiren Chemical Industries and 2008 (12) STR-416(SC) - CCE, BolpurvsRatan Melting & Wire Industries shows that circular contrary to the statutory provisions has really no existence in the law.

5.21 This is a case of revenue neutrality and interpretation of provisions. There is no substantive provision for confiscation or imposing Redemption fine in Customs Tariff Act 1975. There is no evidence showing intention for evasion of duty. There is no justification for confiscation of goods or imposing redemption fine, where the goods in question were released on Final Assessment and not available for release. The Larger Bench decision by the Hon'ble Tribunal in Shiv Kripa Ispat Pvt. Ltd-2009 (235) ELT 623 supports Appellant's contention. Thus, the orders for confiscation of goods and imposing redemption fine are not sustainable, in terms of the applicable provisions of law and the decisions relied upon by the Appellant.

5.22 This is a case also of interpretation of provisions. There is no statutory provision for imposing Penalty under section 3(7) or 3(12) of the Customs Tariff Act 1975. There is no evidence showing intention for evasion of duty. Imposition of penalty requires malafide intention to evade duty, which is not found in these cases. The ingredients required for imposing

penalty are not found in these cases. Thus, the orders for imposing Penalty are not sustainable, in terms of the applicable provisions of law and the decisions relied upon by the Appellant.

5.23 As regard the submission made on demand being time barred, we find that the entire case is based upon assessments of the relevant Bills of Entry, cleared on final assessment by proper customs officers, where all the relevant documents and Information were provided by Appellant on facts and Re-assessment of same Bills of Entry are after Hon'ble Supreme Court's decision dt. 28-04-2023 and CBIC Circular dt. 07-06-2023. Thereis no suppression by appellant. Since the case was made out on the basis of alleged violation of "Pre-Import Condition" in imports under Advance Authorisation scheme, customs authorities were also aware of the said Pre-Import Condition inserted by the Notification on 13-07-2017, hence the department could have taken action within the normal period. Further, the situation was complete revenue neutral for Appellant on availability of credit of duty paid. In these facts, since no suppression of fact is there and show cause notices were issued beyond two years, from import, the entire demand is time barred. We also find force in the Appellant's submission that Revenue cannot invoke larger period of time limitation for duty demands in cases involving interpretation and resolution of the issues by higher courts upto the level of Hon'ble Apex Court and in a Revenue Neutral Situation. There is no evidence or justification to invoke extended period u/s 28(4) of Customs Act 1962. Since the demand made against the appellant was barred by time limitation, the duty liability is illegal and liable to be set aside. Such duty liability, would be permissible only when the assessee was guilty of deliberate omissions and/or commissions with malafide intention, to evade duty. Thus, we are of the view that in these cases, allegation of suppression of facts etc and invocation of extended period of limitation is not correct. Accordingly, entire demands of duty are beyond the normal period, the orders of confirmation of demands of duty with interest, fine and penalty are not sustainable on the ground of time bar also, though Appellant has not objected confirmation of duty seriously, which has been paid and allowed as credit by the revenue as per the Circular dated 07-06-2023..

5.24 In view of the above mentioned provisions of law and judicial pronouncements, it is settled that in the absence of specific provision relating to levy of Interest, Redemption Fine and Penalty in respective legislation for levy duty, the same cannot be demanded or imposed or recovered by taking recourse to machinery provisions relating to recovery of

the duty. Therefore, the orders for recovery of "Interest, Redemption Fine and Penalty" in these cases are not sustainable considering charging provisions of the Customs Act 1962 and relevant provisions under the Customs Tariff Act, 1975 and the decisions rendered thereon as mentioned above. The issue on imposing Interest, Redemption Fine and Penalty is no longer ResIntegra.

5.25 We also note that adjudicating authority has relied upon a few decisions in the impugned orders, which are on different facts and applicable in such facts. The facts and issue in the present cases are not identical to those cases. Therefore, the ratio of the decision is not directly applicable in the present case.

6 Since we decide these Appeals on the multiple counts, on merits and limitation, the other issues raised by the appellant are not taken up or discussed and the same are left open.

7. In view of our above discussion and findings, the impugned orders on confirmation of demands for interest and appropriation thereof, order of confiscation of goods, imposition of Redemption fine and penalty are not sustainable and the same are set aside. The appeals are allowed with consequential reliefs in the above terms.

(Pronounced in the open court on 23.07.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Bharvi

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 50006 of 2022 (SM)

(Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-137-2020-21 dated 24.02.2021 passed by the Commissioner (Appeals) Customs, CGST & Central Excise, Indore (M.P.))

Shri Balaji Ceramic Products **Appellant**
E-338 & E-339, RIICO Industrial Area
Pahse-I, Bhiwadi, Distt- Alwar-301019.

VERSUS

Commissioner of Customs **Respondent**
Manik Bagh Palace
Post Box No. 10, Indore,
Madhya Pradesh-453771

APPEARANCE:
Mr. Arun Goyal, Advocate for the Appellant
Ms Tamanna Alam, Authorised Representative for the Respondent

CORAM:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50024 / 2023

Date of Hearing: 10.01.2023
Date of Decision: 10.01.2023

ANIL CHOUDHARY:

Heard the parties.

2. The issue involved in this appeal is whether the re-imported petroleum coke have been rightly confiscated alongwith imposition of penalty under Section 112(b) of the Customs Act. The brief facts are as follows:

(i) The Appellant had filed a Bill of Entry bearing No. 7159403 dated 08.03.2020.at ICD Mandideep (Bhopal) for clearance of

purportedly re-imported goods (calcined Petroleum Coke) which were claimed to have been exported against SB No. 1275899 dated 1.12.2017, on the grounds of rejection of the goods by the Buyer, and were accompanied with re-export invoice no. SBCP-53/2019 dated 21.01.2020 issued by M/s NAJD STEEL, Riyadh.

(ii) It was observed during routine physical verification of the goods that:

- Most of the bags were un-marked.
- 42 bags were exported vide SB No. 1275899 dtd. 1.12.2017 and only 20 jumbo bags were re-imported, and all the jumbo bags were in open condition and the weight of each and every bag deviated from that mentioned in Shipping Bill.
- Total weight of purportedly re-imported goods was found to be 19,526.20 KGs, against declared weight of 19,690 Kgs.

Hence it could not be established that the said imported goods pertained to those goods which were exported from India, as per shipping bill dated 01.12.2017, attached.

Also, re-import of the calcined Petroleum coke appeared not allowable as per applicable Notifications, Circulars.

(iii) As per DGFT Notification No. 42/2015-2020 dtd. 23.10.2018, the import of pet coke for fuel purpose is prohibited. However, import of pet coke is free for cement, lime Kiln, calcium carbide, 'gasification Industries, and graphite electrode industries for use as feed stock or in the manufacturing process. Further, Aluminum industry can import calcined pet coke not exceeding 0.5 MT per annum and calcined Pet coke manufacturing units can import raw pet coke not exceeding 1.4 MT per annum.

(iv) It was observed that 42 bags were exported vide S.B. No. 1275899 dtd. 1.12.2017 and on the contrary only 20 jumbo bags

were re-imported and all the Jumbo bags were found in open condition and the weight of each and every bag was found to be different. Hence, it could not be established that the said re-imported goods pertained to those goods which were exported from India, as per the referred shipping bill. Further, all the goods appeared not of good quality and the party was unable to provide the gradation test report of the goods imported, and copy of reversal of amount in Bank statement as per BOE.

(v) In terms of Notification No. 45/2017- Customs dated 30.06.2017, in the case of goods exported under the Duty Exemption Scheme or Export Promotion Capital Goods Scheme or Duty Entitlement Passbook Scheme or any reward scheme of Chapter 3 of Foreign Trade Policy, re-importation, of such goods are allowed within 1 year of exportation. The exporter had availed the benefit of MEIS scheme and therefore the importer had availed reward scheme.

(vi) In terms of MOEF guidelines for regulation and monitoring of imported Petcoke in India, import of petcoke for use as fuel is prohibited. Further, consent issued by the concerned SPCB/PCC shall clearly specify the quantity permitted for import and its use on a per month and or per annum basis-. Only registered industrial units with valid consent from SPCBs/PCC shall be permitted to directly import pet coke and consignment shall be in the name of user industrial unit for their own use only. Import of Pet Coke for the purpose of trading shall not be permitted.

(vii) Further, identity of goods exported as per shipping bill was not established with respect to BOE filed. Also, the importer is engaged

in trading of goods and not connected with any manufacturing activity.

(ix) Accordingly the Show Cause Notice No 01/DC/CUS/MDP/ 2020 dated 08.06.2020 was issued to appellant by the Deputy Commissioner, ID Mandideep proposing therein:

- Confiscation of 19,526.20 Kgs of "calcined Petroleum Coke" valued at Rs. 6,06,156.22/-, in terms of Section 111 of the Customs Act, 1962.
- Penalty for improper importation of restricted/prohibited goods etc. under Section 112 of the Customs Act, 1962.
- For Non-compliance of all the provisions of Customs Act, 1962 and any other act and order enforced, the goods should be disposed off/destroyed as the case may in supervision of Pollution Control Board, M.P. at the importers own cost in such a manner as prescribed by Pollution Control Board, M.P. or any other authority as per applicable rules and regulations read with provisions of Customs Act thereof.
- A penalty for knowingly or unknowingly or intentionally importation of incorrect material.
- A penalty for any other contravention of the Customs Act, 1962 under section 117 of the said Act.

3. The SCN was adjudicated on contest and the goods were absolutely confiscated being 19,506.20 kg of CPC valued at Rs. 6,06,156.22/-. Further penalty of Rs. 6,06,156/- was imposed under Section 112(b) of the Act. Being aggrieved the appellant preferred appeal before the learned Commissioner (Appeals) who vide impugned Order-in-Appeal have been pleased to reject the appeal. Being aggrieved, the appellant exporter (re-importer) have filed present the appeal before this Tribunal.

4. Learned Counsel for the appellant, Mr. Arun Goel, *inter alia* urges that this is a case of re-import by the appellant who had exported the goods to the actual user-NAJD Steel, Saudi Arabia.

However, as they found part of the goods not suitable, they have returned part of the goods after negotiation and agreement between the parties. The learned Counsel have referred to the correspondence between the parties regarding the goods which were exported. The Director of the appellant had also travelled to Saudi Arabia to settle the dispute, and agreed to take back 20 bags equivalent to 20,000 kg of CPC. Accordingly, NAJD Steel re-exported the rejected CPC packed in 20 Jumbo bags mentioning net weight at 19.690 kg valued at USD 8072.90/- vide re-export invoice dated 21.01.2020 to the appellant. As the buyer NAJD Steel had made advance payment for these goods at the time of purchase, they also advised the appellant to refund the amount, giving swift details. The goods were booked vide bill of lading on 28.10.2020, wherein the shipper is NAJD Steel and the consignee is the appellant. Further, it is mentioned in the bill of lading that the goods are being sent which have been received by the shipper against invoice no. SBCP-53 dated 30.11.2017 and Shipping Bill No. 1275899 dated 01.12.2017. Thus, evidently rejected goods have been sent by the buyer from Saudi Arabia back to the appellant exporter. Further admittedly, the goods are CPC which had been exported to Saudi Arabia.

5. Learned Counsel, further urges, as per Section 20 of the Customs Act, if goods are re-imported into India after exportation therefrom, such goods shall be liable to duty and be subject to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subjects, on the importation thereof. Further, notification 45/2017-Cus dated 30.06.2017 exempts goods falling under any Chapter of the Customs Tariff Act when re-imported into

India, from so much of the duty of the customs leviable thereon, as well as the whole of integrated tax, compensation cess leviable. Below the table in the said notification, conditions precedent are mentioned. As per condition no. (b), goods other than goods exported under any incentive scheme can be re-imported within three years after their exportation or within such extended period, not extending two years, as the Principal Commissioner of Customs, on sufficient cause being shown for the delay, may be allowed. Further, condition Clause (d) mentions that the goods are the same which were exported.

6. Learned Counsel further urges that the Court below have erred in relying on Notification No. 42/15-16-Cus dated 23.10.2018 which provides for restriction on import of petroleum coke, and it is allowed to be imported only on actual user basis for the specified purpose. The notification also provides for import of raw petroleum coke for manufacture of calcined petroleum coke, subject to quantitative restriction.

7. Learned Counsel further draws attention to para 1.05 of Chapter 1 of Foreign Trade Policy, 2015-2020 (as amended), wherein in Clause B of para 1.05, it is provided- in case of change of policy from free to restricted/ prohibited/ state trading or otherwise regulated, the import/export already made before the date of such regulation/restriction, will not be affected.

8. Learned Counsel further points out that the learned Commissioner appeals have also committed mistake of fact inasmuch as, it has been observed that the re-import have been

made after more than three years, wherein the actual re-import have been made within three years as allowable by Section 20 of the Customs Act r/w Notification No. 45/2017-Cus. Further, learned Commissioner observed that CPC is not freely importable, treating import as a fresh import and not re-import of the goods.

9. Accordingly, learned Counsel prays for allowing the appeal with consequential benefits.

10. Learned AR for Revenue relies on the impugned order and further draws the attention to the inspection report wherein, the customs officers were of the view that the goods claimed to be re-imported do not appear to be the same goods, in absence of marking on the Jumbo bags. Further, it appeared to the customs that the appellant have taken benefit of MEIS scheme and they were entitled to import only within one year of export or extended period as may have been allowed.

11. Having considered the rival contentions, I find that the learned Commissioner (Appeals) have recorded the findings that the appellant had purchased the goods for export and on being rejected by the buyer in Saudi Arabia, the goods have been re-imported and admittedly, appellant have not availed any export benefit on the impugned goods. Thus, I find that both the identity of the goods is also established and also that the appellant had genuinely exported the goods to the user buyer in Saudi Arabia. Further, on rejection by the buyer, the appellant was obligated to re-import the goods to mitigate his loss. Further, admittedly, the re-imported goods have been found to be CPC. The minor variation in weight is normal

variation in the weight of the goods, due to normal loss in transit. I further find that as per para 1.05 (Clause B) of Chapter 1 of FTP 2015-2020, provides that in case of change of policy from free to restricted/prohibited etc. the imports or export already made before the date of such regulation/restrictions will not be effected. Admittedly, the export in this case was made through shipping bill dated 01.12.2017, which is before the date of restriction imposed vide aforementioned Notifications. Thus, I hold that CPC was free for export-import on the day of export, the re-import by the appellant of the rejected goods, has to be treated as freely importable under the Foreign Trade Policy.

12. In view of my aforementioned findings and observations, I allow this appeal and set aside the impugned order. The appellant shall be entitled to consequential benefits, in accordance with law.

13. Appeal allowed.

(order dictated in the open Court)

Anil Choudhary
Member(Judicial)

sb

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO 5373 OF 2019

Hewlett Packard India Sales Pvt. Ltd. ... Appellant

(Now HP India Sales Pvt. Ltd.)

VERSUS

Commissioner of Customs (Import), Nhava Sheva ... Respondent

WITH

CIVIL APPEAL NO 6715 OF 2019

Lenevo (India) Pvt. Ltd. ... Appellant

VERSUS

Commissioner of Customs (Import), Nhava Sheva ... Respondent

JUDGMENT

Surya Kant, J.

Signature Not Verified
Digitally signed by VISHAL ANAND
Date: 2020.11.17 17:20:27 IST
Reason:

The question that arises for our consideration pertains to correct classification of Automatic Data Processing Machines (hereinafter,

'ADP') which are popularly known as 'All-in-One Integrated Desktop Computer' (hereinafter, 'Concerned Goods') under the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter, 'First Schedule').

FACTS

2. The Appellants imported certain units of the Concerned Goods and classified them under 'Tariff Item 8471 50 00' as per the prevalent self-assessment procedure. During subsequent examination by the Custom Authorities, the Concerned Goods were classified under 'Tariff Item 8471 30 10', which was later confirmed by the Assistant Commissioner of Customs and Commissioner of Customs (Appeal). These findings were further affirmed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter, 'CESTAT'), West Zonal Bench, Mumbai vide the impugned judgments dated 19.12.2018 and 24.06.2019.

3. While the rate of duty is same under both the Tariff Items, the method of computing them is different. Goods under 'Tariff Item 8471 30 10' attract the application of Section 4A of Central Excise Act, 1944, which valued the excisable goods on the basis of percentage of retail sale price. In contrast, a classification under 'Tariff Item 8471 50 00' invites valuation based on price mechanism under Section 4 of Central Excise Act, 1944 which would have effectively reduced the overall liability to pay the requisite duty. This difference in liability is

the precise reason behind the present dispute regarding classification under the correct Tariff Item which calls for adjudication.

4. Before delving into the reasoning of the revenue authorities and CESTAT, which is more or less identical, it would be appropriate to reproduce the following relevant parts of the First Schedule :-

Heading/Sub-Heading/Tariff Item[1] (1)	**Description of goods[2] (2)**
8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data on to data media in coded form and machines for processing such data, not elsewhere specified or included
8471 30	**- Portable digital automatic data processing machines, weighing not more than 10 kg, consisting of at least a central processing unit, a**

1 Additional Notes to The Customs Tariff Act 1975, sch 1 states that -

1(a) "Heading", in respect of goods, means a description in list of tariff provisions accompanied by a four-digit number and includes all sub-headings of tariff items the first four-digits of which correspond to that number.

(b)"Sub-heading" ", in respect of goods, means a description in list of tariff provisions accompanied by a six-digit number and includes all tariff items the first six-digits of which correspond to that number.

(c)"Tariff Item" means a description in list of tariff provisions accompanied by a six-digit number means a description of goods in the list of tariff provisions accompanying either eight-digit number and the rate of the duty of excise or eight-digit number with blank in the column of the rate of duty.

2 General Explanatory Notes to The Customs Tariff Act 1975, sch 1 states that -

1. Where in column (2) of this Schedule, the description of an article or group of articles under a heading is preceded by "-", the said article or group of articles shall be taken to be a sub classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of articles is preceded by "--", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-". Where the description of an article or group of articles is preceded by "---" or "----", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "--".

	keyboard and a display
8471 30 10	**--- Personal computer**
8471 30 90	--- Other
	- Other automatic data processing machines
8471 41	-- Comprising in the same housing at least a central processing unit and an input and output unit whether or not combined
8471 41 10	--- Micro computer
8471 41 20	--- Large or main frame computer
8471 41 90	--- Other
8471 49 00	-- Other, presented in the form of systems
8471 50 00	**- Processing units other than those of subheading 8471 41 or 8471 49, whether or not containing in the same housing one or two of the following types of unit: storage units, input units, output units**

(Emphasis Applied)

5. Since, the reasoning confirming the classification under 'Tariff Item 8471 30 10' by the adjudicating authorities including CESTAT is identical, hence, it would be sufficient to discuss the key findings of the impugned decisions in brevity. These observations are :-

a) The Concerned Goods weighed less than 10 kilogram and were easily carried from one place to another. In this respect the CESTAT relied on dictionary meaning of the word 'portable' to hold that the goods were rightly classified under 'Tariff Item 8471 30 10";

b) The absence of in-built power source does not render the Concerned Goods as non-portable;

c) The dimensions of the Concerned Goods as well as the fact that it was not foldable did not impact the element of portability;

d) The Concerned goods had a display unit, a touch screen which could function as a keyboard and thus it fulfilled the description mentioned under 'Tariff Item 8471 30 10'.

B. CONTENTIONS

6. We have heard learned counsel for the parties and perused the documents produced on record. It must be noted that both sides have not disputed the findings of the adjudicating authorities except in respect of the aspect of portability of Concerned Goods. Hence, the only limited question that falls for consideration before us in these proceedings is whether the Concerned Goods are 'portable' or not under 'Tariff Item 8471 30 10'.

7. Mr. V Lakshmikumaran, learned counsel for the Appellants, has made four key contentions. *Firstly*, that 'Tariff Item 8471 30 10' pertains to class of ADPs which are popularly known as laptops or notebooks. He has highlighted that the classification under 'Tariff Item 8471 30 10' involves an element of 'functionality' which is not applicable in the present case as Concerned Goods are not capable of functioning without an external source of power. *Secondly,* he contended that Concerned Goods have been wrongly held to be 'portable' by the CESTAT on the sole aspect that their weight was less than 10 kilograms. He argued that mere weight cannot be the sole

consideration for deciding whether any good is 'portable' or not, and it is necessary to consider additional aspects such as functionality and ease of transportability which is suitable for a mobile lifestyle of the user. *Thirdly,* he urged that the CESTAT erroneously relied on the general definition of 'portable' given in dictionaries and instead the same should have been defined in relation to the class of goods, i.e. ADPs. In this respect, he pointed out that the relevant 'Sub-Heading 8471 30' which entails the condition of being 'portable' in the description of goods was preceded by a single '-' and consequently all the goods under the said sub-heading should be taken as a sub classification of the goods covered by the 'Heading 8471'. *Finally,* to buttress the aforementioned arguments, he highlighted that the Concerned Goods are not considered as 'portable' by the European Commission's classification and are also not covered by the 'Tariff Item 8471 30 10' as per the World Customs Organization's Harmonized System Explanatory Notes (hereinafter, 'HSN'). We must also bring to the fore and appreciate the efforts of learned counsel for the Appellants who physically demonstrated by setting up one of the sample units of the Concerned Goods to showcase the aspects of portability involved in present matter.

8. On the contrary, Mr. Arjit Prasad, learned senior counsel for the Respondent while supporting the observations in the impugned decisions, put forth two counter arguments. *Firstly*, that since the

word 'portable' is nowhere defined in the statute, it should be interpreted on the principle of general parlance. In other words, he submitted that the dictionary meaning of the word 'portable' is sufficient to resolve the dispute regarding its interpretation. *Secondly*, he maintained that the legislature's intention was crystal clear in qualifying the term 'portable' by providing the condition in the description that any ADP less than 10Kgs would automatically become portable. In furtherance of this argument, he relied on the Constitution Bench decision of this Court in ***Mathuram Agrawal v State of MP***[3] to urge that the intention of the legislature has to be discerned from the plain and unambiguous meaning of the language used in a taxation statute and any other interpretation is impermissible.

9. We now examine these contentions of both parties.

ANALYSIS

10. Before we ponder over the question whether the Concerned Goods are 'portable' or not, it would be appropriate to highlight their key characteristics which are as follows :-

a) The central processing unit is embedded within the display unit;

b) The display unit is generally a touch screen which can be used as an input unit also, such as in the capacity of a keyboard or a mouse;

3 *Mathuram Agrawal v State of MP* (1999) 8 SCC 667, para 12.

c) The units generally come along with in-built speakers as well as ports for further connectivity including a port for establishing links with internet network;

d) The diagonal length of the display is at the minimum of 18.5 inches. It may be clarified that presently certain models of the Concerned Goods even exceed this aspect by having the display's diagonal length as wide as 25 inches while still being weighed under 10 kilograms;[4]

e) It needs a constant source of external power source to function;

f) It is non-foldable and cannot be carried around in the usual laptop bags because of its dimensions;

g) The Concerned Goods for efficient functioning need to remain in a vertical state and to be tethered to a stand which is provided along with it or requires support of something else such as a wall. It must be noted that the user guides brought on record in respect of one of the models of the Concerned Goods indicate that any other method of usage including horizontal use was harmful and could cause damage to the Concerned Goods.

11. The first aspect which we will address is with respect to the issue of constant source of power and whether the same is a necessary characteristic to treat goods as 'portable'. In this respect, the Appellants argued that 'Tariff Item 8471 30 10' is only applicable

4 It must be noted that in respect of current market trends, generally the largest display for laptops/notebooks is around 17 inches.

to laptops/notebooks and that the applicable sub-heading HSN indicated this. The relevant part of the same reads as follows –

> **"Subheading 8471.30**
> **This subheading covers portable automatic data processing machines weighing not more than 10 kg. These machines, which are equipped with a flat screen, may be capable of operating without an external source of electric power and often have a modem or other means for establishing a link with a network."**

(Emphasis Applied)

12. While it appears well settled that the HSN is to be normally taken as a safe guide for classifying goods under the First Schedule because it is based on an internationally recognized 'harmonized nomenclature'[5], a bare reading of the explanatory note applicable to the sub-heading clearly lays out the fact that there is no mandatory condition for being operable without any external source of power. We are thus unable to agree with the Appellants that only ADPs with a built-in power source is necessarily required to be classified under 'Tariff Item 8471 30 10'. In other words, no element of 'functionality' is contemplated for the purpose of classifying the Concerned Goods as 'portable'.

13. The second aspect deals with the question as to whether mere factum of weighing less than 10 kilograms would be sufficient to classify the Concerned Goods as 'portable' or not. In this respect, it may be seen that the CESTAT vide its impugned order(s) has relied on

5 *Collector of Central Excise, Shillong v Wood Craft Products Limited* (1995) 3 SCC 454.

the dictionary meaning which defined 'portable' as - "*that can be easily carried and not permanently fixed in a place*". It then went on to conclude that the dimensions of the Concerned Goods were not a concern as long as it could be easily lifted and moved. As noted above, a similar argument has been raised by learned senior counsel for the Respondent before us also.

14. At the outset, we must note that the adjudicating authorities while coming to their respective conclusions, especially the Commissioner of Customs (Appeal) have extensively referred to online sources such as Wikipedia to support their conclusion. While we expressly acknowledge the utility of these platforms which provide free access to knowledge across the globe, but we must also sound a note of caution against using such sources for legal dispute resolution. We say so for the reason that these sources, despite being a treasure trove of knowledge, are based on a crowd-sourced and user-generated editing model that is not completely dependable in terms of academic veracity and can promote misleading information as has been noted by this court on previous occasions also.[6] The courts and adjudicating authorities should rather make an endeavor to persuade the counsels to place reliance on more reliable and authentic sources.

15. Moving forward, we must now address the issue at hand, namely, the interpretation of the word 'portable' and more so when the

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6 *Commissioner of Customs, Bangalore v Acer India (P) Ltd.* (2008) 1 SCC 382, para 17.

reasoning of the CESTAT solely hinges on the aspect of weight. Such an approach is apparently erroneous because despite the fact that the 'portable' was not defined under the statute, it was incorporated in 'Sub-Heading 8471 30' and was preceded by a single '-', which meant that classification of goods under the same would be taken as a sub-classification of the 'Heading 8471'.

16. In other words, 'portable' should have been defined in reference to the ADPs instead of relying on dictionary meaning which contains all kinds of hues of associated meanings as held by this Court in ***CCE v Krishna Carbon Paper Co.***[7]**.** The cited decision also explains the correct approach to be taken in case when a word is to be defined in context of any entry under the First Schedule. It thus holds that :–

> **"10. The trade meaning is one which is prevalent in that particular trade where the goods is known or traded. <u>If special type of goods is subject-matter of a fiscal entry then that entry must be understood in the context of that particular trade, bearing in mind that particular word.</u> Where, however, there is no evidence either way then the definition given and the meaning following (*sic* flowing) from particular statute at particular time would be the decisive test."**[8]
>
> (Emphasis Applied)

17. In our considered opinion, the word 'portable' should have been interpreted in the context of ADPs. In this regard, relevant technical and commercial literature has been perused by us. On a minute

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7 *CCE v Krishna Carbon Paper Co.* (1989) 1 SCC 150, para 6.
8 ibid, para 10.

analysis thereof, we deem it appropriate to extract the following relevant material:-

The Institute of Electrical and Electronics Engineers defines 'portable computer' as -

> **"A personal computer that is designed and configured to permit transportation as a piece of handheld luggage"[9]**

The Dictionary of Computer and Internet Terms defines it as -

> **"able to be carried around. A portable computer is larger than a laptop computer, but is still easily movable"[10]**

The Oxford Dictionary of Computer Science defines 'portable' in respect of computers as -

> **"A computer that can be simply carried from one place to another by one person. They cannot necessarily be used in transit. Examples include laptop computers."[11]**

The Microsoft Computer Dictionary also provides a definition along with an illustrative chart depicting various types of 'portable computers' –

> **"Any computer designed to be moved easily. Portable computers can be characterized by size and weight."[12]**

Type	Approximate weight	Power source	Comments

9 The Institute of Electrical and Electronics Engineers, *IEEE Standard Computer Dictionary* (1990) 155.

10 Douglas A. Downing and others, *Dictionary of Computer and Internet Terms* (10th edn, Barron's Educational Series 2009) 374.

11 Andrew Butterfield and Gerard Ekembe Ngondi (eds), *Oxford Dictionary of Computer Science* (7th edn, OUP 2016).

12 Alex Blanton (ed), *Microsoft Computer Dictionary* (5th edn, 2002) 412-413.

Transportable	**15–30 lb.**	**House current**	**Sometimes called luggable; usually has floppy and hard drives; standard CRT screen.**
Laptop	**8–15 lb.**	**House current or batteries**	**Can be held on the lap; usually has a floppy drive; uses flat LCD or plasma screen.**
Ultralight	**2–8 lb.**	**Batteries or transformer pack**	**Easy to carry in a briefcase; sometimes uses RAM drive or EPROM instead of floppy or hard drive; thinner models are known as notebook computers.**
Handheld	**Less than 2 lb.**	**Batteries or transformer pack**	**Also called palmtop or palm-sized; can be held in one hand.**

18. On a conjoint reading of the relevant material and inputs, it is explicitly clear that weight cannot be the sole factor to determine the factum of portability. Instead, the essential ingredients to logically establish whether an ADP is 'portable' are twofold. The first ingredient is their ability to be carried around easily which includes all aspects

such as weight and their dimensions. We must hasten to add that in appropriate cases, this assessment would also take into consideration the necessary accessories which are required for safe and efficient usage such as mounted stands or any power adapters. The second ingredient is that the ADP must be suitable for daily transit of a consumer and would include aspects such as durability to withstand frequent commute and damage protection. An example of the same would be the availability of protection cases which allows users to carry the ADPs in hand or possibility of carrying the same in normal briefcases or shoulder bags.

19. On applying these core ingredients to the characteristics of Concerned Goods, there is no room to doubt that they are not 'portable'. *Firstly,* the dimensions of the Concerned Goods make it illogical and unviable for daily transit. While it is true that classification of the goods must not be usually made on the advertisement material of the manufacturer, the user guides produced before us showcase that placing the product in other than the specified orientation could lead to damage to the Concerned Goods. The user guides also emphatically highlight that the Concerned Goods were meant to be used at a fixed place and contained specifications that made them ideal for being mounted on a wall.

20. *Secondly*, the inability of the consumer to carry these goods around in the absence of any protective case or any covering bags,

which makes the Concerned Goods vulnerable to damage during transit. As noted in the literature relied upon before us, the weight was not the sole consideration for being considered as 'portable'. For example, there used to be computers which are now no longer in common use which were popularly known as 'luggable'. They used to weigh more than 10 kilograms. These old predecessors of laptops were designed at the relevant time to be portable and used to fold up neatly in one box with a handle. Despite their weight and the size comparable to small suitcase, they could still be transported, albeit without a wagon.

21. Furthermore, we must also use this opportunity to highlight the impact of technological advancement on law. It's a matter of fact that at the time when the relevant entries of the First Schedule came into effect, weight was definitely an important criterion for deciding whether any ADPs was 'portable'. Scientific progress has greatly reduced the weight associated with high performance in the context of ADPs. It is not surprising that the advent of LED technology, faster microchips, etc. has made it possible for mobile phones to have performance specifications which merely a decade ago was possible only on high end laptops. We must therefore be cognizant of such an impact on the consumer's understanding of any good or trade.

22. Keeping in view the applicable understanding of the element of 'portable' as understood in common parlance used in the trade of ADPs, we must hold that the Concerned Goods are not portable for the reasons that- *Firstly*, the diagonal dimension of the Concerned Goods being minimum of the length of 18.5 inches and the same needs to be transported along with the power cable as well as the applicable stand in most cases if it is to be mounted and; *secondly* there being no protective case designed by the markets for daily transport for these Concerned Goods. Such requirements make the Concerned Goods unable to be carried around easily during daily transit. We, thus, hold that the Concerned Goods are not 'portable'.

23. It goes without saying that since the customs authorities wanted to classify the goods differently, the burden of proof to showcase the same was on them, which they failed to discharge.[13] Hence under the prevalent self-assessment procedure, the classification submitted by the Appellants must be accepted.

CONCLUSION

24. In light of the abovementioned discussion, we allow the appeals and set aside the impugned orders which classified the Concerned Goods under 'Tariff Item 8471 30 10'. It is directed that valuation of the Concerned Goods for levy of the duty be determined under the

13 *Dabur India Ltd. v CCE, Jamshedpur* (2005) 4 SCC 9.

initially declared 'Tariff Item 8471 50 00'. All necessary consequences shall follow.

25. The appeals are disposed of along with any pending applications in the above terms.

..... J.
(SURYA KANT)

..... J.
(VIKRAM NATH)

NEW DELHI
DATED:17.01.2023

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2360-2376 OF 2009

COMMISSIONER OF CUSTOMS AND CENTRAL EXCISE, AMRITSAR (PUNJAB) ..... APPELLANT

VERSUS

M/S D.L. STEELS ETC. ..... RESPONDENT(S)

J U D G M E N T

SANJIV KHANNA, J.

These appeals raise a common question – should dried pomegranate seeds, domestically known as '*anardana'*, be classified under Heading 0813 of the Tariff entries issued under the Customs Tariff Act, 1975,[1] as claimed by the Commissioner of Customs, Amritsar,[2] or under Heading 1209 as claimed by the importers?[3]

2. For brevity, we will only refer to the specific facts in the case of M/s. D.L. Steels, wherein the respondent had imported two

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Reason:

[1] "the Act", for short.
[2] "the appellant" / "the Revenue", for short.
[3] "the respondent" / "the other respondents", for short.

consignments of '*anardana'*[4] from Pakistan, *vide* Bills of Entry dated 15th December 2005 and 9th March 2006. For taxation they classified the goods under the tariff sub-heading 1209.99.90, attracting basic custom duty at the rate of 5% plus education cess at the rate of 2%. However, the customs authorities contend that the goods must fall under sub-heading 0813.40.90, and accordingly, are liable for basic custom duty at the rate of 30% plus education cess at the rate of 2%.

3. To this end, the Office of the Assistant Commissioner, Rail Cargo, Amritsar,[5] issued a show-cause notice dated 27th March 2006, which *inter alia* stated that fresh pomegranate falls under the Heading 0810, and the goods, being nothing but the dried form of fresh pomegranate fruit seeds, would fall under Heading 0813, an entry which covers the dried form of all items falling under Headings 0807 to 0810. Consequently, sub-heading 0813.40.90 would be applicable to the goods.

4. The goods were released provisionally by the customs authorities on the execution of a bond. By assessment order dated 31st May 2006, the adjudicating authority confirmed the differential duty of

[4] Hereinafter referred to as "the goods".
[5] Hereinafter referred to as "adjudicating authority'".

Rs.82,136/- under Section 28(2) of the Customs Act, 1962, and imposed a personal penalty of Rs.82,000/- under Section 114-A read with Section 112 of the Customs Act on the respondent. Levy of interest under Section 28AB was directed.

5. Similar orders based on identical grounds classifying the goods under sub-heading 0813.40.90, imposing differential duty, interest, and penalty were passed in the cases of the other respondents as well.

6. First appeals preferred by the respondents were allowed by the Commissioner (Appeals), Central Excise, Jalandhar, on the ground that the goods were the dried form of a type of pomegranate which, when fresh, is not consumed as a fruit. Accordingly, Heading 0810, which applies to the type of pomegranate which is consumed as a fruit, would have no relevance to the type of pomegranate from which the goods are obtained. Additionally, it was observed that the respondents' contention would also prevail in light of the policy condition attached to sub-heading 1209.99.90 of the Indian Export/Import Policy,[6] which specifically states – "*import of pomegranate seeds will be free*".[7]

[6] "Import Policy", for short.

[7] The word "free" here denotes that the import of pomegranate seeds is not subject to licencing restrictions. It does not imply that custom duty is not payable. Reference to the sub-heading is relevant.

7. Aggrieved, the Revenue preferred appeals before the Customs, Excise and Service Tax Appellate Tribunal,[8] which, in the case of the respondent, was dismissed *vide* order dated 18th July 2008 *inter alia* citing the certificate of Dr. Y.S. Parmar University of Horticulture and Forestry, Solan, to hold that the goods do not fall under the ambit of Heading 0813. The CESTAT observed that words in a taxing statute must be construed in the same sense as understood in common or trade parlance, and the Revenue had failed to lead any evidence to support its contention that in trade parlance, the goods are understood as dried fruits. Reference was made to the observation in the Import Policy which had classified the goods under the sub-heading 1209.99.90. Adverting to the Explanatory Notes to the Heading 1209, it was held that as the goods did not fall in the list of items expressly excluded from sub-heading 1209.99.09, they very well stood included in the sub-heading 1209.99.90. Accordingly, sub-heading 0813.40.90 was not applicable, and the appeal was dismissed.

8. Similar orders were passed by the CESTAT in the cases of other respondents as well. Resultantly, the Revenue is in appeal before us.

[8] "CESTAT", for short.

9. The Harmonised System of Nomenclature,[9] developed by the World Customs Organisation, has been adopted in India by way of the Customs Tariff Act, 1975, though there are certain entries in the Schedules to this Act which have not been assigned HSN codes. The Harmonised System is governed by the *International Convention on Harmonised Commodity Description and Coding System*, which was adopted in 1983, and enforced in January, 1988. This multipurpose international product nomenclature harmonises description, classification, and coding of goods. While the primary objective of the HSN is to facilitate and aid trade, the Code is also extensively used by governments, international organisations, and the private sector for other diverse purposes like internal taxes, monitoring import tariffs, quota controls, rules of origin, transport statistics, freight tariffs, compilation of national accounts, and economic research and analysis. In the present times, given the widespread adoption of the Harmonised System by over 200 countries, it would be extremely difficult to deal with an international trade issue involving commodities, without adverting to the Harmonised System. The Code is the bedrock of custom controls and procedures. The HSN consists of over 5000 commodities groups, which are structured into 21 Sections and 97

[9] "Harmonised System" / "HSN" / "the Code", for short.

Chapters, which are further divided into four and six digit sub-headings. Many custom administrations, like India, use an eight or more digit commodity coding system, with the first six digits being the HSN code.

10. Classification under the Harmonised System is done by placing the good under the most apt and fitting sub-heading. This is done by choosing the appropriate Chapter, Heading, and sub-heading respectively. To facilitate interpretation and classification, each of the 97 Chapters in the HSN contain corresponding Chapter Notes, General Notes, and Explanatory Notes applicable to the Headings and sub-headings within that Chapter. In addition, there are six General Rules of Interpretation[10] applicable to the Harmonised System as a whole.

11. GRI 1 states that the titles of Sections, Chapters, and sub-Chapters are provided for ease of reference only. Therefore, they have no legal bearing on classification. Classification is to be effected: (a) according to the terms of the Headings and any relative Section or Chapter Notes; and, (b) provided the Headings or Chapter Notes do not otherwise require according to the provisions thereinafter

[10] "GRI", for short. The GRIs were incorporated in the First Schedule to the Customs Tariff Act, 1975 *vide* the Customs Tariff (Amendment) Act, 2003.

contained, *viz*., GRIs 2 to 6. Thus, it is clear from the above that: (i) the Headings, and, (ii) the relative Section or Chapter Notes must be considered before classification is done. Only after this exercise is done, if a conflict in classification still persists, the subsequent GRIs are to be resorted to. GRI 2 is not germane to the present case and therefore, we make no reference to it. GRI 3 provides for classification in the event when the goods are classifiable under two or more Headings. As per GRI 3, when by application of GRI 2(b) or for any other reason, the goods are, *prima facie,* classifiable under more than one Heading, then; (a) the 'most specific description' is preferred, (b) a mixture of different goods will be classified as that good which gives the mixture its 'essential characteristic', and (c) when goods cannot be classified with reference to (a) or (b), they should be classified under the Heading which occurs last in the numerical order.[11] The order of priority

[11] The General Rules of Interpretation 1 and 3 are reproduced below without the Explanatory Notes:

> "1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:
>
> | | | |
> |---|---|---|
> | xx | xx | xx |
>
> 3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

therefore is; (a) specific description, (b) essential character, and (c) the Heading which occurs last in numerical order. However, GRI 3 can only take effect provided the terms of the Heading or Section or Chapter Notes do not otherwise require. GRI 4 states that when the goods cannot be classified in accordance with the aforementioned rules, they shall be classified under the heading appropriate for the goods "to which they are most akin". GRI 5 applies exclusively to cases and packing material, and therefore, is not apropos. GRI 6 states that the classification of goods in the sub-headings of a Heading shall be determined according to the terms of those sub-headings and any related Notes, and *mutatis mutandis* to the above GRIs, on the understanding that only sub-headings at the same level are comparable.

12. We would, at this stage, take on record the well-settled principle that words in a taxing statute must be construed in consonance with their commonly accepted meaning in the trade and their popular meaning.[12] When a word is not explicitly defined, or there is

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.
(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration".

[12] *See* Dunlop India Ltd. v. Union of Indian and Ors. (1976) 2 SCC 241, and Commissioner of Central Excise, New Delhi v. Connaught Plaza Restaurant Private Ltd., New Delhi (2012) 13 SCC 639.

ambiguity as to its meaning, it must be interpreted for the purpose of classification in the popular sense, which is the sense attributed to it by those people who are conversant with the subject matter that the statute is dealing with. This principle should commend to the authorities as it is a good fiscal policy not to put people in doubt or quandary about their tax liability. The common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law-maker. However, the above rule is subject to certain exceptions, for example, when there is an artificial definition or special meaning attached to the word in a statute, then the ordinary sense approach would not be applicable.[13]

13. The two contesting Headings along with the relevant General, Chapter and Explanatory Notes are extracted below:

> "**Chapter 8: Edible Fruit and Nuts; Peel of Citrus Fruit or Melons**
>
> Chapter Notes.
> 1.- This Chapter does not cover inedible nuts or fruits.
>
> xx xx xx
>
> General:
> This Chapter covers fruit, nuts and peel of citrus fruit or melons (including watermelons), generally intended for human consumption (whether as presented or after processing).
>
> xx xx xx
>
> 08.10 – Other fruit, fresh.

[13] *Collector of Central Excise, Kanpur* v. *Krishna Carbon Paper Company*, (1989) 1 SCC 150.

081010 - Strawberries
081020 - Raspberries, blackberries, mulberries and loganberries
081030 - Black, white or red currants and gooseberries
081040 - Cranberries, bilberries and other fruits of the genus Vaccinium
081050 - Kiwifruit
081060 - Durians
081090 - Other
0810.90 Other

This heading covers all edible fruits not falling in any preceding heading of this Chapter nor included in other Chapters of the Nomenclature (see the exclusions in the General Explanatory Note to this Chapter).

It therefore includes:
(1) – (6)
(7) Boysenberries, rowan berries, elderberries, sapodilla (naseberries), pomegranates, cactus figs (prickly pears), rose hips, persimmons (kakis), jujubes, medlars, longans, litchi, soursops, sweetsops and fruit of the species Asimina triloba also known as pawpaws.

xx xx xx

08.13 – Fruit, dried, other than that of headings 08.01 to 08.06; mixtures of nuts or dried fruits of this Chapter.
0813.10 - Apricots
0813.20 - Prunes
0813.30 - Apples
0813.40 - Other fruit
0813.50 – Mixtures of nuts or dried fruits of this Chapter

(A) Dried fruit.
This heading includes dried fruits which when fresh are classified in headings 08.07 to 08.10. They are prepared either by direct drying in the sun or by industrial processes (e.g., tunnel-drying).

xx	xx	xx

However, the heading excludes such products consisting of a mixture of one or more of the dried fruits of this heading with plants or parts of plants of other Chapters or with other substances such as one or more plant extracts (generally heading 21.06).

xx xx xx

Chapter 12: Oil seeds and Oleaginous Fruits; Miscellaneous Grains, Seeds and Fruit; Industrial or Medicinal Plants; Straw and Fodder

Chapter notes.
(1.)-(2.)
3.- For the purposes of heading 12.09, beet seeds, grass and other herbage seeds, seeds of ornamental flowers, vegetable seeds, seeds of forest trees, seeds of fruit trees, seeds of vetches (other than those of the species Vicia faba) or of lupines are to be regarded as "seeds of a kind used for sowing Heading 12.09 does not, however, apply to the following even if for sowing : (a) Leguminous vegetables or sweet corn (Chapter 7); (b) Spices or other products of Chapter 9; (c) Cereals (Chapter 10); or (d) Products of headings 12.01 to 12.07 or 12.11.

xx xx xx

12.09- Seeds, fruit and spores, of a kind used for sowing.
1209.10 Sugar beet seed
-Seeds of forage plants:
1209.21 Lucerne (alfalfa) seed
1209.22 Clover (Trifolium spp.) seed
1209.23 Fescue seed
1209.24 Kentucky blue grass (Poa pratensis L.) seed
1209.25 Rye grass (Lolium multiflorum Lam., Lolium perenne L.) seed
1209.26 Timothy grass seed
1209.29 Other
1209.30 Seeds of herbaceous plants cultivated principally for their flowers
- Other:
1209.91 Vegetable seeds
1209.99 - Other
This heading covers all seeds, fruit and spores of a kind used for sowing. It includes such products even if they are no longer capable of germination. However, it does not include products such as those mentioned at the end of this Explanatory Note, which, although intended for sowing, are classified elsewhere in the Nomenclature because they are normally used other than for sowing.
The heading includes beet seeds, grass or other herbage seeds (lucerne, sainfoin, clover, fescue rye grass, Kentucky blue grass, timothy grass, etc.), seeds of ornamental flowers, vegetable seeds, seeds of forest trees (including pine cones bearing seeds), seeds of fruit trees, seeds of vetches (other than those of the species Vicia faba, ie., broad beans and horse beans), seeds of lupines, tamarind seeds, tobacco seeds, and seeds (not themselves used

primarily in perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes) of plants yielding the products of heading 12.11.

xx xx xx

The heading excludes:
(a) Mushroom spawn (heading 06.02).
(b) Leguminous vegetables and sweet corn (Chapter 7).
(c) Fruit of Chapter 8.
(d) Spices and other products of Chapter 9.
(e) Cereal grains (Chapter 10)
(f) Oil seeds and oleaginous fruits of headings 12.01 to 12.07.
(g) Seeds and fruit which are themselves of a kind used primarily in perfumery, in pharmacy, or for insecticidal, fungicidal or similar purposes (heading 12.11)
(h) Locust beans (heading 12.12).

xx xx xx

12.11 – Plants and parts of plants (including seeds and fruits), of a kind used primarily in perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh or dried, whether or not cut, crushed or powdered.
1211.10 – Liquorice roots
1211.20 – Ginseng roots
1211.30 – Coca leaf
1211.40 – Poppy straw
1211.90 – Other
This heading covers vegetable products of a kind used primarily in perfumery, in pharmacy or medicine, or for insecticidal, fungicidal, parasiticidal or similar purposes. They may be in the form of whole plants, mosses or lichens, or of parts (such as wood, bark, roots, stems, leaves flowers, petals, fruits and seeds (other than oleaginous fruits and oil seeds classified in headings 12.01 to 12.07), or in the form of waste resulting, in the main, from mechanical treatment. They remain in the heading whether fresh or dried, whole, cut, crushed, ground or powdered or (where appropriate) grated or hulled. Products of this heading impregnated with alcohol remain classified here."

14. Though not cited or relied upon by either party, for completeness, we would like to reproduce the relevant Headings of Chapter 9 and the General and Explanatory Notes applicable:

"**Chapter 9: Coffee, Tea, Mate and Spices**
General:
This Chapter covers:

xx xx xx

(2) Spices, i.e., a group of vegetable products (including seeds, etc.), rich in essential oils and aromatic principles, and which, because of their characteristic taste, are mainly used as condiments.

xx xx xx

This Chapter further excludes:
(a)-(c)
(d) Certain fruits, seeds and parts of plants which, although they can be used as spices, are more often employed in perfumery or in medicine (heading 12.11)(e.g., cassia pods, rosemary, wild marjoram, basil, borage, hyssop, all species of mint, rue and sage).

xx xx xx

09.09 - Seeds of anise, badian, fennel, coriander, cumin or caraway; juniper berries.
0909.10 – Seeds of anise or badian
0909.20 – Seeds of coriander
0909.30 – Seeds of cumin
0909.40 – Seeds of caraway
0909.50 – Seeds of fennel; juniper berries
These fruits or seeds are used for consumption as spices, for industrial purposes (e.g., in distilleries) and for medicinal purposes. They remain in this heading even when, in case of anise seeds in particular, they are put up (e.g., in sachets) for making herbal infusions or herbal "teas".

xx xx xx

09.10 **–** Ginger, saffron, turmeric (curcuma), thyme, bay leaves, curry and other spices.
0910.10 – Ginger
0910.20- Saffron
0910.30 - Turmeric (curcuma)
0910.40 - Thyme; bay leaves
0910.50- Curry
- Other spices:
0910.91-- Mixtures referred to in Note 1 (b) to this Chapter
0910.99 -- Other

Thus, the seeds of anise, badian, fennel, coriander, cumin, and caraway fall under the Heading 09.09. The Note is inclusive and states that these seeds may be used for consumption as spices, for industrial purposes and for medicinal purposes. However, what is of relevance is the General Note 2 which refers to a group of vegetable products including seeds etc. rich in essential oils and aromatic principles, or which on account of their characteristic taste are mainly used as condiments. However, the Chapter excludes certain fruits, seeds, and parts of plants which although used as spices are more often employed in perfumery or in medicine and are classified under heading 12.11.

15. The first Chapter Note to Chapter 8 stipulates that inedible nuts and fruits are not covered by the Chapter. Clearly, for the purpose of classification, this Note draws a distinction between 'edible' and 'inedible' fruits. Etymologically, the word 'edible' derives from the Latin word '*edibilis*' which means 'eatable'. The word 'edible' as per *Webster's New International Dictionary* means "fit to be eaten as food; eatable; esculent." The *Concise Oxford English Dictionary* defines edible as "fit to be eaten". The phrase 'fit to be eaten' can imply an absence of harmful effects. However, while the word 'edible' seems simple, it warrants elaboration as over-simplification

will be problematic. Ben Baumgartner, in his article,[14] has referred to several judgments of different courts in the United States of America to argue that the decisions have culminated in the various tests and parameters to determine the meaning of the word 'edible'. These are extracted below:

> "Thus, courts have turned to, and parties have argued for, various other tests to determine whether a good is edible. Such tests include: (1) whether the good appears edible to the senses, (2) whether the good provides nourishment, (3) whether the good's constituent parts are edible, (4) whether the good is principally used as food, (5) whether the good may be eaten without harmful effects, (6) whether the good is "habitually eaten", and (7) whether the good is actually eaten. This Comment argues that a good should be considered edible if it can be eaten without harmful effects, but that whether the good is "habitually eaten" should control if testing the good is dangerous, and if neither of these tests yields a result, the matter should be resolved by whether the good is actually eaten."

The author thereafter goes on to argue that an item should be considered edible if it can be eaten without harmful effects, however, the 'habitually eaten' test would apply if the testing of the goods to check for harmful effects is dangerous. If neither of the two tests yield a result, the matter should be resolved by determining if the item was actually eaten. We need not discuss this article in detail but for the purpose to record that the word 'edible' is

[14] Ben Baumgartner. *"Chewing it Over: Determining the Meaning of Edible In the Harmonized Tariff Schedule of the United States"*. Kansas Law Review, Kansas Law Review Inc. November, 2015: vol. 64(1).

capable of diverse and multiple meanings, which are plausible. For the purpose of the present case, the word 'edible' must be construed using the principle of common parlance, which has been discussed supra. The law-makers, while enacting statutes, are cognizant of the way in which a word might be understood in common or trade parlance. Thus, if a meaning different than that attributed to it by people who are conversant in that subject matter was intended to be attached to a word, the same would be specifically delineated by way of a definition. The word 'edible' has no such specific definition attached to it, and therefore, must be interpreted using the common parlance test. The question which so arises is whether the goods – *'anardana'*, are dried pomegranates, which when fresh are understood as 'edible' fruits in common parlance. Before we elaborate on the factual aspect, the desideratum requires that we consider sub-heading 081340.90 in Chapter 8.

16. The contention of the appellant is that the goods are covered by sub-heading 081340.90. As mentioned in the title of the Heading itself, the Heading does not include fruits which, when fresh, are covered under Headings 08.01 to 08.06. If the dried fruits are relatable to the fresh fruits classified under the Headings 08.07 to 08.10, they would fall in the category of 'other fruits' in 0813.40. The

dried fruits, for the purpose of this Heading, may be prepared either by drying directly in the Sun or by industrial process like tunnel drying. The last portion of the Explanatory Note to Heading 08.13 states that products consisting of mixtures of one or more of the dried fruits of this Heading with plants or parts of plants of other Chapters or with other substances, such as one or more plant extracts, are excluded. Reference is made to Heading 21.06 in this regard. This Note, however, is not applicable to the goods in question, as they are not mixed with other plants or parts of plants.

17. It is also required to be noted that the Explanatory Note to Heading 08.10 states that the Heading covers all edible fruits not falling in any preceding Heading of the Chapter, nor included in other Chapters. Any fruit included in any other Chapter, is not to be included under the sub-heading 08.10. Reference in this regard can also be made to the exclusion in the General Note to this Chapter. The General Explanatory Notes exclude a number of vegetable and other products, even though botanically they are fruits, as they are covered more specifically in other Chapters. Reference by way of example is made to fruits that are primarily used in pharmacy or perfumery, locust beans, kernels of apricots or of similar fruit contained in Chapter 12. The Chapter Note also excludes from Chapter 8, the products of Chapter 9.

18. In favour of the appellant's claim, it must be highlighted that pomegranates, along with some other fruits, are expressly included in clause 7 to the Explanatory Notes to sub-heading 0810.90. Consequently, it can be argued with some merit that dried pomegranate, if prepared by drying in the Sun or by industrial processes, would fall under sub-heading 0813.40.

19. However, pomegranates are rather unusual fruits and their structure is unlike other fruits. The outer most layer is a hard and inedible shell. The edible part consists of the seeds and arils. Arils are the sweet, juicy, and crunchy covering that encase the seeds. However, the finding of the CESTAT is that wild pomegranates from which *'anardana'* is made are different from the pomegranate fruit. This finding of fact is supported by considerable literature which states that *'anardana'* is prepared by dehydrating the arils of wild pomegranates, and not from the pomegranate which is eaten as a fresh fruit.[15] The conventional utilization of the wild pomegranate

[15] *Refer to:* J. S. Pruthi and A. K. Saxena. *"Studies on Anardana".* Journal of Food Science and Technology, September/October, 1984: vol. 21, and specific reference may be made to the first paragraph which reads "Dried, sour, whole pomegranate (*Punica granatum* L) seeds popularly known as *Anardana*, is used as an acidulant in Indian curries, chutneys, etc. in place of tamarind and *amchur* (dried raw mango) in North India. It is also used in Ayurvedic system of medicine".
The research paper by Amit Prashar, S. K. Gupta and Ashok Kumar. *"Studies on separation techniques of pomegranate seeds and their effect on quality of Anardana".* African Journal of Biochemistry Research, October, 2009: vol.3(10) states "the dehydrated seeds of wild pomegranate fruits (*Anardana*) are used as acidulent in culinary preparations and in making various medicines".

fruit lies in drying the seeds along with pulp to make *'anardana'*. The wild pomegranate fruit is widely found on the hilly slopes of the Himalayas. It contains high acid content along with other quality characteristics, which distinguishes it from the pomegranate fruit which is consumed as a fresh fruit. The dried wild pomegranate arils have a distinct tart and sour flavour, owing to the high acid content, which gives it the commercial value. *'Anardana',* therefore, can be defined as Sun-dried seeds of ripe sour pomegranate, and is predominantly used as an acidulant in Indian and Persian cuisines, and for its health benefits in the Ayurvedic system of medicine.

20. The respondents, in support of their contention, have relied upon a certificate issued by Dr. Y.S. Parmar University of Horticulture and Forestry, Solan, which has been relied upon by the CESTAT and reads:

> "
>
> To Whom It May Concern
>
> This is to certify that Anaradana is dried product of local Daru which grows in wild form in mid hill conditions. The fruits of Daru are harvested in the month of July/August and seeds after extraction are dried which is known as Anardana. Whereas, Anar is used for fresh fruit purpose

Abhimanyu Thakur, N. S. Thakur, Hamid, Pradeep Kumar and Sunakshi Gautam. *"Studies on Storage Quality Evaluation of Dried Wild Pomegranate Arils (Anardana) Prepared in Mechanical Cabinet Drier*". International Research Journal of Pure & Applied Chemistry, August, 2020: vol.21(11), the relevant portion of which reads "the fruit (wild pomegranate) being highly acidic in nature is being processed into its dried product known as *anardana*. Dried wild pomegranate arils with distinct sour or tart flavour are commercially available in many West and East Asian countries. *Anardana* is a good source of organic acids, sugars, vitamin C, phenols, flavonoids and have been used in formulations of various ayurvedic medicines which are helpful in curing a number of ailments".

> and its seeds are consumed as such which has no suitability to Anardana.
> Anardana is sour in taste and is used in Ayurvedic Pharacies. However, the botanical name of Daru (Anardana) and Anar is some that is Punica granatum and Anardana is not a dried produce".

21. We will now proceed to examine Heading 12.09, and in particular, sub-heading 1209.99, along with the applicable Notes. Chapter Note 3 of Chapter 12 states that for the purpose of Heading 12.09, the seeds specified therein, which include seeds of fruit trees, are to be regarded as 'seeds of a kind use of sowing'. Chapter Note 3, therefore, creates a fiction when it stipulates that for the purpose of Heading 12.09, seeds of fruit trees would be considered 'seeds of a kind used for sowing'. The Note, however, expressly excludes the goods specified in clauses (a) to (d), even when they are for the purpose of sowing. Clause (b) excludes spices and other products of Chapter 9 from the purview of Heading 12.09. Further, the Explanatory Notes to sub-heading 1209.99, also explicitly exclude fruits of Chapter 8, which Chapter subject to the exclusions and the principles of interpretation that apply to resolve conflict of classification of entries, applies to 'edible fruits' and not 'inedible fruits'.

22. We will now examine the Explanatory Notes to Heading 12.09. The first paragraph of the Explanatory Notes to Heading 12.09 states

that the Heading covers all seeds, fruits and spores of a kind used for sowing. It includes such products even if they are no longer capable of germination. This statement has to be read in conjunction with Chapter Note 3, which states that for the purpose of Heading 12.09, seeds of fruit trees are to be regarded as seeds of a kind used for sowing. However, the paragraph does not apply to the products which are mentioned at the end of the Explanatory Note even when the seeds mentioned therein are used for sowing as they were classified elsewhere in the nomenclature. The exclusion *vide* clauses (a) to (h) confirms and validates the first paragraph of the Explanatory Notes to the Heading 12.09. The second paragraph of the Explanatory Notes, in addition to the seeds already excluded by Chapter Note 3, also excludes the seeds and fruits which are primarily used in perfumery, pharmacy or for insecticidal, fungicidal or similar purposes, as they are covered under Heading 12.11. This is reiterated by clause (g) of the Explanatory Note which states that seeds and fruits, which are themselves of a kind primarily used in perfumery, pharmacy or for insecticidal, fungicidal or similar purposes would be covered under the Heading 12.11.

23. Heading 12.11 states that the plants and parts of plants including seeds and fruits, of the kind used primarily in perfumery, pharmacy

or for insecticidal, fungicidal or similar purposes, fresh or dried, whether or not cut, crushed or powdered would be covered by the said Heading. We need not refer to this Heading in detail, except noticing the details of the products included in the said heading, which include seeds as in the case of Ambrette, Angelica, Burdock, etc., among others. After enumerating the list, the Explanatory Notes state that the list is not exhausted and is given to assist in the identification of the plants. Mention of botanical names of a particular species does not necessarily indicate that other species of the same plant family are not classified in the Heading. It is further stated that products of this Heading which are regarded as narcotic drugs under international instruments, are indicated in the list at end of Chapter 29.

24. The word 'seed' in common parlance and in commercial sense means the grains or ripened ovules of plants used for sowing. The normal function of a seed is to germinate and produce a new plant. Broadly, a seed includes a propagative structure such as a spore, or a small dry fruit. Some fruit and vegetable seeds are edible and are used by human beings as food or even as condiments. However, as explained above, as per the Chapter Note 3 "seeds of forest trees, seeds of fruit trees…….are to be regarded as seeds of a kind used for sowing".

25. In the context of the present case, once we accept the finding of fact recorded by the CESTAT that *'anardana'* is a dried product of local '*daru'* or wild pomegranate, which grows in mid hill conditions and which fruit in its fresh form is different from the pomegranate included in clause 7 to Heading 08.10, as this wild pomegranate is not consumed as a fresh fruit, the contention of the Revenue must fail. GRI 3, which in the absence of the Heading, Section or Chapter Notes, prescribes the order of priority as - (a) specific description, (b) essential character, and (c) the Heading that occurs last in numerical order, and even GRI 4 – the heading appropriate for the goods "to which they are most akin", supports our conclusion and finding. The submission of the learned counsel for the Respondent is correct that when the Revenue challenges the classification made by the assessees, the onus is on the Revenue to establish that the item in question falls in taxing category as claimed by them.[16] The burden is on the Revenue to adduce proper evidence to show that the goods are classifiable under a different heading than that claimed by the assessee. The finding of fact as recorded by CESTAT gets reinforced by the policy condition attached to the sub-heading 1209.99.00 of the Import Policy which specifically

[16] See *HPL Chemicals Ltd.* v. *Commissioner of Central Excise, Chandigarh* (2006) 5 SCC 208, *Parle Agro Pvt. Ltd.* v. *Commissioner of Commercial Taxes, Trivandrum* (2017) 7 SCC 540, *Union of India & Ors.* v. *Garware Nylons Ltd. & Ors.* (1996) 10 SCC 413.

states - *'import of pomegranate seeds will be free'*. Without any doubt, sub-heading 1209.99.00 in the Import Policy correlates to sub-heading 1209.99 to Chapter 12 of the HSN. The contention of the Revenue that the Import Policy is in the nature of delegated legislation *albeit* correct, would not make any difference in the context of the present case as the policy condition in the Export/Import Policy specifically includes pomegranate seeds – as *'anardana'* under sub-heading 1209.99.00, whereas the Schedule to the Customs Tariff Act, 1975 merely reproduces the Heading and the sub-heading of the HSN, without specifically including or excluding pomegranate seeds under the sub-heading 1209.99.

26. For the reasons stated above, the appeals by the Revenue must fail and are liable to be dismissed. However, before parting, we must advert to the reason why we have referred to and reproduced Heading 12.11 and Heading 09.10 under Chapter 9. There are also several sources which suggests that *'anardana'* is primarily used as condiment and in pharmacy for preparation of Ayurvedic medicines.[17] However, we would not express any final opinion in this regard as the Revenue has not relied upon said headings and

[17] The main application of *'Anardana'* as per the Council of Scientific & Industrial Research, Ministry of Science & Technology, Government of India is in "food acidulent, digestive candies, traditional system of medicine". Further, the Spices Board of India, Ministry of Commerce and Industry, Government of India states that "the (pomegranate) seed dried with pulp is used as a spice in many dishes". Refer also to supra footnote 15.

the show-cause notice which resulted in the adjudication orders and the appellate orders was restricted and confined to claim that the goods would be covered under the sub-heading 0813.40.90.

27. As a postscript, it is also worth mentioning that pomegranate seeds are one of the items notified and recognised as a 'spice' under the schedule of the Spices Board Act, 1986. Section 2(n) of this Act states that a 'spice' means any of the items specified in the schedule. Furthermore, the data available on the export of *'anardana'* from India paints a very different picture and contradicts the contention of the Revenue. As per the data available,[18] most of the *'anardana'* that is exported from India, is exported under the sub-heading 0910.99.90 as 'other spices' or under the sub-heading 3004.90.11 as 'medicaments of Ayurvedic system'. While we express no opinion in this regard, it is surprising that, for the import of the very same goods, the Revenue seek classification under Heading 0813. We are conscious that the above observations may lead to another round of litigation. The Revenue, it may be advisable, should take a considered policy decision after examining the data and ascertaining the views of the trade associations on classification of '*anardana'* or by fixing a specific customs duty. Till

[18] The data is available on https://www.seair.co.in/anardana-hs-code.aspx.

the said exercise is undertaken, the classification as determined by the CESTAT may be continued to avoid confusion and litigation.

28. Keeping in view the aforesaid, the appeals are dismissed without any order as to costs.

.....J.
(SANJIV KHANNA)

.....J.
(BELA M. TRIVEDI)

NEW DELHI;
JULY 11, 2022.

2025 INSC 411

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2025

(@ SPECIAL LEAVE PETITION (CIVIL) NO. 6470 OF 2022)

GASTRADE INTERNATIONAL ...APPELLANT (S)

VERSUS

COMMISSIONER OF CUSTOMS, KANDLA ...RESPONDENT(S)

With

CIVIL APPEAL NO. OF 2025

(@ SPECIAL LEAVE PETITION (CIVIL) NO. 6472 OF 2022)

CIVIL APPEAL NO. OF 2025

(@ SPECIAL LEAVE PETITION (CIVIL) NO. OF 2025)
(@ Diary No. 32623 OF 2024)

J U D G M E N T

NONGMEIKAPAM KOTISWAR SINGH, J.

Delay condoned in Special Leave Petition arising out of Diary No.32623 of 2024. Leave granted in all the Special Leave Petitions.

2. The issue involved in this batch of appeals is, whether, the imported goods is to be treated as Base Oil as claimed by the appellants or High Speed Diesel (HSD) as

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Reason:

determined by the Customs Authorities, which is contested by the appellants. If the product is treated as HSD, it would be a prohibited item that could not have been imported by a private entity other than a State Trading Enterprise, in which event it would be liable to be confiscated and penalty be imposed on the appellant importers.

3. The Commissioner of Customs, the Adjudicating Authority held vide order dated 03.12.2019 that the said product is not Base Oil, but HSD and accordingly, ordered confiscation of the same apart from levying penalties. On the other hand, the appellate authority, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) held the same to be Base Oil and not HSD, thus reversing the decision of the Adjudicating Authority. On being challenged before the High Court of Gujarat, by the Customs Authorities, the High Court reversed the decision of the Appellate Tribunal and affirmed the decision of the Adjudicating Authority holding the imported goods to be HSD.

4. In order to appreciate the issues in proper perspective, a brief reference of the relevant facts may be necessary.

Facts in brief

5. The three appellants, M/s Gastrade International, M/s Rajkamal Industrial Pvt Ltd and M/s Divinity lmpex imported the goods from UAE by sea per vessel ''Al Heera" which was docked at Kandla Port. The importers declared the goods as “Base Oil SN 50” seeking clearance of the same under Chapter Heading 27101960, which is for Base Oil. On the basis of the Intelligence Report, the Directorate of Revenue Intelligence (“DRI”), classifying the said cargo as HSD under Chapter Heading 27101930, which is prohibited from being imported except only by State Trading Enterprises, seized the said cargo. As per Import Policy ITC (HS), 2017, High Speed Diesel (HSD) and Low Diesel Oil (LDO) are covered under the EXIM Code 27101930 and 27101940 and in terms of policy as notified under Notification dated 20.05.2015 issued by the DGFT Department of Commerce, these items could be imported only by the State Trading Enterprises and thus, not by appellants. The samples of the seized goods were sent to Central Excise and Customs Laboratory at Vadodara for testing which returned the report on 11.05.2018 with the

finding that the samples drawn from the seized goods had characteristics of High Speed Diesel Oil/Automative Fuel Oil conforming to IS 1460: 2005 in respect of 8 parameters and that the samples were "other than Base Oil". The appellant-importers contested the said test report and the requested the Customs authorities for retesting the samples at the Central Revenues Control Laboratory (CRCL), New Delhi or Indian Institute of Petroleum, Dehradun. Accordingly, the samples were sent to CRCL.

6. The Central Revenues Control Laboratory to which the samples were again sent also submitted a report dated 03.07.2018 with the finding that the samples conform to the specifications of HSD Oil (Automotive Diesel Fuel) as per IS 1460: 2005 in respect of 10 parameters and each of the samples is "other than Base Oil".

7. Not satisfied with the aforesaid results, one of the appellants, M/s Rajkamal Industrial Pvt. Ltd. approached the High Court of Gujarat by filing a Special Civil Application No. 10882 of 2018 in which the High Court passed an interim order on 30.07.2018 directing the Department to send requisite quantity of samples to the Indian Oil

Corporation Ltd. (IOCL), Mumbai which is one of the notified laboratories as per the Department's circular dated 16.11.2017.

8. The samples were accordingly sent to the Central Laboratory, Indian Oil Corporation Limited in Mumbai which submitted the report dated 14.08.2018 stating that the sample had been tested as per Indian Standard 1460: 2005 and the sample met 14 parameters as per the laboratory capability out of prescribed 21 parameters in terms of the specification IS: 1460: 2005.

9. The DRI, thereafter, issued show cause notices to the appellants on 24.04.2019 alleging improper classification. In the said show cause notices, it was stated that the imported goods are classifiable as HSD under CTH 27101930, that the imported goods were liable to be confiscated under Sections 111(d) and (m) of the Customs Act, 1962 (for short, "Act") and that penalties are liable to the imposed under Sections 112(a) and (b) of the Act and the Directors of the appellant-companies were also liable to be imposed penalties under Sections 112(a) and (b), Section 114AA and the Section 117 of the Act.

The show cause notices also stated that the earlier imports were liable to be classified as Light Diesel Oil under CTH 27101940 and these were also liable to be confiscated under Sections 111(d) and (m) of the Act and penalty be imposed under Sections 112 (a) and (b) and Section 114AA of the Act.

Show cause notice was also issued to the buyer, in respect of the appellant – Gastrade International Pvt. Ltd., of the earlier imported goods stating that the earlier imports were LDO under CTH 27101940 and were liable to be confiscated under Sections 111(d) and (m) of the Act and penalties were liable to be imposed under Section 112(b). Show cause notice was also issued to the exporters of the said goods as to why penalty should not be imposed on them under Sections 112(a) and (b), 114AA and 117 of the Act.

Finding by the Adjudicating Authority

10. After considering the replies furnished by the parties and considering the evidence, both oral and documentary, relied upon, and hearing the parties, the Adjudicating Authority, the Principal Commissioner of Customs, Custom

House, Kandla passed the Orders-in-Original No. KND-CUSTM-000-COM-12-2019-20 dated 05.12.2019, KND-CUSTM-000-COM-13-2019-20 dated 05.12.2019, and KND-CUSTM-000-COM-14-2019-20 dated 05.12.2019, rejecting the claim of the appellants and upholding the departmental findings. In the course of the enquiry and hearing conducted by the Adjudicating Authority, one of the experts, namely Dr. Gobind Singh, Manager (Lab), IOCL Central Laboratory, Mumbai was also examined.

11. The Adjudicating Authority concluded that as per the findings of the three independent laboratories of repute, the samples meet the parameters specified under IS 1460:2005 prescribed for High-Speed Diesel, a hydrocarbon oil and the importers could not produce any authentic or authoritative literature about what is Base Oil SN 50 and thus failed to prove that the goods imported were Base Oil falling under Chapter 27101960 of Customs Tariff Act, 1975 (for short, "Tariff Act").

12. The Adjudicating Authority also repelled the contention of the appellants that since IOCL had tested only 14 out of 22 parameters for IS 1460:2005, and thus, all the

parameters had not been tested, it cannot be said that the sample is of HSD. It was also held that the appellants could not point out which of these remaining eight parameters will not be satisfied if tested.

13. Accordingly, the Adjudicating Authority held that the goods were liable to confiscation under Sections 111 (d) and (m) of the Act. The Directors of the appellants were held liable for penalty under Sections 112(a) and 114AA of the Act. However, granting permission to the appellants to redeem the confiscated goods for re-export on payment of fine.

14. Being aggrieved by the aforesaid orders in original passed by the Adjudicating Authority, the appellants preferred appeals before the Custom Excise Service Tax Appellate Tribunal (CESTAT).

Finding by the Appellate Authority (CESTAT)

15. According to the CESTAT, as per the statutory definition provided in the Tariff Act which needs to be construed strictly, only such hydrocarbon oil that conforms to the Indian Standard Specification IS1460:2005 can be classified as HSD. As per the said specification, 21/22

parameters have been mentioned and no exception has been provided to the effect that if any or some of the parameters out of 21/22 parameters are not met, even then the product will be determined as HSD. According to CESTAT, only such product that meets all the 21/22 parameters as specified in IS 1460:2005 can be qualified as HSD. The CESTAT held that in the present case, since eight parameters were not tested, it cannot be said that the product is conforming to IS 1460:2005, and if it is not conforming to IS 1460:2005, it does not fall within the definition of HSD as provided under Supplementary Note of Chapter 27.

The CESTAT also held that the burden is on the Department to establish the classification of goods as HSD, which conforms to IS 1460:2005, and in the absence of testing of all the parameters, it can be only an assumption of the Department that on the basis of 14 parameters, a product can be classified as HSD.

16. The CESTAT also took the view that the test report of IOCL Laboratory is not conclusive. The CESTAT was of the opinion that the expert, Dr. Gobind Singh who was examined had not considered that the flash point is an important

parameter for testing the goods and he could not give any firm opinion as regards the parameter of flash point. The CESTAT held that the test conducted by Dr. Gobind Singh of IOCL cannot be considered to be conclusive to determine that the product is HSD. The CESTAT was of the view that in the present case as the flash point tested was above 93°C, the goods cannot be classified as HSD. The CESTAT also held that the Department had with a predetermined mind got the goods tested for HSD, whereas the said goods should have been tested as to whether these are Base Oil or not, and only when the parameters are not met for Base Oil then the Department could have resorted to carrying out the test for classifying the goods either under HSD or any other classification.

17. The CESTAT held that even if the product is not Base oil, since it was not proved by the Department beyond doubt that the impugned goods are HSD, the case of the Department would fail.

18. Accordingly, the CESTAT held that the goods are not classifiable as HSD under CTH 27101930. Consequently, the claim of the appellants for classification of goods as Base

Oil under CTH 271019160 was maintained and in view of the submission made by the appellants that irrespective of the decision of the classification, they would seek permission to re-export, the appellants were allowed to re-export the goods and the CESTAT set aside the order of confiscation, imposition of penalty and the redemption fine by the Department vide a common order dated 28.09.2021 passed in the aforesaid Customs Appeal No.10240 of 2020, Customs Appeal No.10291 of 2020 and Customs Appeal No.10298 of 2020.

19. Being aggrieved by the aforesaid decision of the CESTAT, the Department preferred three appeals before the High Court of Gujarat, which were registered as Revenue Tax Appeal No.297 of 2021, Revenue Tax Appeal No. 298 of 2021 and Revenue Tax Appeal No.299 of 2021, which were allowed by a common judgement and order dated 20.01.2022 passed by the High Court, which is the subject matter of challenge in this batch of appeals.

Finding by the High Court

20. Before the High Court, the issue of maintainability of the appeals under Section 130 of the Act was raised, which was decided in favour of the Department. However, the appellants have not pressed this issue before us and as such we make no observation about the decision, and we confine our consideration only on the issue as to whether the High Court was correct in concluding that the imported oil is not Base Oil as claimed by the appellant-importers and is HSD as classified by the Department.

21. The High Court noted that though it would appear that what had been decided by the Tribunal could be termed as a question of fact, and whether the subject goods fall within one category or the other would essentially be a question of fact, yet while deciding the same, if the Tribunal overlooks certain basic principles of law applicable to the case on hand and records findings which could be termed as perverse, then definitely such a decision of the Tribunal would give rise to a question of law and hence maintainable.

The High Court thereafter proceeded to examine the materials on record.

22. Coming to the evidence of Shri Gobind Singh, Manager (Lab), IOCL Central Laboratory, Mumbai, the High Court observed that a plain reading of the statement and cross-examination of Dr. Gobind Singh would indicate that the expert in no uncertain terms had made himself clear that all the 14 tests which were carried out revealed only one thing that the sample was of High-Speed Diesel, and not Base Oil as asserted by the assessees.

The High Court also noted that the expert was honest enough to admit that the IOC laboratory was equipped to conduct only 14 tests and it had no facility or means to conduct the remaining seven tests. The High Court then considered whether the analysis could be said to be complete or conclusive as regards the nature of the sample only if all the 21 tests were undertaken, more particularly when the expert had asserted that all the 14 tests carried out indicated only one thing that the sample analysed was that of High Speed Diesel.

23. The High Court went on to observe that it is not in dispute that the onus of establishing that the sample meets the specification IS1460:2005 lay upon the Customs Authority, and the burden of proof is on the Authority to show that the particular goods or item in question is taxable in the manner claimed by them. According to the High Court, there should be material to enter an appropriate finding in that regard and the material may be either oral or documentary, and it is for the Authority to lay evidence on that behalf even before the Adjudicating Authority.

24. The High Court went on to observe relying on the decisions of this Court in ***Collector of Customs, Madras and others Vs. D Bhoormall,*** **AIR 1974 SC 859**; ***A.N. Guha & Co Vs. Collector*** **[1996 (86) ELT 333];** ***R.V.E Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P.*** [Order dated 08.10.2003 in Civil Appeal number 10585 of 1996] that the Department is not required to prove its case with mathematical precision to a demonstrable degree and legal proof is not necessarily a perfect proof.

25. It was observed by the High Court that so long as the Department has been able to establish its case with such a

degree of preponderance, the existence of fact could be said to have been proved. The High Court observed that the only ground on which the Tribunal interfered with the findings recorded by the Adjudicating Authority was that the laboratories were not in a position to conduct all 21 tests. According to the High Court, the Tribunal ignored the fact that all the tests carried out in three different laboratories revealed only one thing that the sample showed the characteristics of HSD. The High Court then observed that if the Department was able to lead evidence to this extent, the onus thereafter shifted upon the assessee to establish that these tests cannot be said to be conclusive of the fact that the subject good is HSD. However, no such attempt had been made by the assessees.

26. The High Court further went on to observe that it was not at all convinced with the findings recorded by the Tribunal. The High Court held that the Tribunal could be said to have ignored the material evidence in the form of the three test reports of three different laboratories, certifying the samples to meet the specification IS1460:2005 and assessees have not been able to show anything based on

which the High Court can take the view that if all the prescribed 22 tests are not carried out, the report would remain incomplete and would not be admissible in evidence or would not be conclusive of the nature of the sample.

27. The High Court observed that if these 14 tests indicate the sample to be one of the HSD, this evidence could not have been discarded, ignored or overlooked only on the ground that seven other tests could not be undertaken by the laboratories because of lack of adequate facility to conduct these seven tests. According to the High Court, to say so would require the Department to prove its case with mathematical accuracy and beyond reasonable doubt. Accordingly, the High Court allowed the appeals preferred by the Department and set aside the order of the CESTAT.

Consideration by this Court

28. From the above three decisions of the Adjudicating Authority, the Appellate Authority (CESTAT), and the High Court, it is quite evident that their decisions primarily hinged upon the reports of the three laboratories, namely, Central Excise and Customs Laboratory at Vadodara, Central Revenues Control Laboratory (CRCL), New Delhi and

Central Laboratory, Indian Oil Corporation Limited, Mumbai where the samples of the questioned goods were sent for testing as to whether these conformed to the Indian Standards Specification of Bureau of Indian Standards IS: 1460:2005. All three fora also referred to the expert evidence of Dr Gobind Singh.

29. Considering the different conclusions arrived at by the three fora on the same set of the results of the tests conducted by three different laboratories, it would be necessary to examine these tests to understand how these fora had arrived at their conclusions.

30. Since the reference point of these tests is Indian Standard Specification of the Bureau of Indian Standards, IS1460:2005, which prescribes the specifications for HSD under the Tariff Act, it would be necessary to refer to these parameters before we proceed to examine the implications of the results of the three tests and arrive at the correct conclusion.

31. Section 2 of the Tariff Act provides the rates at which duties of customs shall be levied under the Customs Act as specified in the First and Second Schedules to the Tariff Act.

Chapter 27 of the First Schedule to the Tariff Act deals with the rate of duties leviable in respect of mineral fuels, mineral oils, and products of their distillation; bituminous substances; mineral waxes.

Supplementary Note to Chapter 27 defines various kinds of oils specifying the attributes to these, including that of HSD. Accordingly, relevant portions of this Supplementary Note are reproduced hereunder for easy reference.

> "SUPPLEMENTARY NOTES:
>
> In this Chapter the following expressions have the meanings hereby assigned to them:
>
> a) Motor Spirit means any hydrocarbon oil (excluding crude mineral oil) which has its flashpoint below 250C and which either by itself or in admixture with any other substance, is suitable for use as fuel in spark ignition engines. "Special boiling point spirits (subheadings 2710 12 11, 2710 12 12 and 2710 12 13) means light oils, as defined in Chapter Note 4, not containing any anti-knock preparations, and with a difference of not more than 600C between the temperature at which 5% and 90% by volume (including losses) distil;
>
> b) "Natural gasoline liquid (NGL)" is a low–boiling liquid petroleum product extracted from Natural Gas;
>
> c) "Superior kerosine Oil (SKO)" means any hydrocarbon oil conforming to the Indian Standards Specification of Bureau of Indian Standards IS:1459-1974 (Reaffirmed 1996);
>
> d) "Aviation turbine fuel (ATF)" means any hydrocarbon oil conforming to the Indian Standards

Specification of Bureau of Indian Standards IS:1571:1992:2000;

e) "High-speed diesel (HSD)" means any hydrocarbon oil conforming to the Indian Standards Specification of Bureau of Indian Standards IS: 1460:2005;

f) "Light diesel oil (LDO)" means any hydrocarbon oil conforming to the Indian Standards Specification of Bureau of Indian Standards IS: 15770:2008;

g) "Fuel oil means any hydrocarbon oils conforming to the Indian Standards Specification of Bureau of Indian Standards IS:1593:1982 (Reaffirmed in the year 1997);

h) "Lubricating oil" means any oil, which is ordinarily used, for lubrication, excluding any hydrocarbon oil, which has its flash point below 93.30 Centigrade;

i) "Jute batching oil" and "textile oil" are hydrocarbon oils which have their flash point at or above 93.30C, and is ordinarily used for the batching of jute or other textile fibres;

j) The expression "petroleum jelly crude" (subheading 2712 10 10) by the ASTM D 1500 method

k) For the purposes of these additional notes, the tests prescribed have the meaning hereby assigned to them

1) "Flash Point" shall be determined in accordance with the test prescribed in this behalf in the rules made under the Petroleum Act, 1934 (30 of 1934);
2) .....
.....
5) .....

32. Thus, High Speed Diesel (HSD) has been defined as any hydrocarbon oil conforming to the Indian Standards Specification of Bureau of Indian Standards IS: 1460:2005.

33. As regards the Indian Standards Specification of Bureau of Indian Standards IS1460:2005 relating to High Speed Diesel, the specifications provided are as follows:

EURO IV/BHARAT STAGE IV EMISSION NORMS COMPLAINT – SPECIFICATION FOR AUTOMOTIVE DIESEL FUEL

Sl No.	*Characteristics*	*Requirements*	*Test Method [P:] of IS 1448/ISO/ASTM*
(1)	(2)	(3)	(4)
i)	Acidity, inorganic	Nil	[P : 2]
ii)	Acidity, total, mg of KOH/g, Max	To Report	[P : 2]
iii)	Ash, percent by mass, Max	0.01	[P : 4]/ISO 6245
iv)	Carbon residue (Ramsbottom) on 10 percent residue[1)], percent by mass, Max	0.30	[P : 8]/ISO 10370
v)	Cetane number, Min	51[2)]	[P : 9]/ISO 5165
vi)	Cetane index, Min	46[2)]	D 4737/ISO 4264
vii)	Pour point[3)], Max:		[P : 10]/D 5949 or D 5950 or D 5985
	a) Winter	3° C	
	b) Summer	15 C	
viii)	Copper strip corrosion for 3 h at 50°C	Not worse than No. 1	[P : 15]/ISO 2160
ix)	Distillation, percent v/v, recovered at 360°C, Min	95	[P : 18]/ISO 3405
x)	Flash point* :		
	a) Abel, °C, Min	35	[P : 20]
	b) Pensky Martens closed cup[4)], °C, Min	66	[P : 21]
xi)	Kinematic viscosity, cSt, at 40°C	2.0 to 4.5	[P : 25]/ISO 3104
xii)	Sediment, percent by mass, Max	-	[P : 30]
xiii)	Total contamination, mg/kg, Max	24	EN 12662
xiv)	Density at 15°C[5)], kg/m^3	820-845	[P : 16] or [P : 32][6)]/D 4052/ ISO 3675 or ISO 12185
xv)	Total sulphur[7)], mg/kg, Max	50	ISO 20846 or ISO 20847 or ISO 20884/ [P : 83]/D 5453/ D

			2622/D 4294/[P : 34][8)]
xvi)	Water content, mg/kg,	200	ISO 12937
xvii)	Cold Filter Plugging Point (CFPP)[3)], Max:		[P : 110]/D 6371
	a) Winter	6°C	
	b) Summer	18°C	
xviii)	Oxidation stability[9)], g/m^3 , Max	25	ISO 12205 or ASTM D 2274[9)]
xix)	Polycyclic Aromatic Hydrocarbon (PAH), percent by mass, Max	11	IP 391 or EN 12916
xx)	Lubricity corrected wear scar diameter (wsd 1.4) at 60°C, microns, Max	460	ISO 12156-1/Cor 1
xxi)	Oxygen content[10)], percent by mass, Max	0.6	Annex B

1) This limit is applicable prior to addition of ignition improvers, if used. In case a value exceeding the limit is obtained on finished fuels in the market, ASTM D 4046/ISO 13759 shall be used to establish the presence of nitrate containing compound. In such case the present limit for carbon residue cannot be applied. However, the use of ignition improver does not exempt the manufacturer from meeting this requirement prior to the addition of additives.
2) For Fuel processed from Assam crude, Cetane number and Cetane index is relaxed by 3 units.
3) Winter shall be the period from November to February in central and northern plains of India (both months inclusive) and rest of the months of the year shall be called as summer.
4) Applicable for Naval applications and fishing vessels requiring High Flash Automotive Diesel Fuel.
5) For fuel processed from Assam crude, the density range is relaxed to 820-855.
6) In case of dispute, IS 1448 [P : 32] shall be the referee test method.
7) For Automotive Diesel Fuel supplied to Indian Navy, the limit of sulphur shall be in agreement between the buyer and the supplier.
8) In case of dispute, IS 1448 [P : 34] shall be the referee test method.
9) This test shall be carried out only at the refinery or manufacturer's end. In case of dispute, ASTM D 2274 shall be the referee method.
10) Shall be applicable only for Automotive Diesel Fuel blended with 5 percent (v/v) Bio-diesel conforming to IS 15607 and the limit shall proportionately vary as and when the different blending percent of Bio-diesel is permitted.

.....

.....

34. It may be relevant herein to mention that flash point has been defined under Section 2 (c) of the Petroleum Act, 1934 as follows:

> "2 (c) 'Flash-point' of any petroleum means the lowest temperature at which it yields a vapour which will give a momentary flash when ignited, determined in accordance with the provisions of Chapter II and the rules made thereunder;"

35. We will now examine the results of the three tests conducted by the three laboratories, which are reproduced as follows:-

> **1. Central Excise and Customs Laboratory at Vadodara.**
> **Report dated 11.05.2018.**
>
> *Lab No. RCL/AH/DRI/216/07.05.2018*
> *TANK NO. 1*
>
> *Report*
>
> *The sample is in the form of light pale yellow colored liquid. It is composed of mineral hydrocarbon oil having following characteristics:-*
>
> *1. Flash point (PMCC) = Above 66°*
> *2. ASH Content = Nil*
> *3. Acidity= NIL*
> *4. Water Content= NIL*
> *5. Densi1y at 15° = 0,8301 g/ml*
> *6. Distillation recovery*
> *a. At 350° = more than 85%*
> *b. At 360° = more than 95%*
> *7. Kinetic viscosity at 40° = 3.80 CST*
> *8. Sediment = N1L*
>
> *In view of the above analytical parameter the sample has characteristics of high speed diesel oil/Automotive Fuel Oil confirming to IS: 1460:2005 &*

amended thereafter in terms of parameters 1 to 8 mentioned above.

It is other than base oil

Sealed remnant returned

Dispatch No. 177
Sd/-
Date:11.05.2018 *11*
.05.2018

Pradeep Maroo
Chemical Examiner Grade-II

Seen
Deepali
02/07/2018

2. **Central Revenues Control Laboratory (CRCL), New Delhi.**
Report dated 03.07.2018.

Government of India

Ministry of Finance, Department of Revenue Central Board of Indirect Taxes & Customs Central Revenues Control Laboratory Hillside Road, Pusa, New Delhi-110012
Tel.:011-21520123/25843494, Fax: 011-25843495
Email: dir.crcl-cbec@nic.in Website: http://crcl.gov.in

F.No.-27-Cus/C-05 to 14/2018-19 *Dated: 03.07.2018*

To

The Additional Director,
Directorate of Revenue Intelligence,
Ahmedabad Zoal Unit,
No. 15, Magnet Corporate Park,
100 ft Thaltej-Hebatpur Road.
Near Sola Flyover, Thaltej,
Ahmedabad-380054

***Sub.** : Testing of samples declared as Base Oil SN 50- reg.*

Please refer to your letter F. No. DRIAZU/CI/ENQ-l2/2018 dated 06.06.2018 on the subject cited above

forwarding therewith 10 samples described as Base Oil SN 50 pertaining to B/E No. 6252179, 6251273, 6251276. 6251277, 6251258. 6251267. 6251268, 6252184, 6251270 and 6251278 all dated 04.05.2018 and TM No. 1A to 1OA dated 06.06.2018 for retesting.

The samples u/r have been registered here under Lab Nos. CLR-05 to CLR 14 dated 14.06.2018 respectively.

The samples have been analyzed and Test reports are as under:-

***Report**:-*

Each of the ten samples is in the form of pale yellow colored liquid. Each is composed of mineral hydrocarbon oil, having more than 70% mineral hydrocarbon oil and possesses following characteristics:-

Test Results of the samples

Lab No.		CLR-05	CLR-06	CLR-07	CLR-08	CLR-09	CLR-10	CLR--11	CLR--12	CLR--13	CLR--14
TM Mo.		1A	2A	3A	4A	5A	6A	7A	8A	9A	10A
Characteristic	Limit as per IS 1460:2005 and amended										
Acidity. Inorganic	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil
Acidity, total mg of KOH/g	To report	0.05	0.05	0.05	0.05	0.05	0.05	0.05	0.05	0.05	0.05
Ash percent by mass	0.01 (max.)	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil
Carbon residue (Ramx bottom) on 10% resdue percent by mass	0.30 (mat.)	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01
Density at 15°C	0.8200 0.8450	.8287	.8316	.8310	.8288	.8284	.8286	.8286	.8282	.8284	.8281
Flash Point (PMCC)	66° (min.)	113°C	115°C	93°C	88°C	98°C	100°C	95°C	78°C	106°C	111°C
Kinematic 40°C, cSI	2.0 to 4.5	3.7	4.4	4.4	4.4	4.0	3.9	3.5	4.1	4.0	4.0
Kinematic Viscosity 37.8°C	-	4.3	4.9	4.8	4.7	4.7	4.3	4.3	4.3	4.3	4.3
Distillation range, °C	95	238-356	234-358	234-352	238-354	240-356	238-344	240-354	240-350	240-342	238-325
Percent v/v Recovered ot 360°C		356°C	358°C	352°C	354°C	356°C	344°C	354°C	350°C	342°C	325°C
95% volume recovered at											
Pour Point, Max a) Winter b) Summer	3°C 15°C	8°C	8°C	8°C	8°C	8°C	8°C	8°C	8°C	8°C	8°C
Cetaile Index	46 (min.)	65.7	66.0	65.6	66.2	66.0	66.5	66.6	66.6	67.0	67.7
Water content, percent v/v mg/kg	200 (max.)	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil	Nil

On the basis of above analytical parameters, each of the ten samples conforms to the specifications of High Speed Diesel Oil/ (Automotive Diesel Fuel as per IS 1460:2005 and further amended).

Each is other than Base Oil.

Sealed remnants are returned separately.

Sd/-
03.07:2018
(K. C. Agrawal)
Joint Director

Copy to: The Chemical Examiner Gr-I (I/e) Central Excise & Customs Laboratory, Vadodara.

3. Central Laboratory, Indian Oil Corporation Limited, Mumbai.

Report dated 14.08.2018

Indian Oil Corporation Limited
Central Laboratory
"K" Oil H Installation. Sewri (East), Mumbai-400 015
Telefax 0222416 3062 (D). 022 2292 4761
Marketing Division

QUALITY CONTROL TEST REPOT FOR HIGH SPEED DIESEL

SPECIFICATION NO.	IS:1460-2005 AMENDED NO.2 MARCH 2010
Test Required	High Speed Diesel Analysis
Test Report No. & Date	LSE/3791/2018 dated 14/08/2013
Name of Customer	Directorate 01 Revenue Intelligence, Ahmedabad
Source of Sample	7S (Composite), Vessel MT. AL HEERA
Sample Drawn By	Jointly by Representative of DRI, Ahmedabad

Seal No.	Glass bottle sealed with Lead Seal (Yellow tag with Panchas signature)
Date of Sampling	05/05/2018
Date of Sample Received	09/08/2018
Reason for Testing	AS per letter ref. DRI/AZU/CI/ENQ-12(INT 02/2018/2018: dated 08/08/2018. Goods declared as "Base Oil SN 50-IN Bulk" to be tested as per High Speed Diesel Specification IS 1460:2005 amended.

SL.No	CHARACTERISTICS	REQUIREMENTS	TEST METHOD (P) of IS:1448/ISO/ASTM	RESULTS
I.	Acidity, inorganic	Nil	P:2	Mil
II	Acidity, total, mg of KOH/g, Max	To report	P:2	0.06
III	Ash, percent by mass, Max	0.01	P:4	0.002
IV	Carbon residue (Rams bottom) on 10 percent residue, percent by mass, Max	0.30	P:8	0.03
V	Cetane Number, Min.	51	P:9	FNA
VI	Cetane index, Min	46	D-4737	66.9
VII	Pour Point, Max: (a) Winter/(b) Summer	3°C/15°C	P:10	3
VIII	Copper strip corrosion for 3 hrs at 50°C	Not worse than No.1	P:15	1a
IX	Distillation, % v/v, recovered at 360"C, Min	95	P:18	95
X	Flash Point: a) Abel°C Min b) Pensky martens closed cup, °C, Min	35 66	P:20 P:21	--112
XI	Kinematic viscosity, cSt, at 40 C	2.0 to 4.5	P:25	3.997
XII	Sediment, percent by mass, Max	-	P:30	0.02

XIII	Total Contamination, mg/Kg, Max	24	EN 12662	FNA
XIV	Density at 15°C, kg/m^3	820-845	P:16	829.5
XV	Total Sulphur, mg/kg, Max	50	D-4294	37
XVI	Water content, mg/kg, Max	200	ISO-12937	75
XVII	Cold Filter Plugging Point °C (CFPP), Max, (a) Winter/(b) Summer	6°C/18"C	P:110	FNA
XVIII	Oxidation Stability, g/ m^3	25	ISO:12205	FNA
XIX	Policyclic Aromatic Hydrocarbon (PAH), % m, Max	11	IP-391	FNA
XX	Lubricity Corrected Wear Scar Dia @ 60°C, microns, Max	460	ISO:12156-1	FNA
XXI	Oxygen Content, % m, Max	0.6	Annex. B-	FNA

REMARKS:

I. FNA: Stands for "Facility Not Available"
2. Flash point test was first done by Abel apparatus but, since it was more than 66°C, it was done by PMCC.
3. As stated in Point no. 6 of your letter No. DR1/AZU/CI/ENQ-l2(INT-02/2018)/2018 dated 08/08/2018 stating as per the order of the Hon'ble High Court of Gujarat. this sample has been tested as per Indian Standard 15: 1460:2005 as amended & under this specification there are total XXI tests covered out of which we have
tested only XIV parameters as per our lab capability.
4. This sample meet the specification for only XIV parameters tested at our lab as per the specification IS:l460:2005 amended.

NOTE

1. *This test report refers only to the particular sample submitted for testing. Results relate to sample as received.*
2. *This test report shall not be reproduced except in full, without the written approval of the laboratory.*
3. *Form No: QF/OPN/07*

4. *The test results reported are valid at the time of & under stated conditions of the test.*

--- - End of test report------

Tested by

Sd/-
Dr. Gobind Singh
Manager (Lab).
Indian Oil Corporation Limited.
14.08.2018

Reviewed by
Sd/-
14.08.2018

36. Apart from the aforesaid three test results, all three forums had also referred to the evidence of the expert, namely, Dr. Gobind Singh, Manager (Lab), IOCL Central Laboratory, Mumbai, more specifically to his cross-examination, while arriving at the respective conclusions. Hence, it may be apposite to reproduce the same as below:

> (i)The cross-examination of Shri Singh at the instance of M/s. Rajkamal Industrial Pvt. Ltd., is as under:
>
> *"(Before the Principal Commissioner of Customs, Custom House, Kandla)*
> *Cross Examination of Shri Gobind Singh, Manager (Lab), IOCL, Central Laboratory, Mumbai in the matter of SCN F. No.DRI/AZU/CI/INQ-12(INT-2/2018 dated 22.04.2019 issued to M/s. Rajkamal Industrial Pvt Ltd & Others by Shri Hardik Modh, Advocate.*
>
> *Q: What is your name?*
> *A: Dr. Gobind Singh.*

Q: Where have you been working and for how long?
A: I have been working in IOCL at Sewree at Mumabi since 2012.
Q: How many samples have you tested in respect of petroleum products?
A: I have tested large number of samples running into hundreds of samples.
Q: Are you aware of letter dated 04.08.2018 written by the Assistant Director of DRI whereby it was requested to Mr. Vivek W. Sawant, DGM, IOCL to test the samples as requested under test memo in accordance with the parameters prescribed under IS 1460:2005 for "High Speed Diesel" and to categorize the identity of the goods. Had you tested these good only to ascertain whether the parameters prescribed under Indian Standard IS 1460:2005 for High Speed Diesel?
A: Yes.
Q: As per the letter dated 04.08.2018, you were requested to verify whether the samples were HSD as per IS 1460:2005. Have you followed these instructions?
A: Yes.
Q: Have you signed the test reports annexed with "Relied upon Documents" as Sr. No.25 to the Show Cause Notice dated 22.04.2019?
A: Yes.
Q: What does it mean 'reviewed by'?
A: The samples were tested by me and checked, supervised and signed by my senior at the lab.
Q: Table I of IS 1460:2005 provides total 22 parameters are to be tested for ascertaining whether the sample meets with the criteria of HSD?
A: The Sample meets with the specification IS 1460:2005 for the parameters tested at our laboratory which are 14 parameters tested as per our lab capabilities.
Q: Does it mean that the other 8 parameters are not important for ascertaining or deciding whether the sample meets with the criteria of HSD?
A: Already provided in the report that in the lab the samples were tested as per IS 1406:2005 and there is facility available only for testing of 14 parameters and

for the remaining 8 parameters, the facility is not available for which I can't comment.
Q: Do you know the function/characteristics of the 8 parameters provided under IS 1406:2005 that have not been tested?
A: As the 8 parameters have not been tested, I can't comment in respect of these parameters.
Q:On perusal of report, have you concluded that it meets with the criteria of high speed diesel of IS 1460:2005?
A: Again, it is submitted in the report that the samples tested for 14 parameters as per IS 1406:2005, at the lab which itself is for high speed diesel?
Q: In respect of Flash Point, two methods are prescribed, Abel as well as PMCC. Remark No.2 of test report provides that flash point was tested by Abel apparatus method but since it was more than 66°C, sample was tested by PMCC. In which situation, sample of HSD is required to be tested at Abel method and PMCC method?
A: If the temperature is above 66°C then PMCC is required and if the temperature is below 66°C than it is required to do with Able method.
Q: Do you think so one of the ingredients for considering HSD is flashpoint?
A: Can't comment on ingredients. The minimum temperature for Flash Point 35°C as prescribed in standard. We have submitted the report.
Q: What is the maximum and minimum flashpoint for considering the sample as HSD?
A: Only the minimum limit is talked about that is 35°C and there is no maximum limit prescribed in the standard.
Q: If case, the Flash Point exceeds above 100°C, 150°C, 200°C etc., then does it still pertains to HSD standard?
A: Can't comment as above 35°C whatever the Flash Point is, it does not matter.
Q: Point No.1 of supplementary note of Chapter 27 of Customs Tariff Act provides that "Jute Batching Oil", "Textile Oil" are Hydrocarbon Oils, which have their flash points on and above 93°C. In case flash point exceeds 93°C, what you call it?

A: Can't comment. As flashpoint isn't the only parameter. We have tested the samples that were submitted to us as per IS 1460:2005.
Q: IOCL supplies HSD to various parties. Have you ever come across any situation in which you have found the Flash Point of all these test reports above 93°C and considered as a HSD?
A: Flash Point is not the only parameter which is used to measuring the sample as per IS 1460:2005.
Q: Can you Say it is an automotive diesel?
A: Already written in the lab report and we have tested the samples as per the parameters as per IS 1460:2005."

(ii)The cross-examination of Shri Singh at the instance of M/s. Gastrade International is as under:

"(Before the Principal Commissioner of Customs, Custom House, Kandla)
Cross Examination of Shri Gobind Singh, Manager (Lab), IOCL, Central Laboratory, Mumbai in the matter of SCN F. No. DRI/AZU/CI/ENQ-11(INT-2/2018 dated 24.04.2019 issued to M/s. Gastrade International & Others by Shri Hardik Modh, Advocate.

Q: What is your name·?
A: Dr. Gobind Singh.
Q: Where have you been working and for how long?

A: I have been working in IOCL at Sewree at Mumbai since 2012.

Q: How many samples have you tested in respect of petroleum products?
A: I have tested large number of samples running into hundreds of samples.
Q; Are you aware of letter dated 04.08.2018 written by the Assistant Director of DRI whereby it was requested to Mr Vivek W. Sawant, DGM, IOCL to test the samples as requested under test memo in accordance with the parameters prescribed under IS 1460:2005 for "High Speed Diesel" and to categorize the identity of the

goods. Had you tested these good only to ascertain whether the parameters prescribed under Indian Standard IS 1460:2005 for High Speed Diesel?
A. Yes.
Q: As per the letter dated 04.08.2018, you were requested to verify whether the samples were HSD as per IS : 1460:2005. Have you followed these instructions?
A: Yes.
Q: Have you signed the test reports annexed with 'Relied upon Documents at Sr. No.14 to the Show Cause Notice dated 24.04 2019?
A. Yes.
Q: What does it mean 'reviewed by'?
A: The samples were tested by me and checked, supervised and signed by my senior at the lab.
Q: Table I of IS 1480:2005 provides total 22 parameters are to be tested for ascertaining whether the sample meets with the criteria of HSD?
A: The Sample meets with the specification IS 1460:2005 for the parameters tested at our laboratory which are 14 parameters tested as per our lab capabilities.
Q: Does it mean that the other a parameters are not important for ascertaining or deciding whether the sample meets with the criteria of HSD?
A: Already provided In the report that in the lab the samples were tested as per IS 1406:2005 and there is facility available only for testing of 14 parameters and for the remaining 8 parameters, the facility is not available for which I can't comment.
Q: Do you know the function/characteristics of the 8 parameters provided under IS 1406:2005 that have not been tested?
A; As the 8 parameters have not been tested, I can't comment in respect of these Parameters.
Q: On perusal of report, have you concluded that it meets with the criteria of high speed diesel Of IS 1460:2005?
A: Again, it is submitted in the report that the samples tested for 14 parameters as per IS 1406;2005, at the lab which itself is for high speed diesel.

Q: In respect of Flash Point, two methods are prescribed, Abel as well as PMCC. Remark No. 2 of test report provides that flash point was tested by Abel apparatus method but since it was more than 66°C, sample was tested by PMCC. In which situation, sample of HSD is required to be tested at Abel method and PMCC method?

A: If the temperature is above 66°C then PMCC is required and If the temperature is below 66°C than it is required to do with Able method.

Q: Do you think so one of the Ingredients for considering HSD is flashpoint?

A: Can't comment on ingredients. The minimum temperature for Flash Point 35°C as prescribed in standard. We have submitted the report.

Q: What is the maximum and minimum flashpoint for ·considering the sample as HSD?

A: Only the minimum limit Is talked about that is 35°C and there is no maximum limit prescribed in the standard.

Q. If case, the Flash Point exceeds above 100 •c, 150 •c, 200 •c etc., then does it still pertains 10 HSD standard?

A: Can't comment as above 35°C whatever the Flash Point is, it does not matter.

Q: Point No. I of supplementary note of Chapter 27 of Customs Tariff Act provides that "Jute Batching Oil, "Textile Oil" are Hydrocarbon oils, which have their flash points on and above 93°C. In case flash point exceeds 93°C, what you call It?

A: Can't comment. As flashpoint isn't the only parameter. We have tested the samples that were submitted to us as per IS 1460:2005.

Q: IOCL supplies HSD to various parties. Have you ever come across any situation in which you have found the Flash Point of all these test reports above 93°C and considered as a HSD?

A: Flash Point is not the only parameter which is used to measuring the sample as per IS 1460:2005.

Q: Can you say it is an automotive diesel?

A: Already written in the lab report and we have tested the samples as per the parameters as per IS 1460:2005.

(iii)The cross-examination of Shri Singh at the instance of Divinity Impex is as under:

Cross-examination of Shri Gobind Singh, Manager (Lab), IOCL, Central Laboratory, Mumbai in the matter of SCN F.No.DRI/AXU/CI/ENQ-13(INT-02/2018)/2018 dated 24.04.2019 issued to M/s. Divinity Impex & Others by Shri Kumar Pal Mehta, Practising Company Secretary and Authorized representative of M/s Divinity Impex.

Q: What is your name?
A: Shri (Dr.) Gobind Singh.
Q: What is your qualification?
A: P.hd Chemistry.
Q: How many years of experience do you have?
A: 7 years.
Q: How many samples have you tested till now?
A: Whatever the samples that are submitted to me, I have tested them.
Q: What are the exact numbers of samples you have tested?
A: whatever the number of samples that are submitted to me by DRI, I have tested them.
Q: Have you personally examined the samples?
A: Yes.
Q: When did you receive the samples from DRI?
A: 09.08.2018.
Q: Have you yourself prepared the report?
A: There is a procedure for that. The samples were received by concerned authority, after that I have tested and prepared the report and my senior has reviewed the report thereafter.
Q: After how many days of the seizure of the sample by the DRI, the sample was received by you?
Adjudicating Authority intervened and said that this is a matter of record and it is a sheer wastage of time of Adjudicating Authority and the person whose cross examination is being done.
Q: What is the standard specification for testing the samples of HSD?
A: IS 1460:2005.
Q: How many parameters were tested for the samples?

A: A total of 14 parameters were tested as prescribed in the standard as per the Lab capabilities.
Q: Did certain parameters were not tested due to the testing facility of other parameters not being available at the lab?
A: Yes, as the lab is a marketing lab and it is not a refining lab.
Q: Have your tested the sample as per IS 1460:2005?
A: This sample has been tested as per the standard IS 1460:2005 and under this specification there are total 22 tests covered out of which we have tested only 14 parameters as per our Lab capability."

(emphasis added)

37. Since the findings and conclusions reached by the Adjudicating Authority and Appellate Tribunal merged with the High Court's decision, we will focus our attention on the High Court's analysis and conclusion.

38. The conclusion of the High Court that the questioned imported good is HSD was based on the following premise:

(i) Though it is the settled position of law that the burden of showing the correct classification lies on the Revenue, it would suffice if the Revenue is able to establish its case with such a degree of preponderance that the existence of a fact could be said to have been proved, and it is not necessary to establish on a part of the Revenue to prove the fact with mathematical precision.

(ii) Once the Revenue has been able to prove the classification on the basis of preponderance of probabilities, the burden would then shift to the assessee to prove its claim.

(iii) In the present case, the High Court was satisfied that in respect of the sample, in the third test since 14 out of 21 parameters laid down under the Indian Standards Specification of Bureau of Indian Standards IS1460:2005 relating to HSD were satisfied the sample would be of High Speed Diesel and not Base Oil.

(iv) Though the High Court was conscious of the fact that all the tests in respect of the 21 parameters laid down under IS1460:2005 relating to High Speed Diesel were not conducted but only in respect of the 14 parameters in the third test, and since the IOCL laboratory was equipped to conduct only 14 tests as it had no facility to conduct remaining seven tests, by applying the principle of proof on preponderance of probability, the High Court took the view that the Revenue had been able to discharge its burden of the fact that the imported goods was High Speed Diesel and not Base Oil.

(v) In holding so, the High Court was impressed by the evidence of the expert Dr. Gobind Singh of the IOCL laboratory who had conducted the test

and the High Court was of the view that such expert evidence could not have been ignored.

(vi) The High Court took the view that the Tribunal had ignored the fact that all the tests carried out in three different laboratories reveal only one thing that the sample showed the characteristics of HSD.

(vii) The High Court also held that the assessees have not been able to show anything on the basis of which it could be said that if all the prescribed 21/22 tests are not carried out, the report would remain incomplete and would not be admissible in evidence or would not be conclusive of the nature of the sample.

(viii) The High Court also took the view that since the 14 tests indicate the sample to be one of High Speed Diesel, merely on the ground that 7 other test could not be undertaken by the laboratories because of lack of adequate facility to conduct these test, such an evidence could not have been ignored in view of the legal position that the Revenue need not prove its case with mathematical accuracy and beyond reasonable doubt.

39. There cannot be any dispute to the proposition of law as noted by the High Court that the burden of proof as

regards the classification of any goods of importation is upon the Revenue/Customs authority and the standard of proof in proceedings under the Tariff Act is not "beyond reasonable doubt". However, whether "preponderance of probability" can be the appropriate test for classification under the Customs Act would be required to be examined in the light of the "General Rules for the interpretation of this Schedule" as provided in the First Schedule – Import Tariff in Part 2 of the Tariff Act (hereinafter referred to as the "Rules")

40. The aforesaid Rules provide the principles on the basis of which the goods in the First Schedule to the Tariff Act are to be classified, which had escaped the attention of all the three forums below and each forum had adopted its own methodology to determine the proper classification of the goods/substance in issue as discussed above dehors the aforesaid rules for interpretation.

41. Rule 1 of the aforesaid Rules lays down that the classification shall be determined on the basis of the terms of the headings and relative Section or Chapter Notes.

Rule 2 is to be invoked when it relates to an incomplete or unfinished article or a mixture of substances, with which we are not concerned.

Rule 3 is attracted when for certain reasons, the goods are prima facie classifiable under two or more headings. This situation also does not arise in the present case.

Rule 4 further provides that goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are "most akin".

For better appreciation, relevant portions of the aforesaid Rules are reproduced herein below.

> **General Rules for the interpretation of this Schedule**
>
> **Classification of goods in this Schedule shall be governed by the following principles:**
>
> 1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:
> 2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the

complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished
by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles
of rule 3.

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred providing a more general description. However, when two or more headings each to headings refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise
Description of the goods.(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provisions does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub headings and any related sub headings Notes and, mutatis mutandis, to the above rules, on the understanding that only sub headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

xxxxxxxxxxx"

(emphasis added)

42. The aforesaid Rule 4 abundantly makes it clear that goods which cannot be classified in accordance with the preceding rules shall be classified under the heading appropriate to the goods to which they are "most akin."

There may be situations where, because of scientific advancements, innovations and discoveries, there may be new imported products that may not exactly fit the specifications mentioned under the Chapters, Headings, or Notes under the Tariff Act. In such events, if the attributes of these articles show close resemblance, thus, "most akin" to those articles/goods which are already specified in the First Schedule to the Tariff Act, these new products will be classified accordingly with which these imported goods are "most akin" or bear closest resemblance or similarity.

43. In the present case as discussed above, based on the three laboratory tests and evidence of the expert opinion, the High Court had concluded that the Customs Authority had been able to prove that the imported product is HSD by applying the test of preponderance of probability. The High Court had not referred to the aforesaid Rules in arriving at its conclusion by invoking the "most akin" test as contemplated under Rule 4.

44. Before we proceed further, it would be apposite to critically examine the aforesaid test reports and the evidence of the expert.

45. A careful perusal of the first report furnished by the Central Excise and Custom Laboratory at Vadodara on 11.05.2018 would show that the samples were tested in respect of only 8 parameters out of 21. Even in respect of the said 8 parameters, as regards the flash point, for which the specification is 66 (minimum) as per Pensky Martens Closed Cup (PMCC) test, the result mentions it to be above 66°C. Therefore, in respect of flash point it cannot be said that the sample conforms to this specification.

The test report mentions that in view of the analytical parameter, *"the sample has characteristics of High Speed Diesel/Automotive Fuel Oil"* conforming to IS1460:2005 and that it is not Base Oil. However, the said report does not specifically give the opinion that the sample is that of HSD or can be treated as that of HSD. The report merely says that the sample has characteristics of HSD Oil. There is a sea of difference when the opinion says that a sample *has characteristics of* High Speed Diesel in contradistinction to the other possible opinion that the sample *is or can be considered to be* High Speed Diesel Oil. If a questioned article bears only certain characteristics of a specified

article, can the questioned article be treated to be or equated with the specified article? We are afraid, the answer has to be in the negative, unless the opinion clearly states that because of the salient features in the questioned article (samples), the questioned article and the specified article (HSD in the present case) are substantially similar so as to identify the questioned article with the specified article.

46. The first report of the Central Excise and Custom Laboratory at Vadodara, however, neither says that because of the characteristics ascertained, the tested sample can be treated as that of HSD. In other words, no clear opinion has been given in the first test result by the expert that the samples are indeed that of HSD or can be treated to be that of HSD.

47. Therefore, in our opinion, the first test based on examination of 8 parameters against 21/22 prescribed cannot be considered to be a definitive opinion to take the view that the sample is indeed that of HSD. It would be speculative or assumptive to say on the basis of the aforesaid opinion that the sample is that of HSD.

48. Coming to the second test report furnished by the Central Revenues Control Laboratory, CRCL, New Delhi on 03.07.2018, the said report indicates that the sample was tested in respect of 12 out of 21/22 prescribed parameters and we find that of the aforesaid 12 parameters, at least on 2 parameters, the sample does not appear to fulfil the requirements of IS 1460:2005.

49. As per IS 1460:2005, the flash point is 66° C (minimum), whereas the test result in respect of the said sample is shown as 113°C which is far above the prescribed minimum specification.

Further, in respect of the Distillation Range of which the IS 1460:2005 has prescribed as 85 (minimum) at 350°C and 95 (minimum) at 370° C, the result of the test of the samples shows it to be 238 at 356° C, 234 at 358°C, 234 at 352°C, 238 at 354°C, 240 at 356°C, 238 at 344°C, 240 at 354°C, 240 at 350°C, 240 at 342°C and 238 at 325°C. These figures reflected in the test result are far above the prescribed figure of 85 (minimum) and 95 (minimum) as per IS 1460:2005.

Under the circumstances, though the second test was conducted in respect of 12 out of 21 parameters as per IS 1460:2005, in respect of 2 parameters, of flash point and distillation range, the samples did not match the IS 1460:2005 specifications. Thus, it can be said that the samples conform to only 10 parameters. If that is so, can it be said that the samples are of High Speed Diesel? We doubt so.

50. It has been noticed as in the case of the opinion given in the first test report, the second report also merely mentions that each of the ten samples conforms (though not so in respect of two parameters as mentioned above) to the specifications of High Speed Diesel/Automotive Diesel Fuel as per IS 1460:2005. The second test report does not specifically state that because of the characteristics ascertained, the samples can be treated as that of HSD. The second report also avoids giving any such categorical finding or opinion that the samples are of HSD except for stating that these samples conform to the IS specification (though only in respect of 10 out of 21 specifications).

51. Coming to the third test report prepared by the Indian Oil Corporation Limited dated 14.08.2018 upon which much reliance has been placed by the High Court, similar inconclusive opinion has been given.

Interestingly, we have also noted that in respect of a parameter namely, flashpoint, the third report mentions that the flash point of the sample is 112° C which is far above the minimum flashpoint mentioned under the IS specification which is 66°C. It may be noted that in the first report, the flashpoint of the sample has been shown as above 66°C, which itself is quite vague unlike in the second and third reports, which mention very high flash points. Therefore, it cannot be said that as far as the parameter of flashpoint is concerned, the samples truly conform to the Indian Standard Bureau of Specification IS 1460:2005.

What troubles us is whether on the basis of tests conducted only in respect of 14 out of 21 parameters in the third test, can it be said that the samples are that of HSD?

52. It is noteworthy that as in the case of earlier two laboratory test reports, the third report prepared by the Central Laboratory of Indian Oil Corporation Limited also

does not give a clear and categorical opinion that the samples tested indeed are of HSD.

In the REMARKS in the third report, it is mentioned under paragraph 4 that,

> "This sample meet the specification for only XIV parameters tested at our lab as per specification IS:1460:2005 a mended".

No other remark or observation or opinion is given to the effect that in view of the conformity to 14 out of 21 parameters, the sample qualifies to be treated as High Speed Diesel.

53. It was left to the Adjudicating Authority/ High Court to draw the inference that the samples are of HSD in absence of such opinion by the experts.

54. One noticeable aspect in the present case is that the Adjudicating Authority/Tribunal/High Court had been called upon to decide this issue, when there are clearly laid down scientific criteria to determine whether the oil in issue is HSD or not. The fact to be proved herein is not an incident, situation, phenomenon or happening that may require a bundle of evidence to prove its existence based on the

standard of preponderance of probability. The issue involved is about the proper classification of an existing material/article based on certain specified specifications. For this one only needs to refer to the specifications mentioned under IS 1460:2005 and once the sample conforms to the specifications, it would be accordingly identified/classified as HSD which would not require any analysis or appreciation of evidence. The rules do not provide that any substance that partly complies with the aforesaid parameters will be considered or deemed to be that specified substance. If tests had been done in respect of all the 21 parameters as per IS 1460:2005, and if the results conform to all these parameters, there will be no difficulty in concluding that the samples are indeed that of HSD. The problem has arisen because the tests were done only with respect of a few parameters and not all, leaving it to the discretion of the Adjudicating Authorities/Tribunal/High Court to determine whether it has been proved based on these tests that the samples are indeed that of the HSD. Thus, this exercise has introduced an element of subjective appraisal and evaluation of the pieces of evidence.

55. In the present case, the evidence/materials on which the High Court based its conclusion are the test reports and the evidence of the expert, Dr. Gobind Singh. Since the test reports are not conclusive as regards all the 21 stipulated parameters under IS 1460:2005 and the evidence of Dr. Gobind Singh is also not definitive, the test report and expert opinion would be required to be assessed properly.

56. Section 45 of the Evidence Act of 1872 deals with expert opinion, which reads as follows:

> "Section 45.
> Opinions of experts.
>
> When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger-impressions are relevant facts.
>
> Such persons are called experts."

57. The opinion of the experts, however weighty they may be, are not binding on the court and is only relevant for the court to consider it to come to a final decision on any fact in issue. However, since courts are not experts in the discipline of science, they ordinarily accept the scientific report and act upon it. But where the expert opinion suffers from certain shortcomings or ambiguities, lack of clarity, or inadequacy,

it would be subject to judicial scrutiny and it would not be safe to rely wholly on the same under such circumstances.

58. We may briefly recapitulate the views of this Court relating to expert witnesses.

59. This Court in ***State of H.P. v. Jai Lal*, (1999) 7 SCC 280** observed that the credibility of expert witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. It was thus observed as follows:

> **"18.** An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions"
>
> (emphasis added)

60. This Court in ***Dayal Singh v. State of Uttaranchal*, (2012) 8 SCC 263** reiterated the aforesaid view.

It was also observed that the essential principle governing expert evidence is that the expert is not only to

provide reasons to support his opinion but the result should be directly demonstrable. Thus, if the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use.

It was reiterated that the purpose of an expert opinion is primarily to assist the court in arriving at the final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record, and then form its final opinion as to whether such report is worthy of reliance or not.

It was thus observed as follows:

> **"35.** This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases..... The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.....
>
> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
>
> **39.** The Indian law on expert evidence does not proceed on any significantly different footing. The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of

> the expert has to find due weightage in the mind of the court, it has to be well authored and convincing. ……
>
> **40.** We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not……"

61. Though these observations were made in the context of criminal trials, keeping in mind the basic principles underlying the relevance and assessment of expert opinion, in our view, would be beneficial in the present case as well.

62. In the light of the above, we will examine the test results and evidence of the expert witness, Dr. Gobind Singh, Manager (Lab) of the IOCL, Mumbai on which the High Court relied heavily to come to the conclusion that the Revenue/Department had been able to establish their case that the imported goods were HSD.

During the cross examination of the expert witness, the following questions were asked about 8 parameters on which the samples were not tested:

"Q: Does it mean that the other 8 parameters are not important for ascertaining or deciding whether the sample meets with the criteria of HSD?
A: Already provided in the report that in the lab the samples were tested as per IS 1406:2005 and there is a facility available only for testing of 14 parameters and for the remaining 8 parameters, the facility is not available for which I can't comment.
Q: Do you know the function/characteristics of the 8 parameters provided under IS 1460:2005 that have not been tested?
A: As the 8 parameters have not been tested, I can't comment in respect of these parameters.

63. From the above, it is clearly noticeable that the expert who undertook the tests evaded answering the crucial question as to the importance of the 8 parameters for deciding whether the sample is of HSD or not. It is to be remembered that the Indian Specifications of Bureau of Indian Standard IS:1460:2005 specifically provides 21 parameters, which are the attributes of High Speed Oil and nothing is mentioned under the Rules as to whether compliance with only certain of the specifications would justify treating the article as HSD.

64. As regards the third test, only 13 specifications conformed to the specifications (and not 14 as mentioned in the report since in respect of the flash point, the sample did not meet the specification). In the absence of fulfilment of

the remaining of specifications, can it be said authoritatively that the samples will still qualify as HSD?

Interestingly as discussed above, neither the expert nor the test results stated categorically that these samples are indeed that of HSD on fulfilment of some of the parameters.

The expert was specifically asked as to whether the sample was automotive diesel, which the expert evaded and did not give a clear answer except for saying that it is already written in the report and the sample has been tested as per the IS 1460: 2005 as evident from the following question and answer.

> *"Q: Can you say it is an automotive diesel?*
>
> *A: Already written in the lab report and we have tested the samples as per the parameters as per IS 1460:2005."*

65. It may be noted that in the written report, it was not mentioned that the sample is that of HSD though it mentions that it was tested as per the parameters of IS 1460:2005 and has characteristics of some of the parameters.

The Adjudicating Authority as well as the High Court, without there being any such categorical opinion in the report or by the expert, nevertheless, went on to conclude that the samples were indeed of HSD by applying the test of preponderance of probability, which we feel is problematic.

66. Apart from this lack of clarity of opinion by the expert and in the test reports to the effect that the samples are of HSD, there is one aspect which we consider is also important.

67. As noted above, all three test results show that the samples do not meet the specification relating to flash point. Unfortunately, the expert has avoided giving satisfactory answers to the searching questions put to him relating to the flash point during the cross-examination, though as an expert in the field, he was expected to know and clarify the legitimate doubts about the significance of flash point in determining the nature of the fuel as evident from the following questions and answers.

> *"Q: Do you think so one of the ingredients for considering HSD is flashpoint?*

A: Can't comment on ingredients. The minimum temperature for Flash Point 35°C as prescribed in standard. We have submitted the report.

Q: What is the maximum and minimum flashpoint for considering the sample as HSD?
A: Only the minimum limit is talked about that is 35°C and there is no maximum limit prescribed in the standard.

Q: If case, the Flash Point exceeds above 100°C, 150°C, 200°C etc., then does it still pertains to HSD standard?
A: Can't comment as above 35°C whatever the Flash Point is, it does not matter.

Q: Point No. I of supplementary note of Chapter 27 of Customs Tariff Act provides that "Jute Batching Oil", "Textile Oil" are Hydrocarbon oils, which have their flash points on and above 93°C. In case flash point exceeds 93°C, what you call it?
A: Can't comment. As flashpoint isn't the only parameter. We have tested the samples that were submitted to us as per IS 1460:2005.

Q: IOCL supplies HSD to various parties. Have you ever come across any situation in which you have found the Flash Point of all these test reports above 93°C and considered as a HSD?
A: Flash Point is not the only parameter which is used to measuring the sample as per IS 1460:2005

Q: Can you say it is an automotive diesel?
A: Already written in the lab report and we have tested the samples as per the parameters as per IS 1460:2005."

68. We are quite befuddled by the answers given by the expert about flash point, as if he was not aware of the importance of flash point in petroleum products. He was

evasive as regards nonconformity on this parameter in determining whether the samples are those of HSD.

Flash point has been mentioned in the Supplementary Note to Chapter 27 in Appendix-2 to the Customs Tariff Act by stating that it shall be determined following the test prescribed in this behalf in the rules made under the Petroleum Act, 1934.

Under Section 2(c) of the Petroleum Act, 1934 flash-point of any petroleum has been defined as the lowest temperature at which it yields a vapour which will give a momentary flash when ignited, determined in accordance with the provisions of Chapter II and the rules made thereunder.

69. The Petroleum Act classifies petroleum products under three categories, depending on the quantum of flash point, namely,

(i) "Petroleum Class A" which means petroleum having a flash-point below twenty-three degrees Centigrade;

(ii) "Petroleum Class B" which means petroleum having a flash-point of twenty-three degrees Centigrade and above but below sixty-five degrees Centigrade;

(iii) "Petroleum Class C" which means petroleum having a flash-point of sixty-five degrees Centigrade and above but below ninety-three degree Centigrade.

70. Specification regarding flash point is accordingly of some significance, even if it may not be the most important parameter in determining whether a petroleum product is HSD or not. From the specification provided under IS:1460:2005, HSD will have flash point of minimum 66° C. Thus, it will be treated as Petroleum Class C in terms of the Petroleum Act. It is not anyone's case that HSD is not a hydrocarbon and not an automotive fuel. If that is so, it will be classifiable under the Petroleum Act as a Class C Petroleum product, if not Class B or Class A product. As mentioned above, the range of the flash point of Petroleum Class C is between 65° C and 93°C whereas the test results show a higher flash point.

It has been submitted on behalf of the appellants, relying on the decision of this Court in ***Durga Oil Company Vs State of U.P., (1998) 6 SCC 299,*** that HSD is petroleum Class B product. Thus, by implication, if the flash point of the sample goes above 93° C, it is questionable whether the

imported oil can be considered to be HSD, even though the maximum flash point for HSD has not been specifically mentioned in the IS: 1460:2005, but only the minimum.

71. Because of the evasive and non-committal answers given by the expert Dr. Gobind Singh, the legitimate conclusion that can be drawn is that his opinion and also the test results are inconclusive, unclear and cannot be said to be fully reliable to determine the oil as HSD.

72. We would however, like to clarify that we are not stepping into the shoes of the scientific expert relating to the determination of the nature of the oil, as to whether it is HSD or Base Oil. Nevertheless, we are satisfied that there is a very germane and relevant factor on which the expert had failed to clarify, and in respect of which the test reports have also remained silent, that is, relating to flash point, making the classification of the imported oil as HSD by the Customs authority highly doubtful. If the expert or the test reports had clearly mentioned that in spite of the high degree of flash point shown by the samples, and non-examination in respect of all the parameters, these samples can still be

considered to be that of HSD, we would have accorded due deference to such opinion.

But as noted above, neither the expert nor the test results categorically and in clearly terms mention that these samples are that of HSD, except for making an ambiguous remark that these samples *conform to certain* parameters of HSD as per IS 1460:2005. As discussed above, by mere conformation to certain parameters of HSD, the samples cannot be equated with HSD. The expert opinion and the test results are as vague as these can be qua classification of the oil as HSD.

73. However, as noted above, the High Court, by applying the test of preponderance of probability concluded that the substance in question is HSD.

74. At this juncture it may be apposite to dwell briefly upon the meaning of the expression "*preponderance of probability*" in contradistinction to "*proof beyond reasonable doubt".*

75. Under Section 3 of the Evidence Act, 1872, a fact is said to be proved when, after considering the matters before

it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists, which clearly indicates that the Evidence Act does not insist upon absolute standard of proof. Evidence Act also nowhere defines as to the meaning of proof based on *"preponderance of probability*" and *"beyond reasonable doubt"* which are different standards of proof.

76. Different standards of proof have evolved in criminal and civil jurisdictions in course of time considering the differential stakes involved in these proceedings. In a criminal proceeding, the stakes are higher for a defendant as it involves precious rights and liberties of the person with a potential to lose the same if convicted of the offence charged. On the other hand, civil liability is less blameworthy, and penalty, if any, is less severe.

77. The expression "*preponderance of probability"* has been explained by this Court in ***M. Siddiq (Ram Janmabhumi Temple-5 J)*** **v.** ***Suresh Das*****, (2020) 1 SCC 1**. In the aforesaid case, this Court applied the test of a prudent man who upon weighing the various probabilities finds that

the preponderance is in favour of the existence of the particular fact. It was observed that even in the case of proof by preponderance of probability, there may be degrees of probability within that standard and *"the degree depends on the subject-matter."*

It was held that,

> "720. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. *Phipson on Evidence formulates the standard* succinctly : If therefore, the evidence is such that the court can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not. [*Phipson on Evidence*] In *Miller* v. *Minister of Pensions* [*Miller* v. *Minister of Pensions*, (1947) 2 All ER 372.] , Lord Denning, J. (as the Master of Rolls then was) defined the doctrine of the balance or preponderance of probabilities in the following terms : (All ER p. 373 H)
>
> > "(1) … *It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.* If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is
> > possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice."
> >
> > (emphasis supplied)
>
> 721. The law recognises that within the standard of preponderance of probabilities, there could be different degrees of probability. This was succinctly summarised by Denning, LJ in *Bater* v. *Bater* [*Bater* v. *Bater*, [1951] P. 35 (CA).] , where he formulated the principle thus : (p. 37)

"… So also, in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. *The degree depends on the subject-matter.*"

722. The definition of the expression "proved" in Section 3 of the Evidence Act is in the following terms:

> "3. … "Proved". — A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

723. Proof of a fact depends upon the probability of its existence. The finding of the court must be based on:

723.1 The test of a prudent person, who acts under the supposition that a fact exists.

723.2 In the context and circumstances of a particular case.

724. Analysing this, Y.V. Chandrachud, J. (as the learned Chief Justice then was) in *N.G. Dastane* v. *S. Dastane* [*N.G. Dastane* v. *S. Dastane*, (1975) 2 SCC 326.] held : (SCC pp. 335-36, para 24)

> "The belief regarding the existence of a fact may, thus, be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. *The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second.* Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. *Important issues like those*

> *which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue* [Per Dixon, J, in *Wright* v. *Wright*, (1948) 77 CLR 191 (Aust).] , CLR at p. 210"; or as said by Lord Denning, "the *degree of probability depends on the subject-matter"*. In proportion as the offence is grave, so ought the proof to be clear [*Blyth* v. *Blyth*, [1966] A.C. 643 : [1966] 2 WLR 634 : (1966) 1 All ER 524 (HL).] , All ER at p. 536'. But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."
>
> (emphasis supplied)

> 725. The court recognised that within the standard of preponderance of probabilities, the degree of probability is based on the subject-matter involved.
> 726. In *State of U.P.* v. *Krishna Gopal* [*State of U.P.* v. *Krishna Gopal*, (1988) 4 SCC 302 : 1988 SCC (Crl.).] , this court observed : (SCC p. 314, para 26)
>
> > "26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a *robust common sense and, ultimately, on the trained intuitions of the Judge.*"

78. What the aforesaid decisions postulate is that there may be varying range in the degree of probabilities. Certainly, where the proceedings involve requirement of fulfilment of technical/scientific parameters with

confiscatory and penal consequences, the degree of probability would be of a higher order and not mere probability.

79. In the present case, what we have observed is that the High Court, on the basis of the laboratory tests, more particularly the third test conducted by IOCL, Mumbai Laboratory and the opinion of the expert, namely Dr. Gobind Singh, and by observing that it is not necessary to establish on the part of the Revenue to prove the fact with mathematical precision, held that the Department has been able to establish its case on the basis of preponderance of probability that the imported oil was not Base Oil but HSD, which could not have been imported by the appellants and upheld the order of the Adjudicating Authority.

80. However, this analysis and conclusions arrived at by the High Court are problematic for the following reasons:

(i) There was no expert opinion at all that the samples which were tested were indeed of HSD.

(ii) The opinion as contained in the test results was merely mentioning about conformity of the samples with *certain* specifications of IS

1460:2005 and not about conformity with *all* the specifications.

(iii) Once the rule making authority had clearly delineated the requisite parameters for ascertaining the nature of the goods/substance, compliance/conformity with the stated parameters would be the requirement.

(iv) There are 21 parameters laid down under IS 1460:2005 and none of the tests have shown compliance with all these parameters. The last and third test have reported compliance with 14 parameters, though as discussed above in respect of 2 of the aforesaid 14 parameters, namely, flash point and distillation range, the same are not in conformity. Thus, it cannot be said there is substantial compliance with the parameters of IS 1460:2005.

(v) Flash point, though may not be the most important parameter, yet, its importance in determining the nature of the Automotive oil cannot be ignored. Flash point being a very

important criteria to classify petroleum products, non-compliance of the samples on this parameter would make the classification doubtful.

(vi) Evasive answers and non-clarification on certain aspects of the flash point of the samples by the expert Dr. Gobind Singh certainly cast a serious doubt on the samples being identified as that of HSD. The expert himself also has not said that the samples are of HSD except for stating that the samples conform to certain specifications of the IS 1460:2005.

(vii) In view of the ambiguity and lack of clarity in the expert opinion/laboratory test results, it would be unsafe to draw the inference that the Department had been able to prove their case even by applying the test of preponderance of probability merely because the samples conform to *certain* parameters.

(viii) If the Department with all the resources at their command and access to various laboratory

facilities could not get the samples tested in respect of all the 21 parameters, expecting the assesses/appellants to get the samples tested to show that these do not conform the specifications and are not HSD does not appear to be reasonable. Thus, shifting of onus to the assesses to prove otherwise appears to be unreasonable and meaningless.

(ix) The burden was not on the assessees to demonstrate that non-conformity with the remaining 8 parameters would vitiate the conclusion that the samples were of HSD.

81. The aforesaid difficulties in our opinion can be overcome, if we apply the test of "most akin" as contemplated under Rule 4 of the General Rules for Interpretation referred to above.

82. The real test for classification, according to us, would be as to whether any goods or substance in question is "most akin" or bears the closest resemblance or similarity to any of the specified goods mentioned under the Headings and

relative Section or Chapter Notes under the Tariff Act, and *not* by applying the test of preponderance of probability.

83. By way of illustration, we may explain the position. If an importer classifies the imported goods as "X", which is disputed by the Customs authority and classifies the same as "Y", the test would be whether the goods imported are "most akin" to "X" or "Y" in terms of Rule 4 of the aforesaid Rules. The importer may also claim if he so wishes, that the goods are most akin to "Z", though it may be akin to "Y" also, if such claim is more beneficial to him. Thus, it has to be shown by the Customs Authority that the imported goods bear the most affinity or resemblance or similarity to be "most akin" to the specified goods and not mere similarity or akinness. In other words, the test will be whether the imported goods bear the closest resemblance or similarity with the specified good so that these can be considered to be "most akin" to the specified good. Certainly, the principle of preponderance of probability may fall short of the more heightened test of "most akin" for proper classification. The imported goods may bear resemblance to more than one specified goods, in which event, unless the high degree in

the test of preponderance of probability is applied, there may be difficulties in the proper classification. However, the said difficulty may be overcome if the test of "most akin" is applied. If the attributes of the imported goods show that the goods are "most akin" to the specified goods amongst an array of other specified goods, these imported goods have to be classified as the specified goods with which these goods bear the most resemblance or most akinness. Thus, in our view, application of the principle of preponderance of probability does not provide an accurate test. The more accurate and precise test will be whether the goods in question are "most akin" or most similar to the specified goods, as provided under Rule 4 referred to above.

84. In the present case, as noticed above, the finding of the High Court is based primarily on applying the test of preponderance of probability which may not necessarily fulfil the "most akin" test. The High Court came to the conclusion based on the incomplete test reports and noncommittal opinion of the expert Dr. Gobind Singh who in categorical terms had not stated that the imported goods are HSD. There was no opinion that the imported goods are most

similar to HSD to satisfy the test of "most akin". The definitive opinion and finding that the imported goods are "most akin" to HSD is missing in the reports and opinion for classifying the imported goods as HSD.

85. The oil in question does not fully satisfy the specifications of HSD in terms of IS 1460:2005. Hence, the correct test will be whether the oil/article in issue is most akin to HSD or not for which appropriate scientific evidence in the form of laboratory test reports and opinion of the scientific experts will be of utmost relevance.

86. For the reasons discussed above, as the results of the test are inconclusive, so being the opinion of the expert, we are unable to agree with the conclusion of the High Court. Under the circumstances, the option before this Court is, either to send the imported product again for further tests and obtain the expert opinion atleast to the effect that the imported product is 'most akin' to HSD even if it does not fulfil all the parameters under IS 1460:2005 or give a benefit of doubt to the appellants and close the proceedings against the appellants by quashing the impugned orders, since the

Revenue/Customs Authority cannot take action against the appellants based on inconclusive evidence.

87. As far as the first option is concerned, as noted above, though the questioned product was sent for laboratory test in three premier laboratories, these laboratories did not give conclusive finding that the product is indeed HSD and the expert also could not give a definitive opinion. Further after such a long passage of time we are doubtful whether the oil in question would still retain many of the characteristics and properties which were present at the time of import for an effective testing as aforesaid. Hence, we do not consider it appropriate to direct further testing of the imported product/oil at this point of time and such a retest may be rendered a futile exercise. In our opinion, in the facts and circumstances, it would be more appropriate to give the benefit of doubt to the appellants because of the inconclusive evidence, rather than directing for a fresh testing and seeking fresh expert opinion, as a one-time measure.

88. Before parting with these appeals, we deem it necessary to issue certain ancillary directions.

We are of the view that non-examination of any product/article/goods on all the parameters laid down by the customs authority will always lead to uncertainty and doubt, which are required to be removed when dealing with confiscatory proceedings.

The genesis of the prolonged litigation lies in the non-availability of adequate facilities for testing all the parameters provided under Bureau of Indian Standard Specifications. Such a dispute could have been avoided had the testing facilities for all the parameters been available. Since the Authorities themselves had laid down the specific parameters for classification of goods, as in the present case by referring to classification under IS 1460:2005, it is incumbent upon the Authorities to ensure that necessary facilities are made available for testing of any disputed article on all these parameters as otherwise, laying down such parameters would be meaningless.

Hence, to avoid these difficulties, doubts and uncertainties in future, the respondents are directed to ensure that proper facilities are made available in the appropriate laboratories for undertaking tests for all these

parameters or at least for those parameters which the Authorities consider are of essential character to satisfy the "most akin" test without which the article in issue cannot be properly classified. Accordingly, we direct the respondents to take necessary steps in this regard within a period of six months for proper testing in all the parameters in future.

89. For the reasons discussed above, we allow these appeals by setting aside the impugned common judgment and order dated 20.01.2022 passed in Revenue Tax Appeal No. 297 of 2021, Revenue Tax Appeal No. 298 of 2021 and Revenue Tax Appeal No. 299 of 2021.

90. Appeals are accordingly disposed of in the aforesaid terms.

.....J.
(B.V. NAGARATHNA)

.....J.
(NONGMEIKAPAM KOTISWAR SINGH)

New Delhi;
March 28, 2025.

'*REPORTABLE*'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1049 OF 2008

FORTIS HOSPITAL LTD. ... Appellant

VERSUS

COMMISSIONER OF CUSTOMS,IMPORT ... Respondent

J U D G M E N T

A. K. SIKRI, J.

The appellant herein, which is the successor of M/s.Wockhardt Hospital and Heart Institute (referred to as the 'Institute' hereinafter) had a hospital at Bangalore. Sometime in the year 1990, the said Institute imported a Cardiac Catherization Laboratory (known as Angiography system) with its spares/accessories valued at Rs.1,14,23,471/-. The said Institute applied for exemption from payment of import duty taking shelter under the Notification No. 64/88-cus dated 01.03.1988. This notification provides for exemption on medical equipment imported against Custom Duty Exemption Certificate issued by the Director General of Health Services. Apart from the said certificate, there are certain other conditions which are mentioned in the notification that need to be satisfied to avail the exemption. These conditions are as under: -

"All such hospitals which may be certified by the said Ministry of Health and Family Welfare, in each

case, to be run for providing medical surgical or diagnostic treatment not, only without any distinction of caste, creed, race, religion or language but also: -

(a) free, on an average, to at least 40 per cent of all their outdoor patients; and

(b) free to all indoor patients belonging to families with an income of less than rupees five hundred per month, and keeping for this purpose at least 10 per cent of all the hospital beds reserved for such patients; and

(c) at reasonable charges, either on the basis of the income of the patients concerned or otherwise to patients other than those specified in clauses (a) and (b).”

From a bare reading of the aforesaid stipulations, it is clear that these conditions are to be fulfilled not at the time of the import but in future, by the importer while utilising the imported equipment. Therefore, the conditions are continuing in nature.

The Institute was not charged any import duty as it had produced requisite certificate dated 11.02.1991 issued by the Director General of Health Services, New Delhi. After sometime, the Revenue authorities/respondent herein came to know that the Institute was committing breach of the aforesaid conditions, as it had not been providing free diagnostic treatment to at least 40 per cent of all its outdoor patients and it was also not giving free treatment to indoor patients having income of less than Rs.500 per month and for this purpose, it had not got 10 per cent hospital beds reserved for such patients. It resulted in issuance of show cause notice to the Institute.

Pertinently, this show cause notice dated 12.01.2000 was issued under Section 124 of the Customs Act, 1962 (hereinafter referred to as Act) and after stating that the aforesaid breach was allegedly committed by the appellant, in the show cause notice, it was proposed as under: -

> **"16. Therefore, M/s. Wockhardt Hospital & Heart Institute, Bangalore are called upon to show cause to the Commissioner of Customs, Air Cargo Complex, Sahar, Andheri (E), Mumbai-99 as to why: -**
> **(a) the medical equipments/spares and accessories as detailed in Annexure of the Show Cause Notice and valued at Rs.1,14,23,471/- should not be confiscated under Section 111(o) of the Customs Act, 1962.**
> **(b) Penalty should not be imposed under Section 112 of the Customs Act, 1962 for the omission and commission committed by the Wockhardt Hospital & Heart Institute Bangalore."**

In para 17 of the Show Cause Notice, the Noticee was also asked to show as to why penalty under Section 112 of the Act should not be imposed. The Institute replied to the said Show Cause Notice and also desired to be heard in person. Personal hearing was accorded to the Institute. It had filed written submissions which were also considered. However, the plea of the Institute in the reply filed to the Show Cause Notice was not accepted. Orders dated 11.07.2002 were passed by the adjudicating authority holding that the Institute had, in fact, committed the breach of the Notification No. 64/88 dated 01.03.1988. Accordingly, the goods, viz., the aforesaid medical equipment was confiscated. The operative portion of order of the confiscation and penalty reads as under: -

SUPREME COURT OF INDIA
JUDGMENT

> **"a) I order, the confiscation of the goods valued at Rs.1,14,23,471/- mentioned in the show cause notice, under Section 111(o) of the Customs Act, 1962. The importer may redeem them on payment of a fine of Rs.1,00,000 (Rs. One lakh only), within thirty days of this order.**
> **b) I also direct that the importer shall forthwith pay the duty amounting to Rs.1,65,24,050/-(Rs. One crore sixty five lakhs twenty four thousand and fifty only) in view of the failure to discharge the continuing obligation under notification No. 64/88 during the material period.**
> **c) I impose a penalty of Rs.25,000 (Rs. Twenty five thousand only) on the importer under Section 112(a) of the Customs Act, 1962.**
> **d) The proceedings in respect of DGHS are dropped."**

As is clear from this order, after confiscation of the goods, option was given to the Institute to redeem the said goods on payment of fine of Rs.1 lakhs. In addition, the Institute was also directed to pay the duty amounting to Rs. 1,65,24,050/- "in view of the failure to discharge the continuing obligation under notification No. 64/88 during the material period". Penalty of Rs. 25,000/- under Section 112(a) of the Act was also levied. The Institute challenged the aforesaid order by filing appeal before the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT'). Since we are concerned with that part of the order vide which the duty was imposed, henceforth we will confine our discussion to this aspect alone.

Before the CESTAT, submission of the Institute was that in the Show Cause Notice nothing was stated about the payment of duty and as the Show Cause Notice was

conspicuously absent in this behalf, in the final order, the duty could not have been demanded. It was argued that such an order would be violative of the principle of nature justice. The Institute also referred to the provisions of Section 125 of the Act which gives an option to pay fine in lieu of confiscation. It was argued that as per this provision, option is to be given to the importer and it is left to the importer who has to exercise the same. It would imply that if no such option is exercised, the goods are not to be redeemed and they would remain the property of the Government. In that case, when such an option is not exercised, no fine is payable and when no such fine is payable, duty could not be demanded by relying on the provisions of Sub-section (2) of Section 125 of the Act, as such an eventuality has not arisen in the present case because of the reason that the Institute had not exercised the option and had not paid the fine. This contention found favour with the CESTAT and while accepting the same, CESTAT discussed the legal position in the following words:

> **"We have carefully considered the rival submissions. We have also perused the case law cited before us as well as the judgment of the Hon'ble Supreme Court in the case of CC, Mumbai v. Jagdish Cancer & Research Centre 2001(132)ELT 257 (SC). It is no doubt true that under Section 125(2) of the Customs Act, 1962 when goods are redeemed, duty will have to be paid in addition to the fine imposed in view of confiscation. However, the argument before us is not that only fine is required to be paid for redemption of the imported goods. The question before us is whether duty is payable even in the event of the option not being exercised. The decision of the Supreme Court in**

Jagdish Cancer & Research Centre cited supra does not address itself to this issue. No such argument was ever raised before the Apex Court. The contention of the learned DR that the conduct of the appellants in use of the imported equipment after import is tantamount to their having exercised the option of redemption and, therefore, they are liable to pay duty, is not tenable as it is only on adjudication that the option is extended by the adjudicating authority and the option could not have been exercised prior to the passing of the impugned order and, therefore, the use of the imported equipment by the appellants; in their Institute cannot amount to their having exercised the option to redeem the goods, which comes at a subsequent stage namely when the impugned order of adjudication is passed. We therefore hold that the duty demand is not sustainable and accordingly, set aside the same, however, if the absence of any challenge to the confiscation and to the imposition penalty, both are sustained."

In this manner, appeal was allowed holding that demand of duty was not legally sustainable and that part of the Order-in-Original passed by the adjudicating authority was set aside.

Not satisfied with the aforesaid outcome, the respondent-Revenue challenged the order by filing appeal before the High Court of Bombay. It was argued by the Department that the moment order of confiscation is passed with option given to the Institute to redeem the goods on payment of fine, the eventuality comtemplated under Section 125(2) of the Act comes into operation and therefore, in the scheme of things, it was permissible for the Department to charge duty as well. It was also argued that when it is found that the Institute had violated the conditions

stipulated in Notification No. 64/83 dated 01.03.1988, the only conclusion would be that duty was payable by the Institute and therefore, the Department was well within its right to demand the duty.

The High Court, after discussing the respective contentions in detail, accepted the submissions of the Department and set aside the order of the CESTAT. The rational given by the High Court is contained in Para 41 of the impugned judgment which interprets the provisions of Sub-section (2) of Section 125 of the Act as well reflects the reasoning adopted by the High Court in support of its view. We deem it appropriate to reproduce the same hereinbelow:-

> **"41. We find it difficult to accept the above interpretation of Section 125 (2). It is well established in law that the taxing statutes have to be construed strictly and unless the literal meaning leads to anomaly or absurdity, the golden rule of literal interpretation should be adhered to. Literal meaning of Section 125(2) is that, whenever the goods liable to be confiscated under the Customs Act are allowed to be redeemed by giving an option to pay fine in lieu of confiscation imposed under Section 125(1), the owner of such goods or the person referred to in section 125(1) shall, in addition to the fine be liable to any duty and charges payable in respect of such goods. In other words, under Section 125(2), the duty payable on the confiscated goods has to be paid on imposition of fine in lieu of confiscation and it is immaterial whether such option is exercised or not."**

As is clear from the above, according to the High Court, whether option under Section 125(2) of the Act is exercised or not, is immaterial.

In order to find out as to whether the High Court is right or CESTAT's interpretation of the provisions of Section 125(2) of the Act is correct, it would be necessary to peep into the said provision along with Section 124 of the Act. These two Sections are worded as follows:

> **"Section 124. Issue of show cause notice before confiscation of goods, etc. - No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person-**
>
> **(a) is given a notice in writing with the prior approval of the officer of customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;**
> **(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and**
> **(c) is given a reasonable opportunity of being heard in the matter:**
>
> **Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may at the request of the person concerned be oral."**

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

It may be seen from the bare reading of the aforesaid Section that under Section 125(1) of the Act, option is given to the importer whose goods are confiscated, to pay the fine in lieu of confiscation and redeem the confiscated goods. Before this action is taken, Show Cause Notice is to be issued under the provision of Section 124 of the said Act. This provision pertains to confiscation of goods and provides procedural safeguards inasmuch as there cannot be any order of confiscating any goods or imposing any penalty on any person without complying with the procedure contained in Section 124. Section 124 mandates issuance of the Show Cause Notice before passing any such order and contemplates two actions: first, relating to confiscating of the goods and second, pertaining to imposition of penalty. Pertinently, this action does not deal with payment of import duty at all.

It is not in dispute that Show Cause Notice in the instant case was issued under Section 124 of the Act. Once such a Show Cause Notice was issued and as can be seen from the proposed action which was contemplated in this provision (as has been taken note of above), it was also confined to confiscation of the imported machinery and imposition of penalty. Nothing was stated about the payment of duty.

However, in spite of the fact that Show Cause Notice was limited to confiscation of the goods and imposition of penalty, the final order which was passed included the direction to pay the customs duty as well. It is clear that when such an action was not contemplated, which even otherwise could not be done while exercising the powers under Section 124 of the Act, in the final order there could not have been direction to pay the duty.

Notwithstanding the aforesaid position, as pointed out above, the Department is taking shelter under the provisions of sub-section (2) of Section 125 of the Act. However, on a plain reading of the said provision, we are of the view that such a provision would not apply in case where option to pay fine in lieu of confiscation is not exercised by the importer. Trigger point is the exercise of a positive option to pay the fine and redeem the confiscated goods. Only when this contingency is met, the duty becomes payable. In the present case, admittedly, such an option was not exercised and the confiscated machinery was not redeemed by the Institute. As a matter of fact, thus, no fine has been paid.

Mr. K. Radhakrishnan, learned senior counsel appearing for the Department, argued that even if an option was not exercised, the moment it was stated in the order of the Commissioner that fine is being "imposed", sub-section (2)

would get attracted. We do not agree with the aforesaid submission of Mr. Radhakrishnan. The order confiscating the goods has already been reproduced above. Insofar as the payment of fine is concerned, only option was given (and that was only course of action which could be visualised under section 125). The order categorically states that "the importer "may" redeem the confiscated goods on payment of fine of Rs.1,00,000 (Rs. One lakh only)"

Indubitably, unless an option is exercised, fine does not become payable. Sub-section (2) of Section 125 uses the expression "imposed" by stating "where any fine in lieu of confiscation of goods is imposed". In Black law dictionary (Tenth edition), the word 'impose' is defined as "To levy or exact (a tax or duty)". Thus, it has to be a levy or exact which is become payable and has to be paid. Likewise, the word 'impose' is defined by Oxford English Dictionary, as relevant for the purpose of the present case, as "Lay or inflict (a tax, duty, charge, obligation, etc.) (*on* or *upon*), esp. forcibly; compel compliance with; force (oneself) *on* or *upon* the attention etc. of."

In view of the above, we cannot agree with the submission of Mr. Radhakrishnan that fine been "imposed" in the present case. The stipulation contained in the adjudicating order was only contingent in nature which contingency would have arisen only on exercising the option

by the importer to pay fine in lieu of confiscation and to redeem the goods.

As already mentioned above, Section 124 deals with confiscation of goods and penalty and does not deal with payment of import duty. No doubt, such a payment of import duty becomes payable by virtue of sub-section (2) of Section 125 but only when condition stipulated in the said provision is fulfilled, namely, fine is paid in lieu of confiscation of goods. When the Department chose to take action under Section 124 of the Act, it should have been alive of the situation that the Noticee may not exercise the option and in such case, duty would not be payable automatically.

It is not that the Department is without any remedy. We have gone through the provisions of notification No. 64/88 dated 01.03.1988. As pointed out above, importer would be exempted from payment of import duty on hospital equipment only when the conditions contained in the said notification are satisfied. Some of the conditions, as pointed out above, are to be fulfilled in future. If that is not done and the importer is found to have violated those conditions, Show Cause Notice could always be given under the said notification on payment of duty, independent of the action which is permissible under Section 124 and Section 125 of the Act. It is also important to mention that under certain circumstances mentioned in the notification, the

importer can be asked to execute a bond as well. In those cases, action can be taken under the said bond when the conditions contained therein are violated. Therefore, if the Department wanted the Institute to pay the duty, which may have become payable, it could have taken independent action; *de hors* Section 124 of the Act, for payment of duty, simultaneously with the notice under Section 124 of the Act or by issuing composite notice for such an action. No doubt, it could have waited for option to be exercised by the Institute under Section 125(1) of the Act as well and in that eventuality, duty would have automatically become payable under Section 125(2) of the Act. But when such an option was not exercised, it could have taken separate and independent action by issuing Show Cause Notice to the effect that the Institute had violated the terms of exemption notification and therefore, was liable to pay duty.

JUDGMENT

What is emphasised is that when in the Show Cause Notice issued under Section 124, nothing was stated about the payment of import duty, there could not have been direction to that effect in the final order Further, insofar as Section 125(2) is concerned, the contingency contained therein did not occur in the present procedure for want of exercise of option to pay fine. We, thus, are of the opinion that the view taken by the CESTAT is correct and the contrary view taken by the High Court in the impugned

judgment is not warranted on the interpretation of Section 125(2) of the Act.

High Court is not correct in observing that it is immaterial whether option under Section 125(2) is exercised or not. We would like to point out that the High Court has referred to the judgment in the case of '*Commissioner of Customs(Import), Mumbai* v. *Jagdish Cancer & Research Centre*' [2001 (6) SCC 483] in support of its conclusion. However, on going through the said judgment, we find that the issue with which we are concerned in the present case did not occur for consideration before the court in that case at all, as is clear from para 12 of the said judgment, which is reproduced below: -

> **"12. Whenever an order confiscating the imported goods is passed, an option, as provided under sub-section (1) of Section 125 of the Customs Act, is to be given to the person to pay fine in lieu of the confiscation and on such an order being passed according to sub-section (2) of Section 125, the person "shall in addition be liable to any duty and charges payable in respect of such goods". A reading of sub-sections (1) and (2) of Section 125 together makes it clear that liability to pay duty arises under sub-section (2) in addition to the fine under sub-section (1). Therefore, where an order is passed for payment of customs duty along with an order of imposition of fine in lieu of confiscation of goods, it shall only be referable to sub-section (2) to Section 125 of the Customs Act. It would not attract Section 28(1) of the Customs Act which covers the cases of duty not levied, short-levied or erroneously refunded, etc. The order for payment of duty under Section 125(2) would be an integral part of proceedings relating to confiscation and consequential orders thereon, on the ground as in this case that the importer had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of**

the Customs Act. A reference may beneficially be made to a decision of this Court reported in *Mohan Meakins Ltd.* v. *CCE* wherein it has been observed in para 6: (SCC p.465)

> **"Therefore, there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or charge payable on such goods apart from the redemption fine that he intends to levy under sub-section (1) of that section."**

In this view of the matter the objection raised by the Centre that Section 28 of the Customs Act would be attracted is not sustainable."

Obviously, the argument raised in that case predicated on Section 28(1) of the Customs Act and plea was that notice was not issued by the "competent officer" and was also beyond the time prescribed under Section 28(1). In that context, the Court dealt with the provisions of Section 125(1) as well as 125(2) and observed that order of payment of duty under Section 125(2) would be an integral part of the proceedings relating to confiscation and consequential orders thereon. This order, however, must be pursuant to a show cause notice and adjudication. The court was not dealing with the question as to whether sub-section (2) of Section 125 would be applicable even when option to pay fine in lieu of confiscation is not exercised.

Accordingly, we allow the appeal and set aside the order passed by the High Court. We make it clear that it would still be open to the Department to take appropriate

independent action against the appellant for payment of import duty, in case it is still within period of limitation.

......, J.
[A.K. SIKRI]

......, J.
[ROHINTON FALI NARIMAN]

New Delhi;
March 24, 2015.

SUPREME COURT OF INDIA
JUDGMENT

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7570 OF 2004

M/S. SWASTIKA ENTERPRISES & ANR. .....APPELLANT(S)

VERSUS

COMMISSIONER OF CUSTOMS & ORS. .....RESPONDENT(S)

W I T H

CIVIL APPEAL NO. 7571 OF 2004

J U D G M E N T

A.K. SIKRI, J.

The question of law which arises in these two appeals is identical which concerns the interpretation that is to be accorded to the provisions of *Kar Vivad Samadhan Scheme* (for short, the 'Scheme') that was introduced under Chapter IV of the Finance (No.2) Act of 1998 (hereinafter referred to as the '1998 Act') and is contained in Sections 86 to 98 of the said Act. In particular, it is Section 95(ii)(b) of the 1998 Act that becomes the focus of the issue and the meaning that is to be assigned to the said clause

would be the determinative of the outcome of the dispute. It has arisen under the following circumstances (facts are taken from Civil Appeal No. 7570 of 2004 for the sake of convenience):

2) The appellants carry on the business, *inter alia*, of importing old ships for the purpose of ship breaking and disposing of the scrap. In 1993, they imported a vessel called *M.V. Pablo Metz* and for clearance of these goods, filed the Bill of Entry under Section 46 of the Customs Act, 1962. Although the appellants contended that the said import was exempted from levy of 'additional customs duty' under an exemption Notification dated February 28, 1993, the Customs authorities, after hearing the appellants, felt it otherwise. An endorsement on the Bill of Entry was made for payment of additional customs duty of ₹52,20,000 in addition to the basic customs duty. The said endorsement was made under Section 47 read with Section 153 of the Customs Act and required the appellants to make payment of the amount assessed within 7 days, failing which interest was chargeable.

3) This levy was challenged by the appellants by means of a writ petition before the High Court of Calcutta, which was disposed of by the High Court with a direction to the appellants to submit a bank guarantee for 50% of the disputed amount and a personal

bond for the balance 50%.

4) It so happened that in the meantime, one M/s. Amar Steel Industries had succeeded in the writ petition filed by the said assessee on the same point as the learned Single Judge of the Calcutta High Court had allowed its writ petition vide order dated April 16, 1993. However, the Revenue had preferred appeal against the said judgment, which was pending before the Division Bench. The Division Bench had passed an interim order dated May 17, 1993 staying the operation of the judgment of the Single Judge and, at the same time, had also given certain directions.

5) When the writ petition of the appellants was taken up for consideration and disposed of by the learned Single Judge on July 20, 1993, the aforesaid events in the case of M/s. Amar Steel Industries were taken cognizance of. Thus, while disposing of the writ petition and directing the appellants to submit bank guarantee of 50% of the disputed amount and a personal bond for the balance 50%, the learned Single Judge observed that he case of the appellants would abide by the result of the appeal of the Revenue in the case of M/s. Amar Steel Industries.

6) During the pendency of the appeal, the Union of India introduced

the Scheme contained in Sections 86 to 98 of the 1998 Act. The Scheme provides for settlement of disputes relating to tax arrears both for direct taxes and indirect taxes. So far as indirect tax is concerned, Section 87(m)(iii) of the 1998 Act defines 'tax arrear' in respect of which the Scheme was to be applied. It reads as follows:

> "(a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making a declaration under section 88; or
>
> (b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show-cause notice issued on or before the 31st day of March 1998 under the enactment but remaining unpaid on the date of making a declaration under section 88, but does not include any demand relating to erroneous refund and where a show-cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seized gods have not been quantified."

7) The Scheme also provided the procedure to take benefit thereof. It required an assessee to make a declaration to the designated authority in respect of tax arrears and pay the amount payable under the Scheme to conclude in proceeding with respect to the recovery of such tax arrears. For the purpose of taxes payable

under indirect tax enactments, the rates at which the settlement would be made are specified in Section 88(f) of the 1998 Act. For our purposes, crucial provision is Section 95(ii) which made the scheme inapplicable, in respect of indirect tax enactments, in the following cases:

> "(a) In a case where prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the declaration under Section 88, in respect of any tax arrears of such case under such indirect tax enactment.
>
> (b) In a case where show-cause notice or a notice of demand under any indirect tax enactment has not be issued.
>
> (c) In a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of declaration made under Section 88."

8) The appellants opted to avail of the Scheme and filed a declaration accordingly. However, the designated authority passed the order dated February 13, 1999 thereon whereby he rejected the declaration on the ground that in the appellants' case, no show-cause notice/demand notice had been issued and, therefore, by virtue of Section 95(ii)(b), the Scheme did not apply.

9) The appellants challenged the order dated February 13, 1999 by filing another writ petition before the High Court. The appellants

also prayed for quashing of Section 95(ii)(b) of the 1998 Act if it was construed as requiring a notice of payment to be issued in any particular form. The learned Single Judge allowed the writ petition by his judgment dated April 19, 1999 holding that the said endorsement on the Bill of Entry constituted sufficient notice of demand to attract the Scheme.

10) The Revenue filed intra-court appeal before the Division Bench questioning the validity of the judgment of the learned Single Judge. In this appeal, the Revenue has succeeded as the Division Bench has reversed the order of the Single Judge by means of its judgment dated August 28, 2003 resulting in dismissal of the writ petition of the appellants and affirming the order of the designated authority rejecting the declaration of the appellants holding that the appellants were not entitled to take the benefit of the Scheme under Section 95(ii) of the 1998 Act. The Division Bench has gone a step further in rendering the impugned judgment as according to it the declaration filed by the appellants was not only hit by clause (b) but clause (c) of Section 95(ii) as well. It has held that neither clause (b) or (c) of Section 95(ii) of the 1998 Act is attracted inasmuch as there was no show-cause notice or notice of demand issued in the instant case. Further, no

SUPREME COURT OF INDIA
JUDGMENT

appeal or reference or writ petition of the respondent was admitted or pending before any authority mentioned in clause (c) above.

This is how the matter has landed up in this Court.

11) From the facts noted above, it is clear that on the import of the old vessel, the appellants had filed Bill of Entry under Section 46 of the Customs Act. The appellants claimed exemption from payment of additional custom duty. This stand of the appellants was not accepted resulting into an endorsement by the Revenue asking the appellants to pay additional customs duty of ₹52,20,000. According to the appellants, this amounts to notice of demand within the meaning of clause (b) of Section 95(ii). It is also the case of the appellants that though technically the writ petition filed by the appellants challenging the aforesaid additional customs duty was disposed of by the High Court on July 20, 1993, the order of Court was categorical, namely, the result of the appellants' case was made dependant upon the outcome of the appeal which was preferred by the Revenue in the case of M/s. Amar Steel Industries and in that sense the matter was still pending.

12) On the aforesaid facts, we have to examine whether the case of

the appellants is covered by clause (b) and/or clause (c) of Section 95(ii) of the 1998 Act, thereby making them ineligible to utilise the benefit of the Scheme.

13) Insofar as clause (b) of Section 95(ii) is concerned, it is the case of the appellants that endorsement on the Bill of Entry to pay additional customs duty amounted to raising demand for payment of duty. On the other hand, the Revenue argues that the demand stands crystallized only when there is a show-cause notice issued under Section 28 of the Customs Act and after following the procedure the adjudicating authority passes an order on the said show-cause notice holding that customs duty or additional customs duty is payable and on that basis notice of demand is issued. It was, thus, argued that since no such steps were taken in the instant case, it cannot be said that any show-cause notice was issued (which was the admitted position) or notice of demand was given. It was also argued that endorsement on Bill of Entry will be regarded, at the most, a provisional assessment.

14) Having regard to the facts of this case, it is difficult to accept the contention of the Revenue predicated on the provisions of Section 28 of the Customs Act. Section 28 deals with recovery of dues not levied or short levied or erroneously refunded or where any

interest payable has not been paid, part paid or erroneously refunded. In such circumstances, within a period of one year from the relevant date, appropriate officer is competent to serve a notice on the person chargeable with the duty or interest which has not been so levied or which has been short levied or short paid or to whom the refund is has erroneously been made, requiring him to show-cause why he should not pay the amount specified in the notice. Therefore, the contingency of issuing show-cause notice under this provision would arise where the duty has not been paid either on the ground that it was not levied at all or was short levied. Another reason for invoking the provision would be where duty has been erroneously refunded. Such a situation did not arise in the instant case. Moreover, we have to examine the mater in the light of the provision of this Scheme. In this context, we would like to refer to the judgment of this Court in ***Union of India*** v. ***Nitdip Textiles Processors***[1] wherein it is held that under the following circumstances the amount payable shall be treated as *'tax arrears'*:

(i) where tax arrears are quantified but not paid as on 31.03.1998, and

(ii) where a demand or show-cause notice has been issued before

1 (2012) 1 SCC 226

31.03.1998.

15) Thus, it becomes abundantly clear that the *'tax arrear'* had, in any event, been quantified and had not been paid as on March 31, 1998. Moreover, when the Bill of Entry was filed by the appellants, after examining the matter, endorsement was made thereupon that additional duty in the sum of ₹52,20,000 is payable. The appellants contested the same. The question is whether it amounts to notice of demand. In this behalf, we have to keep in mind that the 1998 Act does not contain any specific provision prescribing the manner in which customs duty would be assessed or demanded in respect of goods imported under a Bill of Entry for home consumption. An endorsement on the Bill of Entry and return thereof to the importer asking the importer to pay the amount therein would amount to issuing a demand. On our specific query to the learned counsel for the Revenue that if the importer does not deposit the amount within the specified time on receiving the endorsement on the Bill of Entry, whether interest thereupon shall start accruing, the learned counsel for the Revenue was candid in answering the said question in the affirmative. In fact, that is the legal position contained in Section 46(1) read with Section 47(2) of the Customs Act. Under Section

46(1) (as it then stood), there was an obligation on the part of the importer to present a Bill of Entry in such cases. Section 47(2) of the Customs Act provides that in case there is a failure to pay the import duty within a specified period from the date on which Bill of Entry is returned to the importer, it would attract interest until the date of demand. At the relevant time, the demand was required to be made within 7 days. Otherwise, interest was payable, which was to be fixed between 20% and 30% per annum. It may be mentioned that fundamentals of this provision still remain intact although rate of interest and the period within which the demand is to be paid has been amended from time to time {as per the amended provision which prevails now, the only difference is that the demand is to be met within 2 days, excluding holidays, failing which interest payable is at a rate between 10% and 36% per annum}. Section 153 of the 1998 Act also becomes relevant as it clarifies that any order, decision, summons or notice under the Act may be served by tendering it to the person or to whom it is intended or to his agent. In the instant case, after the endorsement on Bill of Entry, it was admittedly served upon the appellants in the manner specified under Section 153.

16) In ***Renuka Datla (Dr.)*** v. ***Commissioner of Income Tax,***

Karnataka[2], this Court widely interpreted the term *'total tax determined and payable'* appearing in Section 87(f) of the Scheme holding that no particular process of determination is contemplated. It has to be held that on principle, same meaning is to be accorded to the term *'determined as due or payable'* in Section 87(m)(ii)(a) of the Scheme.

17) There is another manner of looking into the matter. Immediately after receiving the Bill of Entry with the endorsement to pay the amount of ₹52,20,000, the appellants filed the writ petition in the High Court disputing the same with the contention that it was not payable. Obviously, it was a demand raised by way of endorsement on the Bill of Entry that prompted the appellants to challenge the same by filing the writ petition. The Revenue never took the plea that the case was premature in the sense that no demand had been crystallized in the absence of show-cause notice or adjudication order and, therefore, such a writ petition was not competent. Thus, both the parties understood that endorsement on Bill of Entry and service thereof upon the appellants was a notice of demand.

18) Even, with reference to the provisions of the Scheme, this

2 (2003) 2 SCC 19

endorsement shall have to be treated as notice of demand. We have already reproduced the provisions of Section 87(m) of the 1998 Act which defines *'tax arrears'*. It, *inter alia*, includes the amount of dues remaining unpaid as on the date of making a declaration under Section 88 of the 1998 Act. Indubitably, there was an amount of duty payable, which had remained unpaid on the date of making declaration by the appellants under Section 88. It would be absurd to hold that though there is a tax arrear, as the appellants were liable to pay the tax/duty demanded, and still the Scheme is inapplicable.

19) It would also be interesting to note that the Division Bench of the High Court in the impugned judgment has itself recorded that *'duty was assessed'* on the Bill of Entry. This is so stated by the Revenue in the counter affidavit filed in the instant proceedings as well. Therefore, endorsement on the Bill of Entry is treated even by the High Court as well as the Department as the assessment.

20) It is necessary to keep in mind the purpose and the objective with which the Scheme was introduced. It pertained to the *'tax arrears'* which was due and not paid as on March 31, 1998 and in order to recover such tax arrears expeditiously without undergoing any legal hassles, the Scheme was promulgated.

Therefore, when it is found in the broader sense that there were tax arrears and the appellants were called upon to pay the said tax, mischief contained in Section 95(ii)(b) would not be attracted.

21) We now advert to the second limb of the matter, viz., whether the case would come within the embargo set out in clause (c). From the facts noted above, it is clear that when the High Court had disposed of the first writ petition of the appellants on July 20, 1993, it was explicit in making categorical remarks that the fate of the appellants' case would abide by the result of the appeal filed by the Revenue in a similar case of another assessee, namely, M/s. Amar Steel Industries. Thus, the appellants' challenge to the substantive levy of the additional duty was disposed of subject to the result of the Revenue's appeal in the case of M/s. Amar Steel Industries. Admittedly, the appeal of M/s. Amar Steel Industries, was still pending before the Division Bench when the Scheme was promulgated by the Legislature and the declaration was filed by the appellants. The said assessee has subsequently been permitted to avail of the Scheme. Therefore, *prima facie* it appears that mischief of clause (c) is not attracted. In any case it is not necessary to go into this aspect in detail, for another simple reason it needs to be remarked that the Revenue had not rejected

SUPREME COURT OF INDIA
JUDGMENT

the declarations filed by the appellants on this ground. It is the Division Bench of the High Court, in the impugned judgment, which has held against the appellants on this account. It is also very pertinent to point out that in the counter affidavit filed by the Revenue in the instant appeal, the Revenue appears to have given up this contention as the impugned order of the High Court is not defended on this ground at all.

22) The aforesaid discussion leads us to conclude that the impugned judgment of the High Court is erroneous and warrants to be set aside. We, accordingly, allow these appeals, set aside the impugned order and hold that the appellants shall be entitled to the benefit of *Kar Vivad Samadhan Scheme*.

No costs.

JUDGMENT

.....J.
(A.K. SIKRI)

.....J.
(ROHINTON FALI NARIMAN)

NEW DELHI;
AUGUST 04, 2015.

ITEM NO.1A COURT NO.12 SECTION III
(for jt.)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 7570/2004

M/S. SWASTIKA ENTERPRISES & ANR. Appellant(s)

VERSUS

COMMNR. OF CUSTOMS, KOLKATA & ORS. Respondent(s)
WITH
C.A. No. 7571/2004

Date : 04/08/2015 These appeals were called on for judgment today.

For Appellant(s)
Ms. Ruby Singh Ahuja,Adv.

Mr. Ashok Kumar Juneja,Adv.
Mr. Chand Qureshi,Adv.
Mr. R. N. Keshwani,Adv.

For Respondent(s) Mr. Sanjai Kumar Pathak,Adv.for
Mr. B. Krishna Prasad,Adv.

Hon'ble Mr. Justice A.K.Sikri pronounced the judgment of this Court comprising of His Lordship and Hon'ble Mr. Justice Rohinton Fali Nariman.

The appeals are allowed in terms of the signed judgment.

No costs.

(SUMAN WADHWA) **(SUMAN JAIN)**
AR-cum-PS **COURT MASTER**

Signed Reportable judgment is placed on the file.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 4294-4295 OF 2002

COMMISSIONER OF CUSTOMS — APPELLANT

VERSUS

SAYED ALI & ANR. — RESPONDENTS

WITH

[CIVIL APPEAL NOS.4603-4604 of 2005]

J U D G M E N T

D.K. JAIN, J.:

1. Challenge in these civil appeals, filed under Section 130E of the Customs Act, 1962 (for short "the Act"), is to the orders dated 1st October, 2001 and 4th January, 2005 passed by the Customs, Excise & Gold (Control) Appellate Tribunal (for short "the CEGAT") and the Customs, Excise & Service Tax Appellate Tribunal (for short "the CESTAT") respectively. In the first set of appeals (Nos. 4294-4295 of 2002), the CEGAT has held that the Commissioner of Customs (Preventive), Mumbai, not being a "proper officer" as defined in Section 2(34) of the Act, did not have jurisdiction to issue show cause notice in terms of Section 28 of the Act.

However, in the second set of appeals (Nos. 4603-4604 of 2005), the CESTAT has, to the contrary, held that the Commissioner of Customs (Preventive), Mumbai had jurisdiction to issue notice under Section 28 of the Act.

2. Since the question of law arising in all the appeals is similar, these are being disposed of by this common judgment. However, to appreciate the controversy, facts in C.A. Nos. 4294-4295 of 2002 are adverted to. These are:

Respondent No. 1 is a partner in respondent No. 2 firm viz. M/s. Handloom Carpet, which is engaged in the business of carpet manufacture/export. Respondent No. 2 was charged with misusing the Export Pass Book scheme by selling goods cleared duty free in the open market or selling the pass book on premium in violation of the ITC restriction imposed on such sale. Investigations in the matter were conducted by the Marine and Preventive Wing of the Customs. On 28th August, 1991, the Assistant Collector of Customs (Preventive), Mumbai, issued to the respondents a show cause notice, alleging violation of the provisions of Section 111(d) of the Act. On 3rd February, 1993, the same officer adjudicated upon the said show cause notice, confirming the demands raised in the show cause notice.

SUPREME COURT OF INDIA
JUDGMENT

3. Being aggrieved, the respondents preferred an appeal before the Collector of Customs (Appeals), who vide order dated 14th December, 1993, allowed the appeal holding that since the matter involved demand of duty beyond a period of six months, the show cause notice was required to be issued by the Collector, and not by the Assistant Collector. Nevertheless, the Collector (Appeals) granted liberty to the department to re-adjudicate the case by issuing a proper show cause notice.

4. Accordingly, the Collector of Customs (Preventive) issued show cause notice dated 16th April, 1994 asking the respondents to show cause as to why the goods under seizure valued at `1,04,118.52/- should not be confiscated, and customs duty amounting to `5,07,274/- be not levied in terms of Section 28(1) of the Act, by invoking the extended period of limitation. Penalties under Sections 112(a) and (b)(i) and (ii) of the Act were also proposed.

5. In reply to the show cause notice, the jurisdiction of the Collector of Customs (Preventive) was questioned on the ground that the jurisdiction of a Commissioner by virtue of Notification No. 251/83 being more specific and limited in nature, the said notification will prevail over Notification No.250/83. Vide order dated 19th August, 1996, the

SUPREME COURT OF INDIA
JUDGMENT

Collector of Customs (Preventive) rejected the objections regarding his jurisdiction, holding thus:

> "It is not disputed by the parties that by virtue of notification No. 250/83 the commissioner of customs (preventive) Mumbai is appointed as Commissioner of Customs in the areas comprising Districts of Mumbai, Thane and Kolaba and a concurrent jurisdiction is thus vested in respect of Mumbai port also. What is being contended is that the jurisdiction of commissioner of customs, Mumbai under Notification No. 251/83 is more specific and limited. In this regard it is relevant to refer to the definition of smuggling under the provisions of customs Act, 1962. Under the Act Smuggling is defined as any act or omission which renders the goods to confiscation under the provisions of the Act. In this case M/s handloom carpet manufacturer (sic) are charged with trafficking of the goods imported and cleared only free in violation of the provisions of notification No. 117/88 dated 30-3-1988 and fabrication of documents to show receipt and consumption of the same in their factory. The goods imported and cleared duty free were thus rendered liable for confiscation under the provisions of the customs Act, 1962 and the customs (preventive) Commisionerate created for the purpose of prevention of smuggling and detention of cases of smuggling including commercial frauds is thus (sic) competent to investigate and adjudicate the case."

JUDGMENT

The Collector confirmed the demand of duty of ` 5,07,274/-under Section 28(1) of the Act. He also ordered confiscation of two consignments of dyes sulphur blue and sulphur blue green valued at ` 1,34,118.52/-, and imposed a redemption fine of ` 1,50,000/-.

6. Aggrieved, the respondents preferred appeals before the CEGAT. As afore-mentioned, accepting the preliminary objection of the respondents

regarding jurisdiction of the Collector (Preventive), the CEGAT has, vide the impugned order, allowed the appeals, observing that:

> "it is very clear that the Commissioner of Customs (Preventive) does not have jurisdiction to issue the impugned show cause notice and in view thereof he could not have the jurisdiction to adjudicate the matter when imports have taken place at Bombay Customs House."

7. At the sake of repetition, it may be noted that although the facts obtaining in C.A. Nos. 4603-4604 of 2005 were similar to those in C.A. Nos. 4294-4295 of 2002, but, in the former case, following the decision of its larger bench in ***Konia Trading Co.*** *Vs.* ***Commissioner of Customs, Jaipur***[1]**,** the CESTAT while upholding the issue of show cause notice by the Collector of Customs (Preventive) under Section 28 of the Act, set aside the order of adjudication passed by the said officer with a direction that the issues be determined afresh by the jurisdictional Collector of Customs who had earlier assessed the bill of entry in question at Bombay Port.

8. Hence, the present cross appeals by the revenue and the importers. At the very outset, we may clarify that these appeals are confined only to the question of validity of the demands raised by virtue of re-assessment orders passed by the Collector of Customs (Preventive) Mumbai, pursuant to the issue of show cause notices under Section 28 of the Act.

[1] 2004 (170) E.L.T. 51 (Tri.-LB)

For the sake of convenience, hereinafter, both the CESTAT and CEGAT are referred to as "the Tribunal".

9. Mr. Harish Chander, learned senior counsel appearing on behalf of the Revenue in one set of appeals, contended that once the Commissioner (Preventive) had been appointed as Collector of Customs (Preventive), Bombay by virtue of the Notification Nos. 250/83 and 251/83, issued by the Central Government under Section 4 of the Act, the former became "proper officer" in terms of Section 2(34) of the Act, and was competent to issue notice under Section 28 of the Act as the goods were cleared for home consumption in Bombay. In support of the proposition that an officer of Customs who has been assigned certain functions, which are to be performed under the Act is a "proper officer" and such assignment can be done by the Board or the Commissioner of Customs, reliance was placed on the decision of this court in ***Union of India & Ors.*** *Vs.* ***Ram Narain Bishwanath & Ors.***[2] as also on a larger bench decision of the Tribunal in ***Konia Trading Co.*** (supra) and another decision of the Tribunal in ***Manohar Bros. (Capacitors)*** *Vs.* ***Collector of Customs-II,***

[2] (1998) 9 SCC 285

Bombay*[3]*, the latter having attained finality on the dismissal of revenue's appeal by this Court (See : ***Collector*** *Vs.* ***Manohar Bros. (Capacitors)***[4]).

10. *Per contra,* Mr. Joseph Vellapally, learned senior counsel appearing on behalf of the respondents in C.A. Nos. 4294-4295 of 2002, contended that the statutory powers conferred under Section 28 of the Act must be exercised by an officer of Customs, who has been assigned those functions either by the Central Board of Excise and Customs or by the jurisdictional Commissioner of Customs (Imports). As the Commissioner (Preventive) has not been appointed as a "proper officer" for the purposes of assessment or re-assessment, nor assigned any functions under Section 28 of the Act or under any other Section related to assessment of goods entered for home consumption, he was not competent to issue notice under Section 28 of the Act, argued the learned counsel. It was also urged that mere appointment of a person as an officer of Customs with territorial jurisdiction over the Mumbai port under Section 4 of the Act, does not *ipso facto* confer authority on him to exercise the statutory powers entrusted to proper officers, as under the Act, while all proper officers must be 'officers of Customs', all 'officers of Customs' are not "proper officers". In support of the proposition, learned counsel heavily

[3] 1998 (98) E.L.T. 821 (Tri)
[4] 2004 (166) E.L.T. A152 (S.C.)

relied on a decision of the Karnataka High Court in ***Devilog Systems India*** *Vs.* ***Collector of Customs, Bangalore***[5] and orders of the Tribunal in ***Orient Arts & Crafts*** *Vs.* ***Commissioner of Customs (Prev.), Mumbai***[6] and ***Informatika Software (P) Ltd. & Anr.*** *Vs.* ***Commissioner of Customs (P), Calcutta***[7]. Learned counsel submitted that the use of the expression "proper officer" in contradistinction to "officer of customs" in certain Sections in the Act makes it clear that the two expressions cannot be used interchangeably. Learned counsel contended that if the Revenue's contention that all "officers of customs" are "proper officers" is accepted, it would render Section 2(34) otiose, and would amount to re-writing the Act, leading to administrative anarchy. In support, reliance was placed on the decision of this Court in ***The Commissioner, Sales Tax, U.P.*** *Vs.* ***M/s. Suraj Prasad Gouri Shankar***[8]**.**

SUPREME COURT OF INDIA
JUDGMENT

11. Explaining the procedure for clearance of imported goods for home consumption, learned counsel submitted that the Act clearly delineates the functions to be performed by the Commissioner of Customs (Imports) and the Commissioner (Preventive). According to the learned counsel under Section 30 of the Act, the owner of a vessel, on arrival or prior to

[5] 1995 (76) E.L.T. 520 (Kar.)
[6] 2003 (155) E.L.T .168 (Tri-Mum)
[7] 1997 (73) ECR 348 (Tri.-Kolkata)
[8] (1974) 3 SCC 230

arrival, is required to file an Import General Manifest ("IGM") with the proper officer i.e. the Commissioner of Customs (Imports), the Rummaging and Intelligence Wing of the Preventive Division checks the conveyance to ensure that all goods in the vessel are mentioned in the IGM; then, in terms of Section 31 of the Act, an order allowing "entry inwards" is granted by the proper officer, i.e. Commissioner of Customs (Imports); the goods are unloaded under the supervision of the Preventive Officer in terms of Section 34; and then, the importer files a bill of entry, which is assessed by the "proper officer" i.e. Commissioner (Imports) who, on payment of all duties by the importer, issues an order allowing clearance of goods for home consumption under Section 47 of the Act. It was thus, asserted that once goods are manifested, the jurisdiction to pass any order of assessment or re-assessment vests in the Collector of Customs (Imports) and not in the Collector of Customs (Preventive). To bring home the point, reference was made to a decision of the Calcutta High Court in ***Sharad Himatlal Daftary*** *Vs.* ***Collector of Customs***[9]. It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports) Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer

[9] 1988 (36) E.L.T. 468 (Cal.)

which was duly executed, undertaking the obligation of export. Learned counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).

12. Before adverting to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that:

> **"28. Notice for payment of duties, interest etc.** — (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may, -
>
> (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;
>
> (b) in any other case, within six months,
>
> from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

> **Provided** that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.

It is plain from the provision that the "proper officer" being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the "proper officer".

13. Section 2(34) of the Act defines a "proper officer", thus:

> " **2. Definitions.-**……
> (34)"proper officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;

SUPREME COURT OF INDIA
JUDGMENT

It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be "proper officers" in terms of Section 2(34) of the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an "officer of customs" is the "proper officer".

14. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions. Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs

SUPREME COURT OF INDIA
JUDGMENT

(Imports) or the Preventive Collectorate, would be "proper officers". In our view therefore, it is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.

15. In this behalf, our attention was also invited by Mr. Joseph Vellapally to standing order No. 35/89 dated 12th July, 1989, issued by a Collector of Customs, holding dual charges of Collector of Customs, Calcutta and Collector of Customs (Preventive) as also to certain notifications issued by the Board under Section 2 (34) of the Act clearly defining the functions of the Customs House and the Preventive Collectorate.

16. In the present cases, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Imports) Mumbai, the same having been assessed and clearance for home consumption having been allowed by the proper officer on importers executing bond, undertaking the obligation of export, in our opinion, the Collector of Customs (Preventive), not being a "proper officer" within the meaning of Section 2(34) of the Act, was not competent to issue show cause notice for re-

SUPREME COURT OF INDIA
JUDGMENT

assessment under Section 28 of the Act. Nothing has been brought on record to show that the Collector of Customs (Preventive), who had issued the show cause notices was assigned the functions under Section 28 of the Act as "proper officer" either by the Board or the Collector/Commissioner of Customs. We are convinced that Notifications No. 250-Cus and 251-Cus., both dated 27th August, 1983, issued by the Central Government in exercise of the powers conferred by sub-section (1) of the Section 4 of the Act, appointing Collector of Customs (Preventive) etc. to be the Collector of Customs for Bombay, Thane and Kolaba Districts in the State of Maharashtra did not *ipso facto* confer jurisdiction on him to exercise power entrusted to the "proper officers" for the purpose of Section 28 of the Act. In that view of the matter, we do not find any substance in the contention of Mr. V. Shekhar, learned Senior Counsel, appearing for the revenue in the second set of appeals, that the source of power to act as a "proper officer" is Sections 4 and 5 of the Act and not sub-section 34 of Section 2 of the Act. The said sections merely authorize the Board to appoint officers of Customs and confer on them the powers and duties to be exercised/discharged by them, but for the purpose of Section 28 of the Act, an officer of customs has to be designated as "proper officer" by assigning the function of levy

SUPREME COURT OF INDIA
JUDGMENT

and collection of duty, by the Board or the Commissioner of Customs. The argument is rejected accordingly. Similarly, revenue's reliance on the decision of this court in ***Ram Narain Bishwanath & Ors.*** (supra) is clearly misplaced. In that case the issue for determination was that when goods imported and cleared at Paradip Port (Orissa State) were seized by the Customs authorities in West Bengal on the allegation that these had been imported on the strength of fictitious licences, whether the customs authorities at Paradip or West Bengal will have the jurisdiction to initiate adjudication proceedings. By a short order it was held that it was for the customs authorities at Paradip to initiate proceedings against the importer. Apart from the fact that none of the statutory provisions were considered in that case, the issue arising for consideration in the present appeals was not the subject matter therein. Thus, the said decision is of no avail to the revenue.

SUPREME COURT OF INDIA
JUDGMENT

17. For the aforegoing reasons, we do not find any merit in the stand of the revenue. Resultantly, C.A. Nos. 4294-4295 of 2002, being devoid of any merit, are dismissed, while C.A. Nos. 4603-4604 of 2005 are allowed. Before parting with the cases, we once again clarify that this judgment shall not preclude the revenue from initiating any proceedings against the

importers for recovery of duty and other charges payable in respect of the subject goods, if permissible under the Act.

18. However, in the facts and circumstances of these cases, there shall be no order as to costs.

.....

(D.K. JAIN, J.)

.....

(H.L. DATTU, J.)

NEW DELHI;
FEBRUARY 18, 2011.
RS

SUPREME COURT OF INDIA
JUDGMENT

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1827 OF 2018

M/S CANON INDIA PRIVATE LIMITED .... APPELLANT(S)

VERSUS

COMMISSIONER OF CUSTOMS .... RESPONDENT(S)

WITH

CIVIL APPEAL NO. 1875 OF 2018

WITH

CIVIL APPEAL NO.1832 OF 2018

WITH

CIVIL APPEAL NO.3213 OF 2018

J U D G M E N T

S.A. BOBDE, CJI.

1. This batch of statutory appeals (being Civil Appeal Nos. 1827/2018, 1875/2018, 1832/2018 and 3213/2018) under Section 130E of the Customs Act, 1962 arises from a common final order of the Central Excise and Service Tax Appellate Tribunal ('CESTAT') dated 19th December 2017 ('impugned order').

Signature Not Verified
Digitally signed by Sanjay Kumar
Date: 2024.03.09 16:50:07 IST
Reason:

2. Vide the impugned order an exemption of basic customs duty accorded to the Digital Still Image Video

Cameras (‘DSIC’) imported by the Nikon India Pvt. Ltd, Canon India Pvt. Ltd., Sony India Pvt. Ltd. and Samsung India Electronics Pvt. Ltd (hereinafter referred to as ‘appellants’ or ‘importers’), in terms of exemption Notification No. 20/2005 dated 01.03.2005 (as amended by Notification No. 15/2012 dated 17.03.2012) came to be denied and the consequential confiscation of goods, demand of interest and imposition of penalty as provided for under various sections of the Customs Act, 1962, was upheld by the CESTAT.

3. Since the appeals involve common questions, these are being decided together and for sake of convenience we shall be referring to the events which took place in the case of Nikon.

4. The main issue is whether after clearance of the cameras on the basis that they were exempted from levy of basic Customs duty under Notification No.15/2012, the proceedings initiated by the Directorate of Revenue Intelligence for recovery of duty not paid under Section 28(4) of the Customs Act, 1962 are valid in law.

Exemption Notification

5. Exemption to Digital Still Image Video Cameras was issued on 1.3.2005 vide Notification No.25/2005 (and amended vide Notification No.15/2012 on 17.3.2012).

Arrival and decision to clear the goods on payment of nil duty

6. The consignment of cameras arrived at Delhi on 15.3.2012. The importer submitted a Bill of Entry to the Customs Authorities on 20.3.2012. Along with the Bill of Entry, the importer submitted a covering letter and literature containing specifications of the cameras. After verification of the Bill of Entry by the Inspector and the Superintendent, the importer requested the Deputy Commissioner of Customs for a first check on 21.3.2012. The Customs Authorities checked the goods on 24.3.2012. They compared the goods with the description given in the literature and took a decision to clear the goods on 24.3.2012, as being exempt from duty in terms of the Notification No.15/2012 which was issued on 17.3.2012.

Recovery of Duties

7. On 19.8.2014, a show cause notice was issued under Section 28 (4) of the Customs Act, 1962[1] alleging that the Customs Authorities had been induced to clear the cameras by wilful mis-statement and suppression of facts about the cameras. In particular; that the cameras were capable of recording more than a single video sequence of less than 30 minutes. In other words, after one sequence of less than 30 minutes was recorded, the camera had sufficient memory (extendable) to record more such sequences.

8. It is significant to note that while the decision to clear the goods for import because they were exempted from customs duties under Notification No.15/2012, was taken by Deputy Commissioner, Appraisal Group, Delhi Air Cargo,

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1 Section 28 (4) Where any duty has not been [levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, -

(a) collusion; or
(b) any wilful mis-statement; or
(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been [so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

the show cause notice was issued by the Additional Director General, Directorate of Revenue Intelligence.

9. The question that arises is whether the Directorate of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted. It is necessary that the answer must flow from the power conferred by the statute i.e. under Section 28(4) of the Act. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in **Consolidated Coffee Ltd. and Another** vs. **Coffee Board, Bangalore**[2] has held:-

> *"**14**. ...Secondly, and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'any*

2 (1980) 3 SCC 358

agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."

In **Shri Ishar Alloy Steels Ltd.** vs. **Jayaswals Neco Ltd.**[3] has held:-

*"**9.** ...'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person."*

10. There are only two articles '*a (*or *an)*' and '*the'*. `A (or an)' is known as the Indefinite Article because it does not specifically refer to a particular person or thing. On the other hand, 'the' is called the Definite Article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28 (4), it could have used the word 'any'.

11. Parliament has employed the article "the" not accidently but with the intention to designate the proper officer who had assessed the goods at the time of

3 (2001) 3 SCC 609

clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2 (2) (c) of the Customs Act, 1962[4].

12. The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first

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4 Section 2. Definitions – In this Act, unless the context otherwise requires, -

…

(2) "assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to –

(a) …

(b) …

(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;

instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.

13. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.

14. It is well known that when a statute directs that the things be done in a certain way, it must be done in that

way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28 (4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake re-assessment [which is involved in Section 28 (4)].

15. It is obvious that the re-assessment and recovery of duties i.e. contemplated by Section 28(4) is by the same authority and not by any superior authority such as

Appellate or Revisional Authority. It is, therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside.

16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the proper officer under Section 6 of the Customs Act. The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act.

17. Shri Sanjay Jain, learned Additional Solicitor General, relied on a Notification No.17/2002 - Customs (NT) dated 7.3.2002 to show all Additional Directors General of the DRI have been appointed as Commissioners of Customs. At the

relevant time, the Central Government was the appropriate authority to issue such a notification. This notification shows that all Additional Directors General, mentioned in Column (2), are appointed as Commissioners of Customs.

18. The next step is to see whether an Additional Director General of the DRI who has been appointed as an officer of Customs, under the notification dated 7.3.2002, has been entrusted with the functions under Section 28 as a proper officer under the Customs Act. In support of the contention that he has been so entrusted with the functions of a proper officer under Section 28 of the Customs Act, Shri Sanjay Jain, learned Additional Solicitor General relied on a Notification No.40/2012 dated 2.5.2012 issued by the Central Board of Excise and Customs. The notification confers various functions referred to in Column (3) of the notification under the Customs Act on officers referred to in Column (2). The relevant part of the notification reads as follows:-

"[To be published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii)]

Government of India
Ministry of Finance
(Department of Revenue)

Notification No.40/2012-Customs (N.T.)

New Delhi, dated the 2nd May, 2012

S.O. (E). – In exercise of the powers conferred by sub-section (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs, hereby assigns the officers and above the rank of officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the Customs Act, 1962, given in the corresponding entry in Column (3) of the said Table: -

Sl. No.	***Designation of the officers***	***Functions under Section of the Customs Act, 1962***
(1)	*(2)*	*(3)*
1.	*Commissioner of Customs*	*(i) Section 33*
2.	*Additional Commissioner or Joint Commissioner of Customs*	*(i) Sub-section (5) of section 46; and* *(ii) Section 149*
3.	*Deputy Commissioner or Assistant Commissioner of Customs and Central Excise*	*(i) .....* *(ii) .....* *(iii) .....* *(iv) .....* *(v) .....* *(vi) Section 28; .....*

19. It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under Section 28, vide Sl. No.3 above. By reason of the fact that the functions are assigned to officers referred to in Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform

the function under Section 28 of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-Section (34) of Section 2 of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows:-

> *"**2. Definitions –** In this Act, unless the context otherwise requires, -*
>
> *...*
>
> *(34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the [Principal Commissioner of Customs or Commissioner of Customs]. "*

20. Section 6 is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:-

> *"**6. Entrustment of functions of Board and customs officers on certain other officers –** The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any*

functions of the Board or any officer of customs under this Act."

21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government. The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2 (34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.

22. In the above context, it would be useful to refer to the decision of this Court in the case of **Commissioner of Customs** vs. **Sayed Ali and Another**[5] wherein the proper officer in respect of the jurisdictional area was considered. The consideration made is as hereunder:-

> *"**16.** It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports), Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer which was duly executed undertaking the obligation of export. The learned counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance, etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).*
>
> ***17.** Before adverting to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that:*
>
> > *"**28. Notice for payment of duties, interest, etc. –** (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-*
> >
> > > *(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research*

5 (2011) 3 SCC 537

or charitable institution or hospital, within one year;

(b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words 'one year' and 'six months', the words 'five years' were substituted."

18. *It is plain from the provision that the 'proper officer' being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by the Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the 'proper officer'.*

19. *Section 2(34) of the Act defines a 'proper officer', thus:*

> ***'2. Definitions**.-*
>
> *(34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;'*

> *It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be 'proper officers' in terms of Section 2(34) the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an 'officer of customs' is the 'proper officer'.*
>
> ***20.** From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice undersection 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions."*

23. We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set-aside and the ensuing demands are also set-aside.

Limitation

24. It is strictly not necessary to decide the question on limitation but we intend to do so since parties have elaborately relied on disclosures made before the Customs officer on that issue. The show cause notice was issued on 19.8.2014. Under Section 28(4), such a show cause notice must be issued within five years from the relevant date which means the date on which the goods were assessed and cleared, in case the duty was not paid or short paid or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts. It is, therefore, necessary for us to examine whether there is suppression of facts.

25. The case was presented for scrutiny of the Customs officers on 20.3.2012 along with the Bill of Entry and literature consisting of specifications of the cameras.

26. The Bill of Entry made a statement that these are Digital Still Image Video Camera packed for retail sale (COOLPIX S4300, S2600 etc.). This was supported by literature which clearly stated that "… the single maximum

recording time for a single movie is 29 minutes, even when there is sufficient free space on the memory card for longer recording". This meant that even if the camera could record more than 29 minutes when it had sufficient free space (which depends on the capacity of the card providing extended memory) the maximum time for which it could record a single sequence was 29 minutes.

27. In other words, the camera could record more than one single sequence but not 30 minutes and more in a single sequence. It is obvious that the Deputy Commissioner took the view that the camera complied with the requirement of exemption i.e. it could only record up to less than 30 minutes in a single sequence. At this juncture, it is not relevant to see whether the Deputy Commissioner was right or not in taking this decision to clear the goods as exempted goods. What is important is to see whether the importers made any wilful mis-statement or suppression of facts and induced the delivery of goods.

28. It is pertinent to note that the importer had asked for a first check and had shown the cameras and the cameras were offered on 20.3.2012 along with Bill of Entry and

literature detailing specifications of models. The camera could have been operated to see the length of time of the single sequence and whether recording of the single sequence exhausts the total memory of the camera (including extended memory) and whether the cameras were eligible for exemption. It is difficult in such circumstances to infer that there was any wilful mis-statement of facts. In these circumstances, it must, therefore, follow that the extended period of limitation of five years was not available to any authority to re-open under Section 28(4).

29. In this view of the matter, we consider it unnecessary to answer the issue whether the cameras that were cleared on the basis that they were exempted from customs duty under Exemption Notification No.15/2012 were in fact eligible for the exemption or not. The goods must be taken to have been validly cleared by the Customs officer.

30. We might note that cameras with similar specifications have been treated as exempted under the Explanatory Note to the Combined Nomenclature of the European communities. It is important to add that the

same cameras have been considered to be eligible for exemption before 17.03.2012 and after 30.04.2015 under the exemption Notifications issued under the Customs Act read with Chapter 84 & 85 (First Schedule) of Customs Tariff Act, 1975.

31. In the result, these appeals are allowed. The common order dated 19.12.2017 passed by the CESTAT, New Delhi in Customs Appeal Nos. 50098, 50099, 50100 and 50280/2017 is set aside. Consequently, the impugned demand notices issued against all the three appellants herein are also set aside.

32. Parties to bear their own costs.

.....CJI.
[S. A. BOBDE]

.....J.
[A. S. BOPANNA]

.....J.
[V. RAMASUBRAMANIAN]

MARCH 9, 2021
NEW DELHI

2024 INSC 854

REPORTABLE

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

REVIEW PETITION NO. 400 OF 2021

IN

CIVIL APPEAL NO. 1827 OF 2018

COMMISSIONER OF CUSTOMS **...PETITIONER**

VERSUS

M/S CANON INDIA PVT. LTD. **...RESPONDENT**

WITH

C.A. No. 6142 OF 2019

C.A. No. 6161 OF 2019

C.A. No. 6160 OF 2019

C.A. No. 6159 OF 2019

C.A. No. 8828 OF 2016

C.A. No. 6157 OF 2019

Signature Not Verified
Digitally signed by SANJAY KUMAR
Date: 2024.11.07 17:37:44 IST
Reason:

C.A. No. 6158 OF 2019

C.A. No. 9313 OF 2016

C.A. No. 9406 OF 2016

C.A. No. 6153 OF 2019

C.A. No. 9315 OF 2016

C.A. No. 10140 OF 2016

C.A. No. 9436 OF 2016

C.A. No. 9317 OF 2016

C.A. No. 10012 OF 2016

C.A. No. 10739 OF 2016

C.A. No. 10422 OF 2016

C.A. No. 10421 OF 2016

C.A. No. 10991 OF 2016

C.A. No. 10952 OF 2016

C.A. No. 12345 OF 2016

C.A. No. 6149-6152 OF 2019

C.A. No. 430 OF 2017

C.A. No. 8749 OF 2016

C.A. No. 6127 OF 2019

C.A. No. 8752 OF 2017

C.A. No. 6139-6140 OF 2019

C.A. No. 6143 OF 2019

C.A. No. 6148 OF 2019

C.A. No. 6248 OF 2019

C.A. No. 6156 OF 2019

C.A. No. 7292 OF 2019

C.A. No. 2666-2695 OF 2020

C.A. No. 1738 OF 2021

R.P.(C) No. 402 OF 2021 in C.A. No. 1875 OF 2018

R.P.(C) No. 403 OF 2021 in C.A. No. 1832 OF 2018

R.P.(C) No. 401 OF 2021 in C.A. No. 3213 OF 2018

S.L.P.(C) No. 2504 OF 2022

C.A. No. 2367-2368 OF 2022

C.A. No. 10788 OF 2024

C.A. No. 3253 OF 2017

C.A. No. 10873 OF 2024

C.A. No. 10819 OF 2024

C.A. No. 4559 OF 2022

C.A. NO. OF 2024 @ SLP(C) No. 12970 OF 2022

W.P.(C) No. 501 OF 2022

W.P.(C) No. 499 OF 2022

W.P.(C) No. 502 OF 2022

W.P.(C) No. 504 OF 2022

W.P.(C) No. 522 OF 2022

W.P.(C) No. 507 OF 2022

W.P.(C) No. 526 OF 2022

W.P.(C) No. 534 OF 2022

W.P.(C) No. 537 OF 2022

W.P.(C) No. 548 OF 2022

W.P.(C) No. 575 OF 2022

W.P.(C) No. 566 OF 2022

W.P.(C) No. 568 OF 2022

C.A. No. 10698 OF 2024

C.A. No. 10693 OF 2024

C.A. NO. 10752 OF 2024

C.A. NO. 10697 OF 2024

C.A. No. 10753 OF 2024

C.A. No. 10754 OF 2024

C.A. No. 10755 OF 2024

C.A. No. 10712 OF 2024

C.A. No. 10756 OF 2024

C.A. No. 10757 OF 2024

C.A. No. 10710 – 10711 OF 2024

C.A. No. 10758 OF 2024

C.A. No. 10759 OF 2024

C.A. No. 10760 OF 2024

C.A. No. 10709 OF 2024

C.A. No. 10761 OF 2024

C.A. No. 10762 OF 2024

C.A. No. 10763 OF 2024

C.A. No. 10764 OF 2024

C.A. No. 10765 OF 2024

C.A. No. 10766 OF 2024

C.A. No. 10767 OF 2024

C.A. No. 10768 OF 2024

C.A. No. 10769 OF 2024

C.A. No. 10770 OF 2024

C.A. No. 10771 OF 2024

C.A. No. 10772 OF 2024

C.A. No. 10774 OF 2024

C.A. No. 4566 OF 2022

C.A. No. OF 2024 @ S.L.P. OF 2024 @ Diary No. 33597/2022

C.A. No. 10707 - 10708 OF 2024

C.A. No. 10781 OF 2024

C.A. No. 10854 OF 2024

C.A. No. 10694-10695 OF 2024

R.P.(C) No. 155 OF 2022 in C.A. No. 3411 OF 2020

R.P.(C) No. 1289 OF 2021 in C.A. No. 5053 OF 2021

C.A. No. 10782 OF 2024

C.A. No. 10784 OF 2024

C.A. No. 10785 OF 2024

C.A. No. 10706 OF 2024

C.A. No. 10705 OF 2024

C.A. No. OF 2024 @ SLP(C) No. OF 2024 @ Diary No. 30895 OF 2022

C.A. No. 10699 - 10704 OF 2024

C.A. No. 10786 OF 2024

C.A. No. 10787 OF 2024

C.A. No. OF 2024 @ S.L.P.(C) No. OF 2024 D. No. 38691 OF 2022

C.A. NO.10845 OF 2024

C.A. No. 10809 OF 2024

T.P.(C) No. 1576-1597/2023

WP (C) D. No. 37678 OF 2024

WP (C) D. No. 37700 OF 2024

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

INDEX

A. FACTUAL BACKGROUND OF THE REVIEW PETITION 10

B. SUBMISSIONS ON BEHALF OF THE DEPARTMENT 18

i. Error apparent in the judgment under review 18

ii. Why the decision in Sayed Ali (supra) requires reconsideration..... 30

iii. The decision in Mangali Impex (supra) is liable to be set aside and the decision in Sunil Gupta (supra) ought to be affirmed 36

iv. Changes introduced by the Finance Act, 2022 are in the nature of surplusage 42

C. SUBMISSIONS ON BEHALF OF THE RESPONDENTS 48

D. ISSUES FOR CONSIDERATION 57

E. ANALYSIS 59

i. Review jurisdiction 59

ii. The decision in Commissioner of Customs v. Sayed Ali 74

iii. Changes to Section 17 w.e.f. 11.04.2011 – the assessment of bill(s) of entry and shipping bill(s) 78

iv. Scheme of Sections 17 and 28 of the Act, 1962 90

v. Use of the article 'the' in the expression "the proper officer" 93

vi. DRI officers as proper officers under section 2(34) 96

vii. Section 4 of the Act, 1962 98

viii. Section 6 of the Act, 1962 106

ix. Observations on the constitutional validity of Section 28 (11) of the Act, 1962 114

x. Bombay High Court decision in Sunil Gupta (supra) 123

xi. Amendments made by the Finance Act, 2022 138

F. CONCLUSION 154

1. Since the pivotal question of law involved in all the captioned petitions is the same, they were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. For the sake of convenience, the Review Petition No. 400 of 2021 filed by the Customs Department is treated as the lead matter.

3. This Review Petition has been filed by the Customs Department through the Commissioner of Customs, New Delhi (the "**Department**") under Order XLVII of the Supreme Court Rules, 2013 seeking review of the judgment and order dated 09.03.2021 passed by this Court in Civil Appeal No. 1827 of 2018 titled ***M/s Canon India Private Ltd. v. Commissioner of Customs***.

A. FACTUAL BACKGROUND OF THE REVIEW PETITION

4. A two-Judge Bench of this Court in the case of ***Commissioner of Customs v. Sayed Ali and Another*** reported in **(2011) SCC 537,** had held that the Commissioner of Customs (Preventive) is not a "proper officer" as defined in Section 2(34) of the Customs Act, 1962 ("**the Act, 1962**") and therefore did not have the jurisdiction to issue a show cause notice in terms of Section 28 of the Act, 1962. The Court observed that while all proper officers must be "officers of customs", all "officers of customs" are not proper officers. It also held that only those officers of customs who were assigned the functions of assessment, which would include re-assessment, working under the

jurisdictional collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and consignments had been cleared for home consumption, would have the jurisdiction to issue show cause notice under Section 28 or else it would lead to a situation of utter chaos and confusion, in as much as all officers of customs in a particular area, be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would fall under the definition of "proper officers". Section 2(34) is extracted below:

> *"(34) proper officer in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs"*

5. As a result of the decision in ***Sayed Ali*** *(supra)*, the Central Board of Excise and Customs (the "**Board**") issued Notification No. 44/2011-Cus-NT dated 06.07.2011 under Section 2(34) of the Act, 1962, assigning the functions of the "proper officers" to the Commissioners of Customs (Preventive), Directorate of Revenue Intelligence ("**DRI**"), Directorate General of Anti Evasion ("**DGAE**") and Officers of Central Excise. The notification specified that it would operate prospectively. With a view to account for the past periods, Section 28(11) was introduced *vide* the Customs (Amendment and Validation) Act, 2011 (Act No.14 of 2011) dated 16.09.2011 by virtue of which all persons appointed as Officers of Customs under sub-section (1)

of Section 4 before the 06.07.2011 were deemed to have and always had the power of assessment under Section 17 and were deemed to be and always have been "proper officers" for the purpose of the said section.

6. The constitutional validity of Section 28(11) of the Act, 1962, came to be challenged before the High Court of Delhi in the case of ***Mangali Impex Ltd. v. Union of India*** reported in **(2016) SCC Online Del 2597** and a batch of matters were disposed of by the High Court *vide* a common judgment on 03.05.2016.

7. The High Court held that although Section 28(11) of the Act, 1962 begins with a *non-obstante* clause, it neither explicitly nor implicitly seeks to overcome the legal position brought about by Explanation 2 which states that the cases of non-levy, short-levy or erroneous refund prior to 08.04.2011 would continue to be governed by the unamended Section 28 of the Act, 1962 as it stood prior to said date. On this basis, it held that the newly enacted Section 28(11) would not empower officers of DRI or DGAE to either to adjudicate the show-cause notices already issued by them for the period prior to 08.04.2011 or to issue fresh show-cause notices for said period.

8. The High Court also held that Section 28(11) of the Act, 1962 is overbroad in as much as it confers jurisdiction on a plurality of officers on the same subject matter which may result in utter chaos, unnecessary harassment and

conflicting decisions. It held that such untrammelled power would be arbitrary and violative of Article 14 of the Constitution. The issue as to the constitutional validity and effect of Section 28(11) of the Act, 1962 was answered accordingly. The Department preferred an appeal against the decision in ***Mangali Impex*** *(supra)* in Civil Appeal No. 6142 of 2019 before this Court and *vide* order dated 01.08.2016, a two-Judge Bench of this Court stayed the operation of that decision.

9. The constitutional validity of Section 28 (11) of the Act, 1962 was also challenged before the High Court of Bombay in the case of ***Sunil Gupta v. Union of India and Others*** reported in **(2014) SCC Online Bom 1742**. The two-Judge Bench *vide* its Judgement dated 03.11.2014 held thus:

> *"25. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which was specifically dealt with by sub- section (11) of section 28 of the Act, that we are of the opinion that the challenge in the writ petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by section 28 and whether initiated prior to the Finance Bill 2011 receiving the assent of the President shall continue to be governed by section 28, as it stood immediately before the date on which such assent is received. The reference to the Finance Bill therein denotes the Bill by the section itself was substituted by Act 8 of 2011 with effect from April 8, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and section 28 was resorted to by the authorities. Explanation 2 clarifies that they will proceed in terms of the unamended provision. The position dealt with by insertion of section 28(11) is distinct and that is about competence of the officer. The*

> *officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of section 28 unamended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail."*

10. Since the decision in ***Sunil Gupta*** *(supra)* was anterior in time, the same was relied upon by the Department before the High Court of Delhi during the hearing in ***Mangali Impex*** *(supra)*. However, the High Court of Delhi did not agree with the view taken therein.

11. A batch of four statutory appeals came to be decided by this Court on 09.03.2021 in ***Canon India*** *(supra)* wherein this Court decided the following two issues – *first*, whether the officers of DRI would be "proper officers" under Section 2(34) for the purposes of Sections 17 and 28 of the Act, 1962 respectively; and *second*, whether such officers are empowered to issue show cause notices demanding customs duty under section 28 of the Act, 1962. To elaborate:

    (a) Whether the Directorate of Revenue Intelligence (DRI) had the legal authority to issue a show cause notice under Section 28(4) of the Act, 1962, when the goods were cleared for import by a Deputy Commissioner of Customs (who had decided that the goods are exempted from being taxed on import)?

(b) Whether an Additional Director General of DRI, who has been appointed as an "officer of Customs" under the Notification dated 07.03.2002, has been entrusted with the functions of "the proper officer" for the purpose of Section 28 of the Act, 1962?

12. This Court while disposing of the aforesaid batch of matters proceeded to reiterate the principles laid down in ***Sayed Ali*** *(supra)* that only such officers who are vested with the power of assessment under Section 17 can be empowered to issue show cause notices under Section 28 or else this would result in a state of chaos and confusion. It also held that unless it is shown that the officers of DRI are at the first instance, customs officers under the Act, 1962 and are entrusted with the functions of a proper officer under Section 6 of the Act, 1962, they would not be competent to issue show-cause notices. It was held that, since no entrustment was made under Section 6 of the Act, 1962, the officers of DRI who were not otherwise officers of customs, could not have been assigned as the "proper officers".

13. It also observed that from a conjoint reading of Section 2(34) and Section 28 respectively of the Act, 1962, it is manifest that only such a custom officer who has been assigned the specific functions of assessment and reassessment in the jurisdictional area where the import concerned has been affected, either by the Board or the Commissioner of Customs, in terms of

Section 2(34) of the Act, 1962, was competent to issue notice under Section 28 of the Act, 1962.

14. It appears from the decision in ***Canon India*** *(supra)* that the Notification No. 44/2011-Cus-NT dated 06.07.2011 designating officers of DRI as "proper officers" for the purposes of both Sections 17 and 28 of the Act, 1962 respectively; the introduction of Section 28(11) *vide* the Validation Act, 2011 introducing Section 28(11) empowering such officers for the period prior to 06.07.2011; the statutory scheme as envisaged under Sections 3, 4, 5 and 2(34) of the Act, 1962 respectively; and the pendency of the appeal against the decision in ***Mangali Impex*** *(supra)* and the stay of the operation of the said decision by this Court was either not noticed or not brought to the notice of the Court.

15. The Department preferred the present Review Petition against the judgement delivered in ***Canon India*** *(supra)* on 09.03.2021. This judgement was followed in other cases adjudicated by this Court and the High Courts, resulting in various other Review Petitions, Special Leave Petitions and Civil Appeals. This Court *vide* order dated 15.02.2022 in the present Review Petition allowed an open court hearing to be conducted and after hearing the parties, issued notice on the Review Petition *vide* order dated 19.05.2022. A co-ordinate Bench of this Court later in ***Union of India and Another v.***

Godrej and Boyce Manufacturing **(SLP (C) No. 1513/2022)** through order dated 11.02.2022 also issued notice.

16. The aforesaid developments led to a hiatus. As a result, the appeals pending before the Tribunals and other authorities could not be decided. This necessitated the introduction of the following provisions by Parliament: Sections 86, 87 and 88 in the Finance Act, 2022 (Act No. 6 of 2022) to amend Sections 2(34), 3 and 5 of the Act, 1962 respectively. Further, Sections 94 and 97 of the Finance Act, 2022 introduced a new Section 110AA and a validation enactment respectively. These amendments came to be challenged before this Court in **W.P. (C) 526 of 2022** titled ***Daikin Air Conditioning India Pvt. Ltd v. Union of India.***

17. The present batch comprises of three clusters of matters:

    (i) The Review Petitions in the ***Canon India*** *(supra)* batch;

    (ii) The ***Mangali Impex*** *(supra)* appeal and other appeals pending before this Court on the issue of whether the officers of DRI would be proper officers in light of Section 28(11); and

    (iii) The petitions challenging the constitutional validity of Section 97 of the Finance Act, 2022.

B. SUBMISSIONS ON BEHALF OF THE DEPARTMENT

18. Mr. N. Venkataraman, the learned Additional Solicitor General of India, made extensive submissions on the following broad issues –

(i) The Review Petitions filed in the case of ***Canon India*** *(supra)* are maintainable as there is an error apparent on the face of the record.

(ii) The decision rendered by this Court in ***Sayed Ali*** *(supra)* requires reconsideration.

(iii) The decision rendered by the Delhi High Court in ***Mangali Impex*** *(supra)* should be overruled and the view expressed by the Bombay High Court in ***Sunil Gupta*** *(supra)* should be upheld.

(iv) The changes introduced by the Finance Act, 2022 are merely clarificatory in nature and the crux of the issue before the Court can be answered without reference to and reliance upon the changes introduced by the said Act.

i. Error apparent in the judgment under review

19. It was submitted that the judgement rendered by this Court in ***Canon India*** *(supra)* requires review as there are errors apparent on the face of the record. The Ld. ASG submitted that it is equally important that the legality and validity of the decision rendered by the High Court of Delhi in ***Mangali Impex*** *(supra)* which is a part of the present batch of pending appeals be considered since the issues in both ***Canon India*** *(supra)* and ***Mangali Impex***

(supra) are one and the same. He submitted that the fact that an appeal against ***Mangali Impex*** *(supra)* was pending before this Court and that the operation of the said judgement was stayed went unnoticed in ***Canon India*** *(supra)*. He submitted that this would have a direct bearing both in the review and in the batch of appeals before this Court.

20. He submitted that ***Canon India*** *(supra)* proceeded on the assumption that DRI officers are not officers of Customs and therefore need to be entrusted with such powers under Section 6 of the Act, 1962 and only upon such entrustment, the functions of a proper officer can be assigned to them. This, he submitted, is in the teeth of the provisions of the Act, 1962 more particularly Sections 3, 4, and 5 thereof. He further submitted that there is no discussion worth the name on these provisions as regards its applicability to the DRI officers who are none other than a class of officers of customs under Section 3 appointed pursuant to Section 4 and consequently, no entrustment is required under Section 6. He submitted that Section 6 would come into play for such of those officers of the Central or State Government or Local Authority, who are not a class of officers of customs under Section 3 appointed in accordance with Section 4 of the Act, 1962. He explained this clear distinction between the two provisions by relying on the notifications issued under Section 4 of the Act, 1962 proclaiming DRI officers to be a class of officers of Customs under Section 3 of the Act.

21. He submitted that this Court erred in not taking into consideration Sections 3, 4 and 5 of the Act, 1962 respectively and its interplay, if any, with Section 6, as duly indicated by the notifications issued from time to time. More particularly, the Court did not take into account the origin and history of the DRI and how it was always a part of the Ministry of Finance since its inception except for a brief period between 1970 and 1977.

22. He adverted to Sections 3, 4, 5 and 6 of the Act, 1962 respectively along with the relevant notifications issued under the respective provisions. The provisions and relevant notifications are reproduced hereinbelow:

Section 3 as introduced in 1962:

"3. There shall be the following classes of officers of custom namely: —
(a) Collectors of Customs;
(b) Appellate Collectors of Customs;
(c) Deputy Collectors of Customs;
(d) Assistant Collectors of Customs; and
(e) such other class of officers of customs as may be appointed for the purposes of this Act."

The provision was amended by the Finance Act, 1995 and underwent only one change wherein the expression 'collector' was replaced by the expression 'commissioner'. The amended provision reads as under:

"3. Classes of officers of customs.-
There shall be the following classes of officers of customs, namely.-
(a) Chief Commissioners of Customs;
(b) Commissioners of Customs;
(c) Commissioners of Customs (Appeals);

(d) Deputy Commissioners of Customs;"

23. He submitted that Section 3 refers to the class of officers of customs. All officers of the same rank irrespective of the functions and roles they play would fall under Section 3 as class of officers of customs. Class in this sense would refer to the same rank.

24. Sections 4 and 5 of the Act, 1962 are extracted below:

> **Section 4:**
> *"(1) The Board may appoint such persons as it thinks fit to be officers of customs.*
>
> *(2) Without prejudice to the provisions of sub-section (7), the Board may authorise a Commissioner of Customs or a Deputy or Assistant Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs.*"
>
> **Section 5:**
> *"(1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge custom the duties conferred or imposed on him under this Act.*
>
> *(2) An officer of customs may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him.*
>
> *(3) Notwithstanding anything contained in this section, an Appellate Collector of Customs shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and section 108."*

25. Section 4 relates to appointment of officers of customs and Section 5 deals with the powers and duties of officers of customs. There is only one significant change carried out in Section 4 on 11.05.2002. Prior to that date, the appointing Authority was the Central Government and post 11.05.2002, the Board became the appointing Authority.

26. Some of the relevant notifications issued under Sections 4 and 5 of the Act, 1962 respectively are reproduced below:

> *"**G.S.R. 214–** In exercise of the powers conferred by sub-section (1) of Section 4 of the Customs Act, 1962 (52 of 1962), the Central Government hereby appoints—*
>
> *(a) the officers specified below to be Collectors of Customs within their respective jurisdictions, namely:—*
>
> *1. Director, Directorate of Revenue Intelligence.*
>
> *2. Collector of Customs and Central Excise, Cochin.*
>
> *3. Collectors of Land Customs and Central Excise, Delhi, Calcutta and Shillong.*
>
> *4. Collectors of Central Excise, Baroda, Bombay, Poona, Bangalore, Madras, Hyderabad, Calcutta, Nagpur, Patna, Allahabad and Kanpur.*
>
> *(b) the Deputy Collectors posted under the Collectors specified in clause (a) to be Deputy Collectors of Customs within their respective jurisdictions;*
>
> *(b) the Assistant Collectors posted under the Collectors specified in clause (a) to be Assistant Collectors of Customs within their respective jurisdictions.*
>
> *[No. 37/F. No. 4/1/63-CAR]*

G.S.R. 215*-In exercise of the powers conferred by sub-section (1) of section 4 of the Customs Act, 1962 (52 of 1962), the Central Government hereby appoints the following persons to be officers of Customs, namely:-*

1. Principal Appraisers, Appraisers, Examiners, Chief Inspectors, Additional Chief Inspectors, Inspectors, Preventive Officers, Women searches, Mnisterial officers and Class IV officer in the Customs Department at Bombay, Calcutta, Madras, Cochin, Visakhapatnum and Kandla.

2. Reverificadors, Verficiadores, Appraisers, Preventive Inspectors, Preventive Officers, Officials Probationary Officials, Fiscal Guards, Cabos, Sub-Chefes, and Auxiliaries of the Technical Cadre, borne on the establishment of Customs and Central Excise Admnistration, Goa.

3. Superintendents, Deputy Superintendent, Inspectors, Sub-Inspectors, women searchers, Ministerial staff and Class IV staff of Central Excise Department, who are for the time being posted to a Customs-port, Customs-airport, land-customs station, coastal port, Customs Preventive post, Customs Intelligence post or a Customs warehouse.

4. Superintendents, Duty Superintendents and Inspectors of Central Excise Department in any place in India.

5. All officers of the Directorate of Revenue Intelligence.

[No. 38/F. No. 4/1/63-CAR.]"

27. Our attention was specifically drawn to S. No. 1 of GSR 214 as extracted above wherein the Central Government appointed the Director, Directorate of Revenue Intelligence as an officer of customs and also to S. No. 5 of GSR

215 by which the Central Government appointed all the officers of DRI as officers of customs.

28. He also placed before us the origin and history of the DRI as a part of the Ministry of Finance. From 04.12.1957 till 24.06.1970, DRI was with the Ministry of Finance. From 25.06.1970 to 28.07.1970, it was with the Ministry of Home Affairs. Between 29.07.1970 and 06.04.1977, it was with the Cabinet Secretariat and from 07.04.1977 onwards, DRI has remained with the Ministry of Finance.

29. Placing reliance on the decision of the Delhi High Court in the case of ***S.K. Srivastava v. Union of India*** reported in **1971 SCC OnLine Del 134**, he submitted that DRI was always a part of the Customs Department, working under a common Board and the Ministry of Finance. The relevant paragraphs from this decision are extracted below:

> *"(2) Therefore, on 3-12-1970 the order dated 27-7-1970 was cancelled.*
> *(3) On 16-12-1970 the President was pleased to order that the petitioner "be posted as Collector of Central Excise, Hyderabad".*
> *The petitioner however refused to join his posting at Hyderabad and has filed the present writ petition challenging his transfer from the post of Director of Revenue Intelligence to the post of Collector of Customs as being illegal and unconstitutional.*
> *Let us first consider the legality of the transfer. Under Article 310 of the Constitution, the petitioner held office during the pleasure of the President. The conditions of service of the petitioner could be regulated by Parliament by legislation under Article 309 of the*

Constitution. In the absence of such legislation the President could also frame rules to do so under the proviso to Article 309. But neither any such legislation nor any such rules exist. The formation of the Indian Customs and Central Excise Service Class I was itself brought about by purely executive action. It is well-established that the administration of service by the Government of India can be carried on by executive instructions and executive action even though no statute or statutory rules may have been made.

The distinction between the personnel forming a Service and the posts which may be manned by the members of such a Service has to be noted at the outset in this case. The petitioner along with others belong to the Indian Customs and Central Excise Service Class I. The members of this Service stood in relation to each other in a particular order of seniority. There was no statute or rules, however, restricting the appointments of the members of the Service to any particular post. Initially the officers of the Collectorate of Customs and Excise working under the Ministry of Finance, Department of Revenue, used to do all the work relating to customs and excise. In 1939, the work of inspection in the Departments of Customs and Central Excise which was till then performed by the departments themselves as carved out and given to a separate Directorate of Inspection (Customs and Central Excise) as a part of the office of the Central Board of Revenue which was formed by an Act of 1924 and which was split later by an Act of 1963 into two Boards, namely*:—*

(a) Board of Direct Taxes under which functions the Department of Income-tax;

(b) The Central Board of Excise and Customs under which functioned the Collectorates of Customs and Central Excise, Directorate of Inspection and Directorate of Revenue Intelligence.

It was in 1957 that the intelligence work till then performed by the Central Revenue Intelligence Bureau functioning as a unit in the Directorate of Inspection, was constituted as a third unit in the Department of Revenue, Ministry of Finance styled as

Directorate of Revenue, Intelligence. All this and more information is contained in the Government publication Organisation Set-up and Functions of the Ministries/Departments of the Government of India ", 4th Edition, 1968, pages 68-70 (Annexure R XIII).

As the work of Directorates of Inspection and Revenue Intelligence has been carved out from the work originally performed by the Collectorates of Customs and Central Excise and as no separate personnel was recruited to man the posts in these two Directorates, the members of the Indian Customs and Central Excise Service Class I have been manning those posts. There have been therefore numerous transfers of officers of the Indian Customs and Central Excise Service Class I from their posts in the Collectorates to the subsequently created posts in the Directorates. Equally frequently these officers have been transferred back to the posts in the Collectorates. The important fact to be noted is that only one set of personnel originally recruited for the Customs and Central Excise Collectorates has been used to fill the posts not only in the Collectorates but also in the Directorates. The reason is obvious. The Central Board of Excise and Customs in 1963 and prior to that the Central Board of Revenue functioning as a part of the Department of Revenue, Ministry of Finance of the Government of India administered and controlled the work of the Collectorates of Customs and Central Excise as well as of the Directorates of Inspection and Revenue Intelligence. These three units form one whole working under the Board and the Ministry. This position is reflected in the following documents:—

(1) The Central Civil Services [Revised Pay Rules, 1960 (Annexure R xiv)] have a Schedule in which the various posts which could be manned by the Central Civil Services are shown with the emoluments attached to those posts. In this Schedule section 10 forms the Ministry of Finance (Department of Revenue)…."

[emphasis supplied]

30. Having adverted to Sections 3, 4 and 5 of the Act, 1962, he submitted that the officers of DRI would fall under Section 3 as "class of officers" and under Section 4 as "officers of customs" and that the Board is empowered to assign and fix powers and assign duties to such DRI officers similar to other classes of officers and officers of customs.

31. In the aforesaid context, he submitted that having failed to advert to these three sections and the various notifications referred to above, this Court erred in placing sole reliance on Section 6 of the Act, 1962 to conclude that DRI officers are not officers of customs as they belong to a different department and require specific entrustment under Section 6 of the Act, 1962 by the Central Government before the powers of a proper officer under Section 2(34) of the Act, 1962 can be assigned to them. Section 6 is reproduced below:

> "*(6) The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act.*"

32. He submitted that the question of entrustment would arise only in relation to an officer of Central or State Government or Local Authority who does not fall within the class of officers of customs under Section 3 appointed under Section 4 of the Act, 1962. Some instances of the Central Government entrusting such functions of customs officers under Section 6 are M.F.

(D.R.) Notification No. 161-Cus dated 22.06.1963 and M.F.(D.R.&I.) Notification No. 33-Cus., dated 27.04.1974 which entrusted functions of customs officer to police officers in a particular jurisdiction and officers of the Border Security Force respectively. However, in the case of DRI officers, they would clearly fall under Sections 3, 4 and 5 of the Act, 1962 and the notifications conferring powers and duties are already on record.

33. Our attention was also drawn to Notification 161-Cus dated 22.06.1963 issued under Section 6 entrusting powers of search to DRI officers. As per Notifications GSR 214 and GSR 215 issued in the same year under Section 4 of the Act, 1962, all officers of DRI were appointed as officers of customs. Therefore, an inadvertent reference to Section 6 under Notification No. 161 dated 22.06.1963 should not lead to the drawing of any adverse inferences as at the highest, it may only be a case of misquoting of a Section. Secondly, till 11.05.2002, it was the Central Government which was the appointing authority under Section 4 for officers of customs as well as for entrustment under Section 6. It is only from 11.05.2002 that the powers under Section 4 were delegated to the Board since Notification No. 161 dated 22.06.1963 was issued prior to 11.05.2002 and the authority being the Central Government under both Sections, any incorrect reference to a provision would be totally inconsequential.

34. He submitted that by virtue of the aforesaid and also without reference to the Notification No. 44/2011 – Cus (N.T.) dated 06.07.2011, erroneous conclusions came to be rendered in paragraphs 17 to 23 of the decision under review. The findings in ***Canon India*** *(supra)* in paragraphs 13 and 14 respectively that DRI officers belong to a different department and therefore cannot become proper officers under Section 28, and if done so, would result in anarchical and unruly operation of the statute, too, is erroneous in light of the aforesaid submissions.

35. He further submitted that despite being a conceded position that issuance of a show cause notice under Section 28 is a quasi-judicial exercise of power, this Court fell in error in holding the same to be an administrative review in paragraph 15. The Court also erred in concluding that the expression "the proper officer" can only signify an officer empowered to undertake assessment and re-assessment under Section 17, by placing unfounded reliance on the decision in ***Consolidated Coffee Ltd. and Anr. v. Coffee Board, Bangalore*** reported in **1980 AIR 1468** as it relates to a totally different scenario envisaged under Article 286 read with Section 5 of the Central Sales Tax Act, 1956.

36. After pointing out the aforesaid aspects as errors apparent on the face of the record, he prayed that the present review petition be allowed.

ii. Why the decision in Sayed Ali (supra) requires reconsideration

37. He submitted that there are two fundamental errors in the dictum laid in ***Sayed Ali*** *(supra)* –

(i) *Firstly*, it casts an obligation that an officer of customs who is empowered to undertake assessment or reassessment under Section 17 alone is qualified to become a proper officer under Section 28 for the purpose of raising demand of short levy, non-levy or erroneous refund. No other officer can be assigned the functions of the proper officer under Section 28.

(ii) *Secondly*, the judgment was rendered in connection with officers of the Customs (Preventive), who were not assigned the powers and duties of a proper officer, and no notifications to this effect were produced or brought to the notice of this Court.

38. It was pointed out by him that ***Sayed Ali*** *(supra)* did not deal with DRI officers who were indeed vested with the powers of proper officers *vide* the Circular No. 437/9/98-Cus.IV dated 15.02.1999 issued by the Board in terms of Section 2(34). Under Section 2(34), the power of assigning functions of a proper officer to an officer of customs vests with the Board or the Commissioner of Customs. Since the Board issued this assignment, the DRI officers became proper officers with effect from 15.02.1999. As a result, the decision rendered in ***Sayed Ali*** *(supra)* which was with reference to only

Customs (Preventive) would have no application to the DRI and DGAE officers. The circular dated 15.02.1999 is reproduced hereinbelow:

"F. No. 437/9/98-Cus.IV

Circular No. 4/99-Cus
Dated 15/2/1999

Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Issuance of Show Cause Notice by the Officers of directorate of Revenue Intelligence - regarding-

A doubt has been recently raised as to whether the Officers of Directorate of Revenue Intelligence could issue show cause notices in cases investigated by them – a practice started last year apparently in tune with the practice of the Directorate General of Anti Evasion. The matter has been examined in the Board.

2. It has been observed that in terms of Customs Notification No. 19/90-Cus (NT.), dated 26.4.90, as amended from time to time, the Officers of Directorate of Revenue Intelligence of different categories have been notified and appointed as Commissioners of Customs, Deputy Commissioners of Customs or Assistant Commissioners of Customs for the are specified. These officers, therefore, can legally be entrust with discharge of functions normally performed by Commissioners, Deputy Commissioners or Assistant Commissioners of Customs in their jurisdiction, as the case may be. Board can no doubt subject these powers/functions to certain restrictions/limitations as may be imposed, as provided under section 5(1) of the Customs Act.

3. Directorate of Revenue Intelligence Officer are, therefore, to undertake investigations of cases detected by them, and to issue the Show Cause Notices on completion of investigations. In line with the instructions issued (vide F.No. 208/23/97-CX-8, dated 20.1.98) in respect of Officers of Directorate General Anti Evasion, Board has decided that in impact of cases investigated by the Directorate General of Revenue intelligence, the officers of said Directorate will be competent to and may issue show cause notices in cases investigated by them – though these will continue to be adjudicated by the concerned jurisdictional Commissioners, Additional Commissioners, Deputy Commissioners or Assistant Commissioners of Customs, as the case may be.

4. The Board has also decided that these instructions may kindly be brought to the notice of all departmental officers by issuing suitable standing orders.

Sd/-
(Rajendra Singh)
Under Secretary to the Government of India"

39. As regards the observations in ***Sayed Ali*** *(supra)* on the *inter se* link between Sections 17 and 28 of the Act, 1962 respectively, he submitted that no such mandate flows from either of the two sections and reading any such linkage into the scheme of the Act, 1962 would directly undermine the powers of search, seizure and investigation of the DRI officers under the Act, 1962 along with the assignment of functions as proper officers to issue show cause notices post such search and investigation. Although no disability is to be found in any provisions of the Act, 1962, yet ***Sayed Ali*** *(supra)* creates such an embargo and also proceeds to hold that empowering such officers to issue

show cause notices would result in multiple persons dealing with the same issue leading to utter chaos and confusion. He submitted that the Board has been issuing circulars and notifications from time to time with a view to ensure that no such overlap occurs. He also argued that the respondents have not adduced any evidence or empirical statistics to even remotely indicate that an importer has been visited with either multiple show cause notices or adjudication orders on the same subject.

40. He further submitted that the Board had vested DRI with the power to issue only show cause notices and the adjudication orders in furtherance of the show cause notices were to be passed by the respective port officers. In cases involving multiple ports, common adjudicators were assigned powers by the Board and later also by the DRI and these adjudicators never involved themselves either in the investigation of the case or in the issuance of show cause notices. In such circumstances, he submitted that both the findings in ***Sayed Ali*** *(supra)* require reconsideration.

41. He further drew our attention to Circular No. 18/2015 – Customs dated 09.06.2015 issued by the Board pertaining to the appointment of common adjudicating authority and the mode and manner of assignment of functions for adjudication with a view to avoid multiplicity or plurality. The same is extracted below:

"Circular No. 18/2015- Customs
F.No. 450/145/2014- Cus IV
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs

To
All Chief Commissioner of Customs / Customs (Preventive)
All Chief Commissioners of Customs and Central Excise
All Commissioners of Customs
All Commissioners of Customs and Central Excise

Sir / Madam,

Subject: Appointment of common adjudicating authority -regarding

Reference is invited to Notification No 60/2015-Customs (N.T.), dated 04.06.2015 whereby the power to appoint common adjudicating authority in cases investigated by DRI upto the level of Commissioner of Customs has been delegated to Principal Director General of Directorate of Revenue Intelligence in terms of section 152 of the Customs Act, 1962. This notification was issued in the interest of expediting decision making with resultant benefits to both trade and revenue in terms of faster settlement of outstanding disputes. These appointments were done hitherto by the Central Board of Excise and Customs under sections 4 and 5 of the Customs Act 1962.

2. In the light of the aforementioned notification, all cases of appointment of common adjudicating authority in respect of cases investigated by DRI will be handled by Principal DG, DRI. In this regard, the Board has prescribed the following guidelines for Principal DG, DRI:

(a) The following cases initiated by DRI shall be assigned to Additional Director General (Adjudication), DRI:

(i) Cases involving duty of Rs.5 crores and above;

(ii) Group of cases on identical issues involving aggregate duty of Rs.5 crores or more;
(iii) Cases involving seizure value of Rs.5 crores or more;
(iv) Cases of over-valuation irrespective of value involved; and
(v) Existing DRI cases with erstwhile Commissioner (Adjudication).
(b) Cases other than at (a) above involving more than one Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs on the basis of the maximum duty evaded;
(c) Cases other than at (a) above involving a single Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs;
(d) Non-DRI cases pending with erstwhile Commissioner (Adjudication) would be assigned to Additional Director General (Adjudication), DRI;
(e) Past DRI cases pending for adjudication with jurisdictional Commissioners of Customs would continue with these officers;
(f) Remand cases would be decided by the original adjudicating authority.
3. All other cases of appointment of common adjudicator i.e. other than the cases mentioned in paragraph 2 above would continue to be dealt by the Board. This would include cases made by Commissionerates or cases made by DRI wherein the adjudicating officer is an officer below the level of Additional Director General (Adjudication), DRI.
4. Board has also decided that all the pending cases where common adjudicating authorities have not been appointed so far or where the common adjudicating authorities have been appointed but adjudications have not been done should be disposed of expeditiously in terms of aforementioned guidelines. However, while doing so in regard to the latter category of cases, Principal DG, DRI will take into consideration the fact whether or not personal hearings have taken place and the stage of passing the adjudication order. This is to ensure that cases about to be finalized are not reallocated to another adjudicating authority thereby

defeating the objective of expediting the finalization of disputes.
5. Difficulty faced, if any, may be brought to the notice of the Board at an early date.

Yours faithfully
(Pawan Khetan)

OSD (Customs IV)"

42. He also brought to our notice similar notifications and circulars issued subsequently to plead that all steps have been taken with a view to ensure that there is no overlap of jurisdiction. In the absence of any evidence or proof adduced by the importer, the dictum as laid in ***Sayed Ali*** *(supra)* declaring that this would result in utter chaos and confusion and only such officers vested with the power of assessment and re-assessment can issue notices under Section 28, requires reconsideration.

iii. <u>The decision in *Mangali Impex (supra)* is liable to be set aside and the decision in *Sunil Gupta (supra)* ought to be affirmed</u>

43. He submitted that the decision in ***Mangali Impex*** *(supra)* too observed that the assignment of powers to DRI officers for issuing show cause notices under Section 28 of the Act, 1962 would create a situation of utter confusion and chaos and declared Section 28(11) of the Act, 1962 to be unconstitutional for being violative of Article 14 owing to its inherent arbitrariness. The decision also directed the Department to issue suitable instructions and ensure avoidance of multiplicity or plurality of proceedings. He submitted that the instructions have been scrupulously followed and

complied with since 1999 through various notifications and Board circulars, thereby avoiding any overlap. He submitted that it was because of this reason that the importers were not able to produce any material to support such adverse inferences. Thus, he submitted that the decision in ***Mangali Impex*** *(supra)* also deserved to be set aside.

44. On the correctness of the decision in ***Mangali Impex*** *(supra)*, he further submitted that the reasoning in the decision i.e., the Validation Act, 2011 does not extend its non-obstante clause to anything contained elsewhere in the same statute or in any other law for the time being in force, is incorrect and not legally unsustainable. On the finding of the High Court that since Explanation 2 remains on the statute even after the insertion of Section 28(11), it places an embargo for the period prior to 08.04.2011, for the application of Section 28(11). The Ld. ASG submitted that Explanation 2, in no way, had interfered or can interfere with the validating power introduced *vide* Section 28(11). He delineated the sequence of events leading to the insertion of Section 28(11) in the Act, 1962 to make good his submission.

    (i) This Court delivered the judgment in ***Sayed Ali*** *(supra)* on 18.02.2011.

    (ii) Parliament *vide* the Finance Act, 2011 introduced certain amendments to Section 28 on 08.04.2011.

(iii) On 06.07.2011, the Central Government issued Notification 44/2011 assigning the functions of proper officers to officers of Customs (Preventive), DRI, DGAE and officers of Commissioner of Central Excise. The same is extracted below:

> ***"Proper officers for Customs Sections 17 and 28***
> *In exercise of the powers conferred by sub-section (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of section 17, section 28, section 28AAA and second proviso to Section 124 of the said Act, namely:-*

TABLE

Sl.No.	***Designation of the officers***
(1)	*(2)*
1.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.*
2.	*Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).*

3.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.*
4.	*Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise."*

[Notification No. 44/2011-Cus. (N.T.), dated 6-7-2011]

(iv) The Validation Bill, 2011, introducing Section 28(11) along with the Statement of Reasons came to be issued on 02.08.2011 and the same is extracted below:

> ***"Introduction of Sub-section 11 in Section 28 as per the Customs (Amendment And Validation) Bill, 2011***
>
> *"(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."*

STATEMENT OF OBJECTS AND REASONS

The Customs Act, 1962 consolidates and amends the law relating to customs. Clause (34) of section 2 of the said Act defines the expression "proper officer" in relation to the functions under the said Act to mean the officer of customs who is assigned those functions by the Central Board of Excise and Customs or the Commissioner of Customs. Recently, a question has arisen as to whether the Commissioner of Customs (Preventive) is competent to exercise and discharge the powers of a proper officer for issue of a notice for the demand of duty. The Hon'ble Supreme Court of India in Commissioner of Customs versus Sayed Ali and Anr. (Civil Appeal Nos. 4294-4295 of 2002) held that only a customs officer who has been specifically assigned the duties of assessment and re-assessment in the jurisdiction area is competent to issue a notice for the demand of duty as a proper officer. As such the Commissioner of Customs (Preventive) who has not been assigned the function of a "proper officer" for the purposes of assessment or re-assessment of duty and issue of show cause Notice to demand Customs duty under Section 17 read with Section 28 of the Act in respect of goods entered for home consumption is not competent to function as a proper officer which has not been the legislative intent.

2. In view of the above the Show Cause Notices issued over the time by the Customs officers such as those of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence and others, who were not specifically assigned the functions of assessment and re-assessment of customs duty may be construed as invalid. The result would be huge loss of revenue to the exchequer and disruption in the revenue already mobilized in cases already adjudicated. However, having regard to the urgency of the matter, the Government issued notification on 6th July, 2011 specifically declaring certain officers as proper officers for the aforesaid purposes.

> *3. In the circumstances, it has become necessary to clarify the true legislative intent that Show Cause Notices issued by Customs officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. It is, therefore, purposed to amend the Customs Act, 1962 retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the said Act at all material times irrespective of issuance of any specific assignment on 6th July, 2011.*
>
> *4. The Bill seeks to achieve the above objects."*

(v) Finally, the Validation Act came to be passed on 16.09.2011 and Sub-Section (11) became part of Section 28.

45. He contended that Explanation 2 and the introduction of Section 28(11) are for distinct purposes and are not connected to each other in any way. Prior to 08.04.2011, the period of limitation available under the statute for demanding short levy, non-levy or erroneous refund was six months. Whereas after 08.04.2011, it was enhanced to one year. As the amendment substituted the then-existing Section 28, it provided a saving provision to protect the notices issued prior to 08.04.2011 from the extension of limitation period from 6 months to one year. He submitted that the purport of Explanation 2 was only to ensure that those rights envisaged under old

Section 28 stand preserved. Explanation 2 did not deal with the jurisdictional exercise of the power of DRI officers in issuing show cause notices under Section 28, whereas, the Validation Act, 2011, introducing Section 28(11) addressed precisely only that issue.

46. He submitted that the conclusion drawn in ***Mangali Impex*** *(supra)* was legally incorrect for holding that Section 28(11) is overbroad in assuming every officer of customs to be deemed as proper officers both for Sections 17 and 28. The Validation Act, 2011, was enacted to regularize only past actions and not future actions, which are governed by Notification No. 44/2011 dated 06.07.2011 which even according to the High Court is valid and proper. Consequently, the validation has a very limited role to play as it travels back only to empower such of those officers of customs who had issued show cause notices in the past and vesting them also with the power under Section 17.

47. He submitted that the decision in ***Sunil Gupta*** *(supra)* clarifies the correct legal position and should be held to be so by this Court.

iv. <u>Changes introduced by the Finance Act, 2022 are in the nature of surplusage</u>

48. Lastly, he referred to the amendments brought about by the Finance Act, 2022, *vide* Sections 86, 87, 88, 94 and 97. The same are extracted below:

Section 86 - Amendment of section 2 of the Act, 1962

“86. In the Customs Act, 1962 (52 of 1962), (hereinafter referred to as the Customs Act), in section 2, in clause (34), after the words "Principal Commissioner of Customs or Commissioner of Customs", the words and figure "under section 5" shall be inserted.”

Section 87 - Substitution of new section for section 3 of the Act, 1962

“87. For section 3 of the Customs Act, the following section shall be substituted, namely:

3. Classes of officers of customs.-

"There shall be the following classes of officers of customs, namely:--

(a) Principal Chief Commissioner of Customs or Principal Chief Commissioner of Customs (Preventive) or Principal Director General of Revenue Intelligence;

(b) Chief Commissioner of Customs or Chief Commissioner of Customs (Preventive) or Director General of Revenue Intelligence;

(c) Principal Commissioner of Customs or Principal Commissioner of Customs (Preventive) or Principal Additional Director General of Revenue Intelligence or Principal Commissioner of Customs (Audit);

(d) Commissioner of Customs or Commissioner of Customs (Preventive) or Additional Director General of Revenue Intelligence or Commissioner of Customs (Audit);

(e) Principal Commissioner of Customs (Appeals);

(f) Commissioner of Customs (Appeals);

(g) Additional Commissioner of Customs or Additional Commissioner of Customs (Preventive) or Additional

Director of Revenue Intelligence or Additional Commissioner of Customs (Audit);

(h) Joint Commissioner of Customs or Joint Commissioner of Customs (Preventive) or Joint Director of Revenue Intelligence or Joint Commissioner of Customs (Audit);

(i) Deputy Commissioner of Customs or Deputy Commissioner of Customs (Preventive) or Deputy Director of Revenue Intelligence or Deputy Commissioner of Customs (Audit);

(j) Assistant Commissioner of Customs or Assistant Commissioner of Customs (Preventive) or Assistant Director of Revenue Intelligence or Assistant Commissioner of Customs (Audit);

(k) such other class of officers of customs as may be appointed for the purposes of this Act."

Section 88 - Amendment of section 5 of the Act, 1962

"88. In section 5 of the Customs Act,--

(a) after sub-section (1), the following sub-sections shall be inserted, namely:--
"(1A) Without prejudice to the provisions contained in sub-section (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.
(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.";
(b) after sub-section (3), the following sub-sections shall be inserted, namely:-

"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board may consider any one or more of the following criteria, including, but not limited to--
(a) territorial jurisdiction;

(b) persons or class of persons;

(c) goods or class of goods;

(d) cases or class of cases;

(e) computer assigned random assignment;

(f) any other criterion as the Board may, by notification, specify.
(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act."

Section 94 - Insertion of new section 110AA to the Act, 1962

"94. After section 110A of the Customs Act, the following section shall be inserted, namely:--
110AA. Action subsequent to inquiry, investigation or audit or any other specified purpose.-
"Where in pursuance of any proceeding, in accordance with Chapter XIIA or this Chapter, if an officer of customs has reasons to believe that--
(a) any duty has been short-levied, not levied, short-paid or not paid in a case where assessment has already been made;
(b) any duty has been erroneously refunded;

(c) any drawback has been erroneously allowed; or

(d) any interest has been short-levied, not levied, short-paid or not paid, or erroneously refunded, then such officer of customs shall, after causing inquiry, investigation, or as the case may be, audit, transfer the relevant documents, along with a report in writing.

(i) to the proper officer having jurisdiction, as assigned under section 5 in respect of assessment of such duty, or to the officer who allowed such refund or drawback; or
(ii) in case of multiple jurisdictions, to an officer of customs to whom such matter is assigned by the Board, in exercise of the powers conferred under section 5, and thereupon, power exercisable under sections 28, 28AAA or Chapter X, shall be exercised by such proper officer or by an officer to whom the proper officer is subordinate in accordance with sub-section (2) of section 5."

Section 97 - Validation of certain actions taken under the Act, 1962

"97. Notwithstanding anything contained in any judgment, decree or order of any court, tribunal, or other authority, or in the provisions of the Customs Act, 1962 (52 of 1962), (hereinafter referred to as the Customs Act):-
(i) anything done or any duty performed or any action taken or purported to have been taken or done under Chapters V, VAA, VI, IX, X, XI, XII, XIIA, XIII, XIV, XVI and XVII of the Customs Act, as it stood prior to its amendment by this Act, shall be deemed to have been validly done or performed or taken;
(ii) any notification issued under the Customs Act for appointing or assigning functions to any officer shall be deemed to have been validly issued for all purposes, including for the purposes of section 6;
(iii) for the purposes of this section, sections 2, 3 and 5 of the Customs Act, as amended by this Act, shall have and shall always be deemed to have effect for all purposes as if the provisions of the Customs Act, as amended by this Act, had been in force at all material times.
Explanation. -- For the purposes of this section, it is hereby clarified that any proceeding arising out of any action taken under this section and pending on the date of commencement of this Act shall be disposed of in accordance with the provisions of the Customs Act, as amended by this Act."

49. He submitted that the amendments carried out in the Act, 1962 *vide* Sections 87 and 88 of the Finance Act, 2022 respectively are a mere surplusage done *ex abundanti cautela* and are clarificatory in nature. He further submitted that Section 3 deals with classes of officers and officers of the same rank will constitute the same class. The amended Section 5 only expands the very same class with designation and functions and nothing more.

50. He submitted that Section 94 of the Finance Act, 2022 introducing Section 110AA to the Act, 1962 is only a way forward for the future wherein post search and investigation by the DRI, certain category of cases have now been directed to be handed over to the port authorities for issuing necessary show cause notices and this, in no way, can vitiate notices issued by DRI earlier especially in the absence of a constitutional or statutory embargo.

51. Finally, he submitted that a provision of law should appear arbitrary or abusive to be declared illegal or unconstitutional or invalid. A possible misuse of the provision by the authorities or a perceived misuse or mere presumptions and conjectures of a possible misuse cannot constitute basis to hold that a provision is arbitrary and violative of Article 14. He relied on the following decisions to fortify his submission:

    a. ***Collector of Customs v. Nathella Sampathu Chetty,*** **1962 SCC OnLine SC 30**

    b. ***Shreya Singhal v. Union of India,*** **(2015) 5 SCC 1**

c. ***Commissioner of Customs v. Dilip Kumar & Co.,*** **(2018) 9 SCC 1**

d. ***Goodyear India Ltd. v. State of Haryana,*** **(1990) 2 SCC 71**

C. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

52. Mr. Mukul Rohatgi, Mr. Arvind Datar and Mr. V. Lakshmikumaran, learned Senior Counsel appeared on behalf of the various importers and vehemently objected to the review of ***Canon India*** *(supra)* and also contended that both ***Sayed Ali*** *(supra)* and ***Mangali Impex*** *(supra)* are correct in their conclusions and need no interference.

53. Mr. Mukul Rohatgi contended that the power of review is extremely circumscribed and limited. It is not a means to provide a second innings to anyone. The Department in the guise of a review is seeking to re-argue the whole matter. Even if a different view is possible, the same cannot give rise to a review. He relied on the following decisions:

(i) ***Col. Avtar Singh Sekhon v. Union of India,*** **(1980) Supp SCC 562**

(ii) ***Lily Thomas Vs Union of India,*** **(2000) 6 SCC 224**

(iii) ***Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.,*** **(1923) SCC OnLine PC 10**

(iv) ***State of Telangana v. Mohd. Abdul Qasim,*** **(2024) 6 SCC 461.**

54. Mr. Arvind Datar too submitted that the scope of review is extremely limited and further contended that Section 97 of the Finance Act, 2022 is a clear overreach and needs to be considered separately.

55. Mr. V. Lakshmikumaran made the following submissions:

(i) The scheme of the Act, 1962 clearly indicates that Sections 17, 46, 47 and 28 of the Act, 1962 respectively are interlinked to and inter-dependent on each other. These provisions involve a sequential flow of events to be processed by a single officer, and therefore, empowering DRI officers who are not connected to this scheme, is illegal.

(ii) Section 17 deals with assessment and reassessment. Section 46 obligates filing of bills of entries. Section 47 allows clearance of goods for home consumption post the assessment under Section 17 and Section 28 pertains to demand of duty in the nature of short levy, short paid and erroneously refunded. Since all these statutory action points are interrelated, it is the same proper officer who should be empowered to perform all of these four functions and the same cannot be assigned to different sets of officers.

(iii) The amendment to Section 17 in 2011 allowing self-assessment is inconsequential since the power to assess and reassess and allow clearances is still with the officer of customs.

(iv) On the issue of whether there are any statutory limitations to the assignment of powers under Section 28 only to those officers who do assessment or re-assessment under Section 17, he submitted that the scheme of the Act, 1962 as explained in ***Sayed Ali*** *(supra)* and ***Mangali Impex*** *(supra)*, clearly indicates that Sections 17 and 28 of the Act, 1962 respectively are interconnected and interdependent.

(v) ***Canon India*** *(supra)* is correct in holding that DRI officers should be entrusted with the functions under Section 6 of the Act, 1962. Since the Central Government has not done so, they cannot be assigned the functions of proper officer.

(vi) Section 5 of the Act, 1962 deals only with powers and duties but not the functions, whereas, Section 6 deals with functions and thus, a notification under Section 6 is necessary. He emphasised on the different consequences arising from the use of the words "powers" and "duties" in Section 5 and use of the word "functions" in Section 6.

(vii) It was contended that Section 28 deals with short levy, non-levy and erroneous refund. Levy means determination of duty through a process of assessment/reassessment. Section 28 therefore involves rendering a finding that the earlier assessment was not correct. Section 28 is intended to revise or upset the original assessment done

under Section 17 and once an order gets passed under Section 28, the original assessment would not survive and therefore, the same officer can issue the show cause notice.

(viii) The Board's Circular dated 15.02.1999 cannot come to the rescue of the Department because there was no assignment of function of assessment/reassessment as required by ***Sayed Ali*** *(supra).* According to the learned counsel, both Notification No. 44/2011 dated 06.07.2011 and Section 28(11) were brought to the notice of this Court in ***Canon India*** *(supra).*

(ix) Having accepted the principles laid down in ***Sayed Ali*** *(supra)* on the interlinkage between Sections 17 and 28 of the Act, 1962 respectively, both *vide* Section 28(11) and Notification No. 44/2011 dated 06.07.2011, it is not open to the Department to now contend the contrary as reaffirmed in ***Canon India*** *(supra).*

(x) All proper officers are officers of customs, but all officers of customs are not proper officers. Mere conferment of power or assignment of functions of assessment/reassessment under Sections 17 and 28 of the Act, 1962 respectively is not enough. Out of the various proper officers who have been empowered under Sections 17 and 28, only that proper officer who had actually carried out the assessment will be the proper officer. There can be concurrent conferment of power

but there cannot be concurrent exercise of powers as the same may result in chaos and utter confusion.

(xi) The decision rendered by the High Court in ***Mangali Impex*** *(supra)* is correct and need not be disturbed for the following reasons:

a. Section 28(11) does not validate the show cause notices issued by various officers. It merely deems all officers who were appointed as officers of customs under Section 4(1) to have always had the powers under Sections 17 and 28 the Act, 1962 respectively. This would not automatically revive the show cause notices issued by such officers of customs.

b. In order to hold that Section 28(11) validates past actions, this Court will have to insert words in the statute, that too in a taxing statute which imposes liabilities on assesses, that too retrospectively.

c. Several unintended consequences may arise if it is held that show cause notices issued by other officers of customs will be revived. There are instances wherein many show cause notices have been issued after the ***Sayed Ali*** *(supra)* judgment by the jurisdictional commissionerate wherever the limitation period permitted for demands to be made. In those cases, assessees will be faced with two show cause notices. He laid emphasis on the

need to take an undertaking from the Department to avoid such a situation if it were to arise.

d. The High Court has correctly held that Section 28(11) perpetrates the very chaos that the judgment in ***Sayed Ali*** *(supra)* sought to prevent.

e. Explanation 2 to Section 28 should be given a plain meaning. It was in the statute before Section 28(11) was introduced, hence the framers of the statute were well aware of the implications of the Explanation 2.

f. On 08.4.2011, Section 28 of the Act, 1962 underwent a drastic change and not just a mere change in terms of time period being changed from six months to one year. The mode & manner of issuing the show cause notice, the manner of adjudication and payment of duty, etc. have been amended making it more beneficial to the assessee. That is the reason why the old notices were to be dealt with under the old Section.

g. It is impossible to read Section 28(11) and Explanation 2 together as validating any action prior to 08.04.2011. Such is the plain meaning and only such an interpretation is warranted in the present case.

(xii) Section 97 of the Finance Act, 2022 is liable to be struck down as manifestly arbitrary and thus violative of Article 14. According to him, the Finance Act, 2022 does not cure the defects pointed out by this Court in its decision rendered in ***Canon India*** *(supra)* for the following reasons:

a. The amendments introduced *vide* the Finance Act, 2022 continue to violate the principles laid down in the judgment of this Court in ***Sayed Ali*** *(supra)* wherein it was held that granting jurisdiction to multiple officers will create utter chaos and confusion. He highlighted that the review filed against the decision in ***Sayed Ali*** *(supra)* has already been dismissed.

b. The validation of past actions by way of Section 97(i) of the Finance Act, 2022 violates the principles enshrined in the judgment of ***Canon India*** *(supra)* since it will lead to a very anarchical and unruly operation of a statute which was sought to be avoided in ***Canon India*** *(supra)*.

c. A Validation Act can only validate the law but cannot validate a fact. Once a particular officer has exercised the function of assessment, it is a jurisdictional fact that has occurred to the exclusion of all other groups in the Customs Department. Thereafter, only that officer or his superiors (known as the

Customs group) who had undertaken assessment under Section 17 in the first place shall have the jurisdiction to issue notices for recovery of duty under Section 28.

d. This Court in its judgment in ***Canon India*** *(supra)* found that factually the assessments were initially not undertaken by officers of DRI and such a defect cannot be cured retrospectively by a validating law. Therefore, the present amendments seek to validate and effectively change a judicially determined fact, which cannot be done by a legislation.

(xiii) The Finance Act, 2022 also introduced a provision, i.e. Section 110AA, providing a mechanism for actions to be taken subsequent to inquiry, investigation or audit by any officer of customs. Section 110AA operates only prospectively. This provision is Parliament's recognition of the importance of maintaining the jurisdiction for issuing show cause notices within the assessing group.

(xiv) Further, by retrospectively modifying the scheme of appointment and assignment of functions to officers of customs, a larger lacuna has been created as there exist no valid notifications for assignment of functions of a 'proper officer' under Section 5 for the period prior to 01.04.2022. Thus, all actions performed by any officer of Customs prior to 01.04.2022 have in fact been performed without jurisdiction.

In such circumstances referred to above, it was prayed that there being no merit in the Review Petition filed by the Department, the same may be dismissed.

D. ISSUES FOR CONSIDERATION

56. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

(i) Whether there is an "error apparent on the face of the record" for the purpose of entertaining the review petition?

(ii) If the answer to the aforesaid question is in the affirmative, then whether the exposition of law propounded by this Court in ***Canon India*** *(supra)* as regards the power of the DRI to issue show cause notices could be said to be the correct statement of law?

This would entail addressal of the following questions:

a. Whether officers of DRI are the proper officers for the purposes of Section 28 of the Act, 1962?

b. What would be the extent, scope and domain of Section 6 of the Act, 1962 *vis-à-vis* Section 2(34), Section 3, Section 4 and Section 5 of the Act, 1962 and whether an entrustment by the Central Government under Section 6 of the Act, 1962 is mandatory to empower the Officers of the DRI for the purpose of issuing show cause notices?

c. Whether the power under Section 28 can be exercised only by someone who is empowered to exercise the power under Section

17 of the Act, 1962 for the goods in question? In other words, how best the meaning of the expression "proper officer" should be construed for the purposes of exercise of functions under Section 28?

d. Whether "the proper officer" in Section 28 must necessarily be the same proper officer referred to under Section 17 of the Act, 1962? If no, whether the use of the definite article "the" in the expression "the proper officer" in Section 28 is in the context of that proper officer who has been assigned the powers of discharging the functions under Section 28 by virtue of powers conferred under Section 5 of the Act, 1962?

e. Whether issuance of show cause notices followed by adjudication under Section 28 of the Act, 1962 is an administrative review as held in ***Canon India*** *(supra)* or a quasi-judicial exercise of power under administrative law?

(iii) Whether the introduction of Section 28(11) *vide* the Validation Act of 2011 which retrospectively validates the show cause notices issued under Section 28 with effect from 06.07.2011, is discriminatory and arbitrary for not curing the defect highlighted in ***Sayed Ali*** *(supra)* and, therefore, is violative of Article 14 of the Constitution of India?

(iv) Whether the judgment delivered by the High Court of Delhi in the case of ***Mangali Impex*** *(supra)* expounds the correct interpretation of Section 28(11)?

(v) Whether Section 97 of the Finance Act, 2022, which retrospectively validates the show cause notices with effect from 01.04.2023, is manifestly arbitrary and therefore, violative of Article 14 of the Constitution of India?

E. ANALYSIS

i. *Review jurisdiction*

57. Article 137 of the Constitution of India provides for review of judgments or orders by the Supreme Court. It reads as under:

> *"**137. Review of judgments or orders by the Supreme Court**. — Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."*

58. Further, Part IV Order XLVII of the Supreme Court Rules, 2013 deals with the review and consists of five rules. Rule 1 is relevant for our purposes. It reads as under:

> *"**1.** The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order 47 Rule 1 of the Code and in a criminal proceeding except*

on the ground of an error apparent on the face of the record."

59. Order XLVII Rule 1(1) of the Code of Civil Procedure, 1908 provides for an application for review which reads as under:

> *"**1. Application for review of judgment**. — Any person considering himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed, or*
>
> *(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."*

60. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the

petitioner or could not be produced by him at the time when the decree was passed or order made;

(ii) Mistake or error apparent on the face of the record; or

(iii) Any other sufficient reason.

61. The words "any other sufficient reason" have been interpreted by the Privy Council in the case of ***Chhajju Ram v. Neki*** reported in **1922 SCC OnLine PC 11** and approved by this Court in ***Moran Mar Basselios Catholicos v. Mar Poulose Athanasius*** reported in **1954 SCC OnLine SC 49** to mean a reason sufficient on grounds, at least analogous to those specified in the rule.

62. In the case of ***Tinkari Sen v. Dulal Chandra Das*** reported in **1966 SCC OnLine Cal 103**, the Calcutta High Court held that if the court overlooks or fails to consider a legal provision that grants it the authority to act in a specific manner, this may amount to an error analogous to one apparent on the face of the record. Such an oversight would fall within the scope of Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 which allows for reviews. Relevant parts are extracted below:

> "*18. Consider, in this context, Sir Hari Sankar Pal v. Anath Nath Mitter, AIR 1949 FC 106. Mr. Chittatosh Mookerjee refers me to Mukherjee, J. (as his Lordship then was), observed, Kania C.J. Fazl Ali, Patanjali Sastri and Mahajan, JJ. (as their Lordships then were) agreeing:*
>
> *"**That a decision is erroneous in law is certainly no ground for ordering review. If the Court has decided a***

point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it "When, however, the Court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47, rule 1 of the CPC.*"*

[Emphasis supplied]

63. *In* ***Girdhari Lal Gupta v. D. H. Mehta*** reported in **(1971) 3 SCC 189**, this Court allowed the review on the ground that its attention was not given to a particular provision of the statute. The relevant observations read as follows:

"15. The learned counsel for the respondent State urges that this is not a case fit for review because it is only a case of mistaken judgment. But we are unable to agree with this submission because at the time of the arguments our attention was not drawn specifically to sub-section 23-C(2) and the light it throws on the interpretation of sub-section (1)*.*

16. *In the result the review petition is partly allowed and the judgment of this Court in Criminal Appeal No. 211 of 1969 modified to the extent that the sentence of six months' rigorous imprisonment imposed on Girdharilal is set aside. The sentence of fine of Rs 2000 shall, however, stand."*

[Emphasis supplied]

64. In ***M/s Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*** reported in **(1980) 2 SCC 167**, the scope of the power of review was explained by this Court wherein it was held that:

> "***8.*** *It is well-settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case.* ***The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so****: Sajjan Singh v. State of Rajasthan [AIR 1965 SC 845 : (1965) 1 SCR 933, 948 : (1965) 1 SCJ 377] .* ***For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment****: G.L. Gupta v. D.N. Mehta [(1971) 3 SCC 189 : 1971 SCC (Cri) 279 : (1971) 3 SCR 748, 750] . The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice: O.N. Mohindroo v. Distt. Judge, Delhi [(1971) 3 SCC 5 : (1971) 2 SCR 11, 27]. ....*
>
> **[Emphasis supplied]**

65. This Court in ***Yashwant Sinha v. CBI*** reported in **(2020) 2 SCC 338**, has observed that if a relevant law has been ignored while arriving at a decision, it would make the decision amenable to review. The relevant observations read as follows:

> *"**78.** The view of this Court, in Girdhari Lal Gupta [Girdhari Lal Gupta v. D.H. Mehta, (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162 : (1971) 3 SCR 748] as also in Deo Narain Singh [Deo Narain Singh v. Daddan Singh, 1986 Supp SCC 530] , has been noticed to be that* ***if the relevant law is ignored or an inapplicable law forms the foundation for the judgment, it would provide a ground for review****. If a court is oblivious to the relevant statutory provisions, the judgment would, in fact, be per incuriam. No doubt, the concept of per incuriam is apposite in the context of its value as the precedent but as between the parties,*

certainly it would be open to urge that a judgment rendered, in ignorance of the applicable law, must be reviewed. The judgment, in such a case, becomes open to review as it would betray a clear error in the decision*."*

[Emphasis supplied]

66. In ***Sow Chandra Kant and Anr. v. Sheikh Habib*** reported in **(1975) 1 SCC 674**, this Court held:

> *"1. Mr Daphtary, learned counsel for the petitioners, has argued at length all the points which were urged at the earlier stage when we refused special leave thus making out that a review proceeding virtually amounts to a re-hearing. May be, we were not right is refusing special leave in the first round; but, once an order has been passed by this Court, a review thereof must be subject to the rules of the game and cannot be lightly entertained.* ***A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility****. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now, except*

> *a couple of rulings on points earlier put forward. May be, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."*
>
> **[Emphasis supplied]**

67. Thus, the decisions referred to above make it abundantly clear that when a court disposes of a case without due regard to a provision of law or when its attention was not invited to a provision of law, it may amount to an error analogous to one apparent on the face of record sufficient to bring the case within the purview of Order XLVII Rule 1 of the Code of Civil Procedure, 1908. In other words, if a court is oblivious to the relevant statutory provisions, the judgment would in fact be *per incuriam*. In such circumstances, a judgment rendered in ignorance of the applicable law must be reviewed.

68. From here onwards, our endeavour is to ascertain whether the relevant provisions of law including the notifications issued by the Board from time to time were brought to the notice of the Court while deciding ***Canon India*** *(supra).*

69. A three-Judge Bench in ***Canon India*** *(supra)* examined whether officers of the DRI are proper officers for the purpose of issuing recovery notices under the provisions of Section 28 of the Act, 1962.

70. The Court while deciding the aforesaid question held as under:

"11. *There are only two articles "a (or an)" and "the". "A (or an)" is known as the indefinite article because it does not specifically refer to a particular person or thing. On the other hand, "the" is called the definite article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word "any".*

12. *Parliament has employed the article "the" not accidently but with the intention to designate the proper officer who had assessed the goods at the time of clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2(2)(c) of the Customs Act, 1962 ["**2. Definitions**.—In this Act, unless the context otherwise requires—***(2) "**assessment**" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to—(a)-(b)***(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;"] .*

13. *The nature of the power to recover the duty, not paid or short-paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper*

> *officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to reopen assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.*
>
> ***14.** Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute."*

71. The aforesaid observations are in line with the decision of this Court in ***Sayed Ali*** *(supra)*. However, it is relevant to note that when ***Sayed Ali*** *(supra)* was decided, Section 17 read differently and the true purport of Section 4 of the Act, 1962 was not considered. We shall deal with this aspect subsequently.

72. The Court further held as under:

> *"16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that*

he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the proper officer under Section 6 of the Customs Act. The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act. 17. Shri Sanjay Jain, Learned Additional Solicitor General, relied on a Notification No. 17/2002-Customs (N.T.), dated 7-3-2002 to show all Additional Directors General of the DRI have been appointed as Commissioners of Customs. At the relevant time, the Central Government was the appropriate authority to issue such a notification. This notification shows that all Additional Directors General, mentioned in Column (2), are appointed as Commissioners of Customs.

18. The next step is to see whether an Additional Director General of the DRI who has been appointed as an officer of Customs, under the notification dated 7-3-2002, has been entrusted with the functions under Section 28 as a proper officer under the Customs Act. In support of the contention that he has been so entrusted with the functions of a proper officer under Section 28 of the Customs Act, Shri Sanjay Jain, Learned Additional Solicitor General relied on a Notification No. 40/2012, dated 2-5-2012 issued by the Central Board of Excise and Customs. The notification confers various functions referred to in Column (3) of the notification under the Customs Act on officers referred to in Column (2). The relevant part of the notification reads as follows :-

"[To be published in the Gazette of India,

Extraordinary, Part I, Section 3, Sub-section (i)]

Government of India

Ministry of Finance

(Department of Revenue)

Notification No. 40/2012-Customs (N.T.)

New Delhi, dated the 2nd May, 2012

S.O. (E). - In exercise of the powers conferred by subsection (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs, hereby assigns the officers and above the rank of officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the Customs Act, 1962, given in the corresponding entry in Column (3) of the said Table :-

. No.	*Designation of the officers*	*Functions under Section of the Customs Act, 1962*
(1)	*(2)*	*(3)*
	Commissioner of Customs	*(i) Section 33*
	Additional Commissioner or Joint Commissioner of Customs	*(i) Sub-section (5) of section 46; and (ii) Section 149*
	Deputy Commissioner or Assistant Commissioner of Customs and Central Excise	*(i) ..... (ii) ..... (iii) ..... (iv)..... (v) .....* *(vi) Section 28; ……"*

19.It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under Section 28, vide Sl. No. 3 above. By reason of the fact that the functions are assigned to officers referred to in Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform the function under Section 28 of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-section (34)

of Section 2 of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows :-

> *"2. Definitions. - In this Act, unless the context otherwise requires, - ... 136/163 https://www.mhc.tn.gov.in/judis W.P.Nos.33099 of 2015 & etc., (34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs."*

20. Section 6 is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:-

> *"6. Entrustment of functions of Board and customs officers on certain other officers. - The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act."*

21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 4-12-1957 issued by the Ministry of Finance and Customs officers who, till 11- 5-2002, were appointed by the Central Government. The notification

which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2(34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.

22. In the above context, it would be useful to refer to the decision of this Court in the case of Commissioner of Customs v. Sayed Ali and Another [(2011) 3 SCC 537 = 2011 (265) E.L.T. 17 (S.C.)] wherein the proper officer in respect of the jurisdictional area was considered. The consideration made is as hereunder :-

> *"16. It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports), Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer which was duly executed undertaking the obligation of export. The Learned Counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance, etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).*
>
> *17. Before adverting to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that :*
>
> > *"**28. Notice for payment of duties, interest, etc. -** (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid*

or erroneously refunded, the proper officer may, -

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words 'one year' and 'six months', the words 'five years' were substituted."

18. It is plain from the provision that the 'proper officer' being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by the Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the 'proper officer'.

19. Section 2(34) of the Act defines a 'proper officer', thus :

'2. Definitions. –

……..

(34)'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;'

It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be 'proper officers' in terms of Section 2(34) the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an 'officer of customs' is the 'proper officer'.

20. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions."

23. We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set aside and the ensuing demands are also set aside."

73. It is not in dispute that ***Canon India*** *(supra)* is based on the decision of this Court in ***Sayed Ali*** *(supra)*. We say so because in ***Canon India*** *(supra)*, the petitioner had not questioned the jurisdiction of the officers of DRI either before the departmental authorities or before the Tribunal. We must, therefore, first look into the judgment rendered in ***Sayed Ali*** *(supra)*.

ii. ***<u>The decision in Commissioner of Customs v. Sayed Ali</u>***

74. In ***Sayed Ali*** *(supra)*, a show cause notice dated 28.08.1991 was issued by the Assistant Collector of Customs (Preventive), Mumbai, alleging a violation of the provisions of Section 111(d) of the Act, 1962. It culminated in an order dated 03.02.1993 which was appealed before the Collector of Customs (Appeals). An order was passed by the Collector of Customs (Appeals) on 14.12.1993. The Collector of Customs (Appeals) allowed the appeal by holding that the matter involved demand of duty beyond a period of six months and therefore the show cause notice could have been issued only by the Collector and not by the Assistant Collector of Customs (Preventive). At that point of time, there were circulars of the Board, which stipulated pecuniary limits for officers to exercise powers under various provisions of the Act. Thus, the Collector (Appeals) granted liberty to the department to re-adjudicate the case by issuing a proper show cause notice.

75. The Collector of Customs (Preventive) thus issued a show cause notice dated 16.04.1994, calling upon the importer to show cause as to why the goods

seized should not be confiscated, why the customs duty amounting to Rs.5,07,274/- should not be levied in terms of Section 28(1) of the Act, 1962, by invoking the extended period of limitation, and why the penalties under Sections 112(a) and (b)(i) and (ii) of the Act, 1962, should not be imposed on the said importer.

76. The jurisdiction of the Collector of Customs (Preventive) to issue the show cause notice was questioned in the reply to the show cause notice by referring to Notification No. 251/83 and Notification No.250/83. The Collector of Customs (Preventive) rejected the submission on the point of jurisdiction. The demand was thus affirmed by the Collector of Customs (Preventive) *vide* Order dated 19.08.1996. The matter was taken up before the Tribunal, which held that the Commissioner of Customs (Preventive) had no jurisdiction to issue the show cause notice and therefore did not have the jurisdiction to adjudicate the matter when the imports had taken place within the Bombay Customs House.

77. This Court, after referring to Section 28 of the Act, 1962 as it stood during the period in dispute, concluded that from a conjoint reading of Section 2(34) and Section 28 of the Act, 1962, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been effected, either by the Board or the Commissioner of Customs, in terms

of Section 2(34) of the Act, 1962, was competent to issue notice under Section 28 of the Act, 1962.

78. This Court further held that *"…any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act of the Act is that of specific conferment of such functions"*. It further held that "*Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act, 1962 is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officers"* ".

79. This Court concluded that *"It is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act"*. Thus, the proceedings impugned therein were set aside.

80. Thereafter, a Review Petition was filed by the Department in the aforesaid case. This Court dismissed the Review Petition on the ground of delay in filing the review.

81. The decision in ***Sayed Ali*** *(supra)* proceeds on the assumption that for the "proper officer" to exercise the functions under Section 28 of the Act, 1962, such officer must necessarily possess the power of assessment and reassessment under Section 17. However, a plain reading of Sections 17 and 28 of the Act, 1962 does not bring out any such inter-dependence between the two provisions. Having looked into the statutory scheme of the Act, 1962, we are of the view that the observations pertaining to the interlinkage between Sections 17 and 28 respectively of the Act, 1962 made in ***Sayed Ali*** *(supra)* do not lay down the correct position of law.

82. Even otherwise, the decision in ***Sayed Ali*** *(supra)* could have been arrived at without deciding on the interdependence of Section 17 and Section 28 of the Act, 1962 as the Customs (Preventive) officers, whose jurisdiction to issue show cause notices was under challenge in that case, were not assigned the functions of the "proper officer" for the purposes of Section 28 through a notification issued by the appropriate authority. As we have observed in the foregoing parts of this judgment, assignment of functions is a mandatory requirement for the exercise of jurisdiction by the "proper officer". The observations made in ***Sayed Ali*** *(supra)* on the connection between Sections

17 and 28 of the Act, 1962 are *obiter dicta* at best and do not constitute the binding *ratio decidendi* of that judgment.

83. Further, ***Sayed Ali*** *(supra)* could not have been relied upon by this Court in ***Canon India*** *(supra)* as it could not have been applied for the period subsequent to 08.04.2011 in view of the fact that Section 17 of the Act, 1962 has undergone a radical change by virtue of the amendments made by the Finance Act, 2011.

iii. ***Changes to Section 17 w.e.f. 11.04.2011 – the assessment of bill(s) of entry and shipping bill(s)***

84. Section 17 of the Act, 1962 was amended by Section 38 of the Finance Act, 2011 with effect from 08.04.2011. The amendment altered the method of assessment of bill(s) of entry and shipping bill(s). This change appears not to have been brought to the notice of this Court while ***Canon India*** *(supra)* was heard.

85. We note that with effect from 08.04.2011, the functions of the proper officer under Section 17 also underwent certain changes. One such change is that the assessment of bill(s) of entry and shipping bill(s) was no longer the task of the "proper officer". With effect from 08.04.2011, Bill(s) of Entry and/or Shipping Bill(s) are self-assessed. This self-assessment is to be accepted or rejected by the proper officer subject to verification in certain cases.

86. The "proper officer" appointed for the purpose of Section 17 of the Act, 1962 under a notification issued under Section 2(34) of the Act, 1962 could only make a re-assessment of the bill(s) of entry and shipping bill(s) in case they did not agree with the self-assessment of the importer or the exporter as the case may be.

87. The purport of Section 17 as it stood before 08.04.2011 and after 08.04.2011 was analysed by a learned Single Judge of the Madras High Court in the case of ***M/s. N.C. Alexander v. The Commissioner of Customs, Chennai*** in W.P. Nos. 33099 of 2015. The relevant paragraphs of the judgment are reproduced below:

> *"207. Thus, there was a paradigm shift in the method of assessment with effect from 08.04.2011. Till 07.4.2011, the assessment of Bill of Entry(s) or the Shipping Bill(s) was by a "proper officer" appointed for that purpose under Section 2(34) of the Custom Act, 1962. The assessment was left to the Group 'B' Gazetted Officers and it is only such officers were appointed as "proper officers" for assessment under Section 17.*
>
> *208. However, after 08.04.2011, Bill(s) of Entry (in the case of import) or Shipping Bill(s) (in the case of export) are to be self assessed by an importer or an exporter under Sections 46 and 50 of the Customs Act, 1962 respectively. The changes are shown in bold in the above Table.*
>
> *209. A "proper officer" has to merely verify the entries made in the Bill(s) of Entry under Section 46 (in case of import) or Shipping Bill(s) under Section 50 (in case of export). The "Proper Officer" may examine or test imported goods or export goods or such part thereof as*

may be necessary. If required, such an officer can only re-assess the goods under Section 17 of the Act. ***Thus, a "Proper Officer" under Section 17(1) & 17(4) of the Act is merely required to re-assess the imported goods or export goods where he differs with the self assessment of an importer or an exporter. This important change was not brought to the attention of the Hon'ble Supreme Court in Canon India Pvt Ltd Case.***

210. As mentioned above, an importer or an exporter is merely required to make a self-assessment in the Bill(s) of Entry or Shipping Bill(s) as may be in the case of import or export respectively and file the same.

211. Officers who are appointed as "Proper Officers" for the purpose of Section 17 of the Customs Act, 1962 are "Officers of Customs" like any "Officer of Customs" as per Section 3 and 4 read with notification issued under these provisions. There is delegation of functions by the Board and senior officers to different class of officers by the Board. This is an internal arrangement with a view for better tax administration. Thus, officers of Directorate of Revenue Intelligence are also one among the class "Officers of Customs" like any Officer of Customs as per Section 3 and 4 read with notification issued for the said purpose are competent to issue show cause notice. ***The "proper officer" at the Port at the time of clearance of import or export, merely reassess the self-assessment already made on the Bill(s) of Entry and/or Shipping Bill(s). They are normally not assigned with the function to adjudicate Show Cause Notices and/or Demand Notices under the various provisions of the Customs Act, 1962.***

212. With effect from, 08.04.2011, there was no question of assessment of Bill(s) of Entry /Shipping Bill(s) by a "proper officer". There is only self assessment by an importer or an exporter. There could be only re-assessment of Bill of Entry(s) or the Shipping Bill(s) by the "proper officer" under Section 17 of the Customs Act,1962.

213. If the "proper officer" was inclined to disagree with the self assessment made by an importer or an exporter as the case may be, the "proper officer" could make a re-assessment and pass a speaking order under Section 17(5) of the Customs Act, 1962.

214. If the self assessment is accepted, the "proper officer" appointed under Section 17 of the Customs Act, 1962 becomes "functus officio" under the scheme of the Act and the Notification issued for the aforesaid purpose.

215. Likewise, where there was a re-assessment, again such an officer becomes "functus officio", after such an order of re-assessment and a speaking order under Section 17(5) of the Customs Act, 1962 is passed.

216. An importer or an exporter aggrieved by such an order of reassessment and the speaking order is entitled to file an appeal under Section 128 of the Custom Act,1962 before the Appellate Commissioner. Only circumstances, where such an officer who makes an order of reassessment can re-visit the re-assessment and/or speaking order is under Section 28 (if specifically authorized) or under Section 149 or under Section 154 of the Customs Act, 1962.

217. The power to issue Show Cause Notice whether under Section 28 or under Chapter XIV of Customs Act, 1962 or under any other provisions and to pass orders has been by and large exercised by the Superior Officers from Group 'A' Cadre Officer of the Custom Department in terms of Notification issued under Section 2(34) of the Act. The Officers from the Directorate of Revenue Intelligence (DRI) being "Officers of Custom" have been recognized as a "Proper Officer" for the aforesaid purpose.

218. ***The "proper officer" who is/was involved at the stage of assessment under Section 17 of the Act upto 08.04.2011 and reassessment after 08.04.2011 have rarely been involved in collateral adjudication of***

notices issued under Section 28 of the Act. *However, once again at the stage of recovery of duty or penalty under other provision of the Customs Act, 1962 or redemption fine under Section 125 of the Customs Act, 1962, they are authorized.*

219. Mostly, at the time of clearance of imported goods or export goods for the purpose of assessment under Section 17 of the Custom Act,1962, it is the Superintendent/Appraisers of Customs from Group 'B' Executive - Gazetted Officers who act as "proper officers". They are merely required to verify the entries made in the Bill(s) of Entry filed under Section 46 of the Act (in case of import) and or Shipping Bill(s) filed under Section 50 of the Act (in case of export). As "proper officers" are required to merely examine or test any imported or export goods or such parts thereof. Such Officer of Customs under the Scheme of the Act and Notification issued thereunder can only re-assess the self-assessment made by the importer or the exporter.

220. ***Earlier, the Officers from the Directorate of Revenue Intelligence (DRI) were mostly confined with the task of investigation. Over a period of time, they were empowered to issue Show Cause Notices and/or Demand Notices under various provisions of the Customs Act. Adjudication of the Show Cause Notices/Demand Notices were however left to the senior officer of customs from Group 'A' cadre of the Customs Department. However, they are empowered to act as "proper officers" not only for issuance of Show Cause Notice and/or Demand Notices but also for adjudication of such Show Cause Notices and/or Demand Notices.*** *"*

[Emphasis supplied]

88. In case of re-assessment, such a "proper officer" is bound to pass a "Speaking Order" to enable the aggrieved party to file an appeal. Section 17

as it read before 08.04.2011 and after 08.04.2011 is reproduced below to better appreciate the nuances of the issue:

Section 17: Assessment of Duty	
Before 08.04.2011	***Between 08.04.2011 and 28.03.2018***
(1) After an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50, the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.	*(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.*
(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in section 85, be assessed.	*(2) The proper officer may verify the **self-assessment** of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.*
(3) For the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon the importer, exporter or	*(3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon, the importer, exporter*

such other person shall produce such document and furnish such information.	*or such other person shall produce such document or furnish such information.*
(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.	*(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods. Amendment of section 18.*
(5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefor under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.	*(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.*

	*[(6) Where re-assessment has not been done or a speaking order has not been passed on re-assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.] * Explanation.— For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received."*

89. The examination of Section 17, as amended *vide* the Finance Act, 2011 vis-à-vis the provisions of the old Section 17 as it stood prior to 08.04.2011, highlights the following major changes:

(a) **Self-assessment of duty**: The concept of self-assessment of duty was introduced by way of the amendment to Section 17 wherein there is no role of the proper officer to assess the duty at the first instance. The onus for providing the duty leviable has been shifted to the assessee itself.

(b) **Discretion to verify**: Sub-section (2) of the new Section 17 states that "*The proper officer **may** verify the self-assessment of the goods…*". The use of the word "may" indicates two things:

(i) that the actions to be taken by the proper officer under the old Section 17 are no longer compulsory. The proper officer may choose to accept the self-assessment made by the assessee, thereby becoming *functus officio* and there is no compulsion on him or her to examine or test any goods for reaching a first instance assessment;

(ii) The proper officer is not involved in the assessment of duty under Section 17 at the first instance except for his or her role in accepting or not accepting the self-assessed duty. There can be three situations that may result from such limited role of the proper officer:

- The proper officer accepts the self-assessed duty without verification of such duty under sub-section (2) of the new Section 17,
- The proper officer accepts the self-assessed duty after verifying the same in accordance with sub-sections (2) and (3) of the new Section 17,

- The proper officer does not accept the self-assessed duty after verifying the same in accordance with sub-sections (2) and (3) of the new Section 17, in which case, the re-assessment of duty will be undertaken by the proper officer as per sub-sections (4) and (5) of the new Section 17.

In the first two cases, the scope of the function of the proper officer is limited. Such proper officer is not entitled to exercise the function of the assessment of duty, which is a noteworthy deviation from the earlier procedure.

The proper officer is entitled to exercise his or her functions of re-assessment of duty only if the verification process shows that the self-assessment done by the assessee was incorrect.

(c) **Condition precedent for re-assessment**: It is worthwhile to note that the old Section 17 allowed for self-assessment of duty, only under sub-section (4) and that too with the permission of the proper officer. However, upon a subsequent finding that the statements made by the assessee were not true, the proper officer was entitled to re-assess the duty so levied. Therefore, re-assessment was allowed under both the old and the new Section 17 only after a self-assessment by the assessee. The only point of difference with respect to re-assessment is that self-assessment was not a matter of course prior to the amendment and was

possible only upon the proper officer permitting for the same. After 08.04.2011, self-assessment is *ipso jure* the procedure and has replaced the assessment process previously undertaken by the proper officer.

(d) **Scheme of Section 17(5)**: The old Section 17(5) requires the proper officer to provide a speaking order within 15 days of the date of assessment of duty if the same is contrary to the claim of the assessee or is not accepted in writing by the assessee. The new Section 17(5) is analogous to the old sub-section (5) except that it requires a speaking order within 15 days from the date of the "re-assessment" of duty. Such change shows the legislative intent to transfer the process of "assessment" under the old Section 17 to the stage of "re-assessment" under the new Section 17 and replace the "assessment" to be done by the proper officer under the old Section 17 with the process of "self-assessment".

90. These changes highlight that the competence of the proper officer to conduct "assessment" is completely taken away by the legislature *vide* the amendment to Section 17. The new Section 17 empowers the proper officer to perform the functions of verification of self-assessment and subsequent re-assessment, if found necessary. However, such re-assessment is not a mandatory function on the same footing as "assessment" under the old

Section 17. Therefore, in our considered view the scope of the functions of the proper officer under the new Section 17 is limited.

91. It is evident from the aforesaid that the attention of this Court in ***Canon India*** (supra) was not drawn to the important changes brought to Section 17 of the Act, 1962 *vide* Section 38 of the Finance Act, 2011 with effect from 08.04.2011.

92. The observation in paragraph 13 in ***Canon India*** *(supra)* that *"where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank"* has been made without taking note of the changes to Section 17 of the Act, 1962 with effect from 08.04.2011.

93. Similarly, the observation in paragraph 14 in ***Canon India*** *(supra)* is erroneous. The relevant paragraph is reproduced below:

> *"We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28(4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment."*

In other words, the conclusion that an officer who did the assessment, could only undertake reassessment under Section 28(4) was arrived at without taking note of the abovementioned amendment to Section 17 of the Act, 1962 with effect from 08.04.2011 *vide* Section 38 of the Finance Act, 2011. The judgment in ***Canon India*** *(supra)* also recorded an erroneous finding that the function of re-assessment is with reference to Section 28(4) when in fact it is an exercise of function under Section 17.

94. Further, in ***Canon India*** *(supra)* the subject show cause notice was dated 19.09.2014 in respect of the Bill of Entry filed on 20.03.2012. This Court appears to have erroneously applied the provisions of Section 17 of the Act, 1962, as they stood prior to 08.04.2011 as opposed to the amended Section 17 which ought to have been applied.

iv. ***Scheme of Sections 17 and 28 of the Act, 1962***

95. Section 17 read with Sections 46 and 47 of the Act, 1962 deals with the assessment and re-assessment at the first instance that is, upon entry of the consignments and clearance of bill(s) of entry. The amendment to Section 17 introduces the process of self-assessment and subsequent re-assessment upon verification by the proper officer, if so required, for undertaking a check at the first instance.

96. The proceedings under Section 28 are subsequent to the completion of the process set out in Section 17 of the Act, 1962. The procedure envisaged

under Section 28 is in the nature of a quasi-judicial proceeding with the issuance of the show cause notice by the proper officer followed by adjudication of such notices by the field customs officers. It is also worth noting that in the case of DRI, the proceedings under Section 28 start only after an investigation has been undertaken by DRI. This is reaffirmed by Circular No. 4/99-Cus dated 15.02.1999 and Circular No. 44/2011-Customs dated 23.11.2011. Therefore, the nature of review under Section 28 is significantly different from the nature of assessment and re-assessment under Section 17. The ambit of Section 28 has also been restricted to the review of assessments and re-assessments done under Section 17 for ascertaining if there has been a short-levy, non-levy, part-payment, non-payment or erroneous refund.

97. Keeping this statutory scheme in mind, we are unable to subscribe to the view taken in both ***Sayed Ali*** *(supra)* and ***Canon India*** *(supra)*, namely, that the vesting of the functions of assessment and re-assessment under Section 17 is a threshold, mandatory condition for a proper officer to perform functions under Section 28. This scheme does not flow from the scheme of the statute and was judicially read in to avoid the possibility of chaos and confusion due to the potential for multiple proper officers exercising jurisdiction under Section 28. We find that such apprehensions of misuse are unfounded considering that no substantial empirical evidence

has been brought forth by the respondents in this case to support such a view. Regardless, the the parameters under Section 28 cannot be reduced to an administrative review of assessment/re-assessment done under Section 17.

98. We are conscious of the fact that Section 110AA of the Act, 1962, which has been introduced by the Finance Act, 2022, stipulates that a show cause notice under Section 28 of the Act, 1962 can only be issued by that "proper officer" who has been conferred with the jurisdiction, by an assignment of functions under Section 5 of the Act, 1962, to conduct assessment under Section 17 of the Act in respect of such duty. However, we are of the view that the introduction of Section 110AA doesn't alter the statutory scheme of Sections 17 and 28 of the Act, 1962 as it stood prior to the introduction of Section 110AA. The legislature in its wisdom may introduce certain new provisions keeping in mind the exigencies of administration and taking into account the evolution of law. However, this would not by itself mean that the procedure which was being followed prior to the introduction of such changes was incorrect or in contravention of the law. The legality and correctness of an action has to be adjudged based on the statutory scheme prevailing at the time when such action took place, and incorrectness or invalidity cannot be imputed to it on the basis of subsequent changes in law. Seen thus, the contention of the respondents that Section 110AA of

the Act, 1962 amounts to an admission by the petitioner on the invalidity of the legal position existing prior to its introduction, deserves to be rejected.

99. Therefore, in our considered view, the scheme of Sections 17 and 28 of the Act, 1962 indicates that there cannot be a mandatory condition linking the two provisions and the interpretation of this Court in the cases of ***Sayed Ali*** *(supra)* and ***Canon India*** *(supra)* is patently erroneous.

v. ***Use of the article 'the' in the expression "the proper officer"***

100. This Court in ***Canon India*** *(supra)*, while laying much emphasis on the use of the expression "the proper officer" observed that the Parliament had employed the article "the" instead of "a/an" in Section 28 of the Act, 1962 so as to give effect to its intention of specifying that the proper officer referred to in Section 28 is the same officer as the one referred to in Section 17. The Court further observed that the use of a definite article instead of an indefinite article is indicative of the fact that the proper officer referred to in Section 28 is not "any" proper officer but "the" proper officer assigned with the function of assessment and reassessment under Section 17.

101. However, there is an error apparent in the aforesaid view. Undoubtedly, a definite article "the" has been used before "proper officer" with a view to limit the exercise of powers under Section 28 by a specific proper officer and not any proper officer. But, in the absence of any statutory linkage

between Sections 17 and 28 of the Act, 1962 respectively, there was no legal footing for this Court in ***Canon India*** *(supra)* to hold that "the proper officer" in Section 28 must necessarily be the same proper officer referred to under Section 17 of the Act, 1962.

102. As we have discussed in the foregoing parts of this judgment, the statutory scheme of the Act, 1962 necessitates that a proper officer can only perform specific functions under the Act if he has been assigned as "the proper officer" to perform such functions by an appropriate notification issued by the competent authority. Seen thus, it becomes clear that an officer of Customs can only perform the functions under Section 28 of the Act, 1962 if such officer has been designated as "the proper officer" for the purposes of Section 28 by an appropriate notification. The use of the article "the" in the expression "the proper officer" should be read in the context of that proper officer who has been conferred with the powers of discharging the functions under Section 28 by conferment under Section 5. In other words, the proper officer is *qua* the function or power to be discharged or exercised.

103. Thus, the definite article "the" in Section 28 refers to a "proper officer" who has been conferred with the powers to discharge functions under Section 28 by virtue of a notification issued by the competent authority under Section 5. In other words, the use of article "the" in Section 28 has no apparent relation with the proper officer referred to under Section 17. The proper

officer under Section 28 could be said to be determinable only in the sense that he is a proper officer who has been empowered to perform the functions under Section 28 by means of a notification issued under Section 5 of the Act, 1962.

104. In ***Canon India*** *(supra)*, this Court held that DRI officers did not have the power of issuing show cause notices under Section 28 as they did not fall within the meaning of the expression "the proper officers" used in Section 28 for the reason that they did not possess the power of assessment under Section 17 of the Act, 1962. However, as we have discussed in the previous parts of this judgment, contrary to the aforesaid observations of the Court, DRI officers were notified as "the proper officer" for the purposes of Sections 17 and 28 of the Act, 1962 respectively *vide* Notification No. 44/2011–Cus–N.T. dated 06.07.2011 issued by the Central Government. Hence, those officers of DRI who were designated as "the proper officer" for the purpose of Section 28 by the aforesaid notification were competent to issue show cause notices under Section 28.

105. Craies on Statute Law[1] has stated that "*the language of statutes is not always that which a rigid grammarian would use, it must be borne in mind that a statute consists of two parts, the letter and the sense*". It was observed by this Court in ***State of Andhra Pradesh v. Ganesweara Rao***, reported in **AIR**

[1] 7th Ed., Page 83

1963 SC 1850 that the aforesaid rule of construction that the provisions of a statute are to be read together and given effect to and that it is the duty of the court to construe a statute harmoniously has gained general acceptance. In ***Management, S.S.L. Rly. Co. v. S.S.R.W. Union*** reported in **AIR 1969 SC 513**, this Court observed that the principle that literal meaning of the word in a statute is to be preferred is subject to the exception that if such literal sense would give rise to any anomaly or would result in something which would defeat the purpose of the Act, a strict grammatical adherence to the words should be avoided as far as possible. The above principles would help us to desist from affording undue stress on the definite article "the" used before the expression "proper officer" in Section 28 of the Act, 1962.

vi. *DRI officers as proper officers under section 2(34)*

106. In ***Canon India*** *(supra)*, this Court erroneously concluded that an officer from the Directorate of Revenue Intelligence (DRI) was not an officer of customs and therefore cannot function as a "Proper Officer". The finding of the Court that the power conferred by the Board under Notification No. 40/2012-Customs (N.T.) dated 02.05.2012 was ill-founded is an error apparent.

107. By way of Notification No. 40/2012-Customs (N.T.) dated 02.05.2012, the Board appointed several persons including the Officers of Directorate of

Revenue Intelligence (DRI) as "Proper Officers" under Section 2(34) of the Act, 1962.

108. Section 2(34) of the Act, 1962 also stood amended under the Finance Act, 2022. Section 2(34) of the Act, 1962 together with the amendment is reproduced below:

Section 2(34) of the Customs Act, 1962 till passing of Finance Act, 2022	***Section 2(34) of the Customs Act, 1962 after amendment vide Finance Act, 2022***
"Proper Officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Section 2(34) of the Customs Act, 1962 till passing of Finance Act, 2022	*"Proper Officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Section 2(34) of the Customs Act, 1962 after amendment vide Finance Act, 2022*
Customs.	*Customs under Section 5.*

109. The Notification No. 40/2012-Customs (N.T.) dated 02.05.2012, issued under Section 2(34) of the Act, 1962 cannot be read in isolation. It has to be read in conjunction with Section 4(1) of the Act, 1962 and the Notification issued thereunder.

110. The view that the "Proper Officer" for the purpose of Section 28 and other provisions of the Act, 1962 could only mean the person who cleared the goods or the officer who succeeds such officer and not any other officer

from any other department requires reconsideration in view of the changes to the Act, 1962 *vide* the Finance Act, 2011 and also in the light of Section 4 and the notification issued thereunder.

111. This Court in paragraphs 11 to 15 of ***Canon India*** *(supra)* proceeded on the footing that under the provisions of the Act, 1962, the Board has no power to appoint "Proper Officers".

112. As per Section 4 of the Act, 1962, the Board constituted under the provisions of Central Board of Revenue Act, 1963 is vested with the power to appoint such persons as it thinks fit to be "officers of customs".

113. Under sub-section (1) to Section 4(1) of the Act, 1962, the Board may appoint such person as Officers of Customs as it thinks fit. Under Section 4(2) of the Act, 1962 the Board can even authorize a Chief Commissioner of Customs or a Joint or Assistant or Deputy Commissioner of Customs to appoint any officers below the rank of Assistant Commissioner of Customs as an "officer of customs". It appears that this aspect was also not brought to the notice of this Court in ***Canon India*** *(supra)*.

vii. ***Section 4 of the Act, 1962***

114. For an easy reference, Section 4 of the Act, 1962 is reproduced below:

> *"Section 4 : Appointment of "Officers of Customs":*
>
> *1) The Board may appoint such persons as it thinks fit to be Officers of Customs.*

> *2) Without prejudice to the provisions of subsection (1), [Board may authorise a* ***Principal Chief Commissioner of Customs or a Chief Commissioner of Customs Principal Commissioner of Customs or Commissioner of Customs)*** *or Joint or Assistant Commissioner of Customs or Joint or Assistant Commissioner of Customs or Deputy Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs.]"*

115. It is relevant to note that it is only an officer of customs, appointed under Section 4(1) of the Act, 1962 who can be designated as the "proper officer" as defined in Section 2(34) of the Act, 1962 by a notification. The notifications issued under Section 2(34) and 4(1) of the Act, 1962 are nothing but an internal arrangement for the purpose of allocation of work among the officers of customs.

116. In ***M/s. N.C. Alexander*** *(supra)*, the High Court has extensively explained how officers of the DRI are officers of customs. We quote the relevant observations:

> *"236. The officers of the Directorate of Revenue Intelligence (DRI) have already been appointed as "Officers of Customs" under Notification issued under Section 4(1) of the Customs Act, 1962 vide Notification of the Government of India in the Ministry of Finance (Department of Revenue) No.186-Cus, dated 4 th August, 1981. The said Notification was later superseded by Notification No.19/90- Cus (N.T.), dated 26.04.1990.*

237. By Notification No.19/90- Cus (N.T.), dated 26.04.1990, the officers from the Directorate of Revenue Intelligence (DRI) were appointed as Collectors and Assistant Collectors of Customs in the area mentioned in Column-I of the said notification.

238. Notification No.19/90- Cus (N.T.), dated 26.04.1990 was later superseded by Notification No.17/2002-Cus. (N.T.) dated 07.03.2002, whereby, various officers from the Directorate General of Revenue Intelligence and Directorate of Revenue Intelligence were appointed as Commissioner of Customs and as Additional Commissioner and Joint Commissioner of Customs and Deputy Commissioner/Assistant Commissioner of Customs. Thus, they were appointed as Officers of Customs. Relevant portion Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 is reproduced below:- Directorate of Revenue Intelligence (D.R.I.) Officers appointed as Customs Officers – Notification No.19/90 - Cus. (N.T.) superseded. In exercise of the powers conferred by sub-section (1) of Section 4 of the Customs Act, 1962 (52 of 1962) and in supersession of notification of the Government of India in the Ministry of Finance (Department of Revenue) No.19/90- Customs (N.T.), dated the 26th April, 1990, the Central Government appoints the officers mentioned in Column (2) of the Table below to the Commissioner of Customs, the officers mentioned in column (3) thereof to be the Additional Commissioners or Joint Commissioners of Customs and Officers mentioned in column(4) thereof to be the Deputy Commissioners or Assistant Commissioners of Customs for the areas mentioned in the corresponding entry in column(1) of the said Table with effect from the date to be notified by the Central Government in the Official Gazette:-

Area of Jurisdiction	***Designation of the Officers***		
(1)	*(2)*	*(3)*	*(4)*

Whole of India	*Additional Director*	*Additional Directors or Joint*	*Deputy Directors, or*
	General, Directorate General of Revenue Intelligence posted at Headquarters and Zonal/regional units	*Directors, of Directorate of Revenue Intelligence posted at Headquarters and Zonal/regional units.*	*Assistant Directors of Directorate of Revenue Intelligence posted at Headquarters and Zonal/regional units*

239. Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 came into force on 25.10.2002 vide Notification No.63/2002-Cus. (N.T.) dated 03.10.2002. Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 was further amended by Notification No.82/2014-Cus. (N.T.), dated 16.09.2014.

240. Thus, the officers from the Directorate of Revenue Intelligence have been appointed as "Officers of Customs" under Section 4 of the Customs Act, 1962 and therefore they are "Proper Officers" for the purpose of Section 2(34) of the Customs Act, 1962. This aspect was not brought to the attention of the Hon'ble Supreme Court in Canon India Private Ltd. case referred to supra.

241. With a view to streamline the allocation of work and for the purposes of Section 17 and Section 28 of the Customs Act, 1962, Notification No. 44/2011-Cus. (N.T.), dated 06.07.2011 was issued by the Board under Section 2(34) of the Act.

242. Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 was issued under Section 2(34) of the Customs Act, 1962 for the purpose of identifying officers of customs for exercising the power and function under the Customs Act,1962.

243. Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 was later amended by Notification No.53/2012-Cus. (N.T.) dated 21.06.2012 and still later by Notification No.43/2019-Cus. (N.T.) dated 18.06.2019 and eventually has been rescinded/superseded by Notification No.25/2022-Cus. (N.T.) dated 31.03.2022 in tune with the amendment proposed in the Finance Bill, 2022 and passed by Finance Act, 2022.

244. Among various officers of the Customs, following officers were also assigned to act and function as the "Proper Officer" under Notification No.44/2011 – Cus. (N.T.) dated 06.07.2011:-

TABLE

Sl.No.	***Designation of the officers***
(1)	***(2)***
1.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.*
2.	*Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).*
3.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.*
4.	*Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.*

245. Thus, over a period of time, the officers of Directorate of Revenue Intelligence (DRI) who are primarily drawn from the Customs Department were

also given the task of issuing show cause notice and adjudicating the same in terms of Notifications issued as "Proper Officer", as defined in Section 2(34) of the Customs Act, 1962.

246. Now, under the amended Section 2(34), the word "under Section 5" has been inserted. Thus, what was implicit in the Customs Act, 1962 has now been made explicit in the amendment to the Customs Act, 1962 vide Finance Act, 2022.

247. As per Section 5(1) of the Act, an "Officer of Customs" may exercise the powers and discharge the duties conferred or imposed on him under the Customs Act, 1962, subject to such conditions and limitations as the Board may impose.

248. The power to be exercised may be subject to such conditions and limitations as the Board may impose on such an "Officer of Customs". Such officers can also exercise the powers and discharge the duties conferred or imposed on any other officers of customs who is subordinate to such officers. This aspect was also not brought to the attention of the Hon'ble Supreme Court in Canon India Private Limited Vs. Commissioner of Customs case referred to supra.

249. Only exception that has been provided was in Sub-Section (3) to Section 5 of the Act. As per Sub-Section 3 to Section 5 of the Act, a Commissioner (Appeals) cannot exercise the power and discharge the duties conferred or imposed on an "Officer of Customs" other than those specified in Section 108 of the Act and Chapter XV deals with the Appeals and Revisions.

250. Section 5 of the Customs Act, 1962 has also been amended in the Finance Act, 2022. Sub-Section (1A), (1B) and Sub-Section (4) and (5) to Section 5 of the Customs Act, 1962 have been now inserted. Section 5 as it stood prior to amendment and as it stands after amendment read as under:-

TABLE

5. Powers of Officers of Customs of the Customs Act, 1962	
Before the amendment Section	***After the 2022 amendment***
(1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge the duties conferred or imposed on him under this Act.	
	1(A) : Without prejudice to the provisions contained in subsection (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, 91 who shall be the proper officer in relation to such functions.
	(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an "Officer of Customs", who shall be the "Proper Officer" in relation to such functions."
(2) An Officer of Customs may excise the powers and discharge the duties conferred or imposed under this Act on any other officer of Customs who is subordinate to him.	
(3) Notwithstanding anything contained in this Section, a Commissioner (Appeals) shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and Section 108.	
	"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions

	under sub-section (1A), the Board may consider any one or more of the following criteria, including, but not limited to— a) territorial jurisdiction; b) persons or class of persons; c) goods or class of goods; *d) cases or class of cases; e) computer assigned random assignment; f) any other criterion as the Board may, by notification, specify.*
	(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act.".

251. ***During the interregnum in 2012, a more comprehensive notification was issued vide Notification No.40/2012-Cus. (N.T.), dated 02.05.2012. This notification fell for consideration in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C). However, No.40/2012-Cus. (N.T.), dated 02.05.2012 cannot be read in isolation. It had to be read along with notifications issued under Section 4 of the Customs Act, 1962.***

252. Notification No.40/2012-Cus. (N.T.), dated 02.05.2012 was also amended from time to time and has now been eventually rescinded/superseded by Notification No.26/2022-Cus. (N.T.), dated 31- 3-2022 in tune with the amendment proposed in the Finance Bill, 2022 and passed by Finance Act, 2022.

> *253. Both Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 and Notification No. 40/2012-Cus. (N.T.), dated 02.05.2012 as amended from time to time have also not been challenged directly by any of the petitioners.*
>
> *254.* ***Although, the vires of Notification No.40/2012-Cus. (N.T.), dated 02.05.2012 was neither challenged or questioned before the Court in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C) nor the issue of jurisdiction was canvassed before the Tribunal, the Hon'ble Supreme has held that the officers of the Directorate of Revenue Intelligence were not "Proper Officers" as they are not Officers of Customs and therefore there had to be issue of an independent Notification under Section 6 of the Customs Act, 1962****."*
>
> **[Emphasis supplied]**

viii. ***Section 6 of the Act, 1962***

117. This Court in ***Canon India*** *(supra)* made certain observations on the purport of Section 6 of the Act, 1962 and held that the Notification No. 40/2012 dated 02.05.2012 which empowered the DRI officers to perform functions under Section 28 was invalid. The relevant portion of the judgment is reproduced below:

> *"21.* ***If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act.*** *The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is*

> *the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government.* ***The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2 (34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power."***
>
> **[Emphasis supplied]**

118. It was held that Section 6 is the only section which provides for the entrustment of the functions of customs officers to other officers of the Central or State Government or local authority. As a result of the judgment in ***Canon India*** *(supra)*, the respondents herein vociferously argued that Section 5 of the Act, 1962 only deals with the powers and duties and not functions and it is Section 6 which refers to functions. Such argument proceeded on the erroneous footing that any notification empowering the DRI should have been issued under Section 6 of the Act, 1962 and not having been done so, the show cause notice issued by the DRI was without jurisdiction.

119. Section 6 of the Act, 1962 reads thus:

> *"**6. Entrustment of functions of Board and customs officers on certain other officers**.—The Central Government may, by notification in the Official Gazette,*

entrust either conditionally or unconditionally ***to any officer of the Central or the State Government or a local authority*** *any functions of the Board or any officer of customs under this Act."*

[Emphasis supplied]

120. It is evident on a plain reading of Section 6 of the Act, 1962 referred to above that the same contemplates the entrustment of the functions of the Board or any officer of customs under the Act, 1962 to any of the officers of the Central or the State Government or a local authority. Such entrustment could be either conditional or unconditional. As per Section 6 of the Act, 1962, the Central Government may by notification in the Official Gazette entrust the functions of the Board or the officers of Customs to any of the following officers, namely, any officer of:

(i) The Central Government; or

(ii) The State Government; or

(iii) A local authority.

121. Section 6 replaced Section 8 of the erstwhile Sea Customs Act, 1878 under which the powers of officers of customs, at places where there is no Customs House, are exercised by the land revenue officers of the district. This is no longer necessary as the Central Excise officers are available all over the country. Further the powers of customs officers at times need to be conferred on other officers, like police officers. Section 6, therefore, makes a general provision empowering the Central Government to entrust the functions of

the Board or an officer of customs to any officer of the Central or State government or a local authority.

122. The object of this Section is to confer powers of search, seizure, arrest and recording of statements, to the officers working in border states like officers of police service, Border Security Force, Tehsildar, Indo Tibet Border Police Force and others. Similarly, officers working in the coast guard or the navy may also be given such powers as they may be involved in anti-smuggling operations.

123. The Board has notified entrustment of powers to various officers working in different departments either under the State services or Central services from time to time. An illustration of this is M.F.(D.R.) Notification No. 161-Cus. dated the 22.06.1963 which empowered specified officers of DRI with the power to search premises. It is worth noting that this notification under Section 6 was issued prior to the notification no. 17/2002 dated 07.03.2002.

124. Notification No. 17/2002 dated 07.03.2002 was issued under Section 4(1) of the Act appointing DRI officers as officers of customs. The powers of officers of customs to discharge duties under the Act is derived from Section 5.

125. A plain reading of Section 6 of the Act, 1962 referred to above, makes it abundantly clear that it applies only to officers from departments other than

the officers of the customs under Section 4 of the Act, 1962. The officers of DRI are not any other officers of the Central Government or the State Government or the local authority to be entrusted with the functions of the Board and the Customs Officers. It has been rightly observed by the High Court of Madras in ***M/s N.C. Alexander*** *(supra)* that post 07.03.2002, a notification of the Central Government under Section 6 is not required to recognise the officers from DRI as officers of customs.

126. The observations of the High Court in ***M/s N.C. Alexander*** *(supra)* in the aforesaid context with which we are in complete agreement are reproduced hereinbelow:

> *"269.* ***By such entrustment, these officers of other Departments do not become Officers of Customs. They can merely function as such officers. Since entrustment under Section 6 is on the officers from other department, the Parliament by design has given the powers to the Central Government and not to the Board.***
>
> *270. As the Officers from the Directorate of Revenue Intelligence, Ministry of Finance (MOF) are already "Officers of Customs" before their induction and deputation to the Board in various Directorates, there is no impediment on their being appointed as proper officers for the purpose of Section 2(34) of the Customs Act, 1962.*
>
> *271. Merely because the Officers of the Customs and Central Excise Department are selected and are deputed in the respective Directorates does not mean that they cease to be Officers of the respective Departments as these Directorates are created only to*

assist the Board to implement the object of respective fiscal enactments. It is an internal arrangement within the Ministry of Finance, Department of Revenue (DRI).

272. If Section 3 and Section 4 of the Act and the Notification issued thereunder referred to supra were perhaps brought to the attention of the Hon'ble Supreme Court in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C.), the Hon'ble Supreme Court would have given a different interpretation. In any event, these discussion are academic in the light of the validation in Section 97 of the Finance Act, 2022.

273. It must also be remembered that the "Officers of Customs" in Section 3(1)(a) to (h) of the Customs Act, 1962 (as amended under Section 3(1) (a) to (j) after 2022 amendment) are Officers from Group 'A' Cadre of the Customs Department (IRS) like their counterparts from the Central Excise Department as Central Tax Officers under GST.

274. ***A reading of Section 2(34) with Section 4 of the Customs Act, 1962 also makes it clear that the expression "proper officer" means the "Officer of Customs" who has been assigned those functions either by the Board or by the Principal Commissioner of Customs or by Commissioner of Customs in relation to any function to be performed under the Act.***

275. ***Notifications which have been issued to appoint these officers from Directorate of Revenue Intelligence (DRI) to act as "Proper Officers" are enabling Notification notwithstanding the fact that they are already "Officers of Customs" under Notification issued under Section 4(1) of the Customs Act,1962.***

276. Further, the Board can also authorize the Principal Commissioner of Customs or Chief Commissioner of Customs or Principal Chief Commissioner or Commissioner of Customs or Joint or Assistant or

Deputy Commissioner of Customs, to appoint Officers of Customs below the rank of Assistant Commissioner of Customs. Thus, the following Group 'B' Executive - Gazetted and Non-Gazetted Officers assist in the initial stage of assessment of goods as:-

Sl. No.	*Group 'B' Executive Gazetted Officer*	*Group 'B' Executive Non – Gazetted Officer*
1	*Superintendent of Customs (Preventive)*	*Preventive Officers (Customs)*
2	*Appraiser of Customs*	*Examiner (Customs)*

277. As mentioned above, assessment is neither by the Group 'B' Executive – Gazetted Officer nor by Group 'B' Executive – Non-Gazetted Officer after 08.04.2011. Only, prior to 08.04.2011, the assessment of goods at the port was vested with the Group 'B' Executive – Gazetted Officer. However, after the said date, the fundamental of assessment has undergone a sea change and changed permanently as mentioned above.

278. These fundamental changes brought to the manner of the assessment under the Customs Act, 1962 with effect from 08.04.2011 appear to have not been brought to the attention of the Hon'ble Supreme Court and therefore the assumption in the paragraph Nos.12 to 15 in the case of Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C.) may require a re-consideration insofar as pending cases before the Hon'ble Supreme Court and other Courts."

[Emphasis supplied]

127. Mr. N. Venkataraman, the Ld. ASG is correct in his submission that the distinction sought to be made between Section 5 and Section 6 of the Act,

1962 (powers and duties *vis-à-vis* functions) could be said to be imaginary and may have very serious legal implications.

128. The assignment of functions of the proper officer for the purposes of any section under the Act to an officer of customs is expressly mentioned in Section 2(34). Section 5 empowers the customs officer to discharge the duties of proper officer so conferred. Even prior to the amendment to Sections 2(34) and 5, this could be the only understanding with respect to the question of entrustment of functions of the proper officer to a customs officer.

129. In our view, the assignment of functions of proper officers as mentioned in Section 2(34) and entrustment of functions of customs officers as mentioned in Section 6 operate on different planes. The assignment of functions of the proper officer is to be done only to officers of customs (whether they be appointed under Section 4 or entrusted with certain functions under Section 6). There may be some overlap between the assignment of functions of proper officers under Section 2(34) read with Section 5 and the entrustment of functions of officers of customs under Section 6 in some instances but there can be no scenario in which we can hold that the "functions" under Section 6 and Section 2(34) are congruent.

130. One of the bases for the decision in ***Canon India*** *(supra)* was that no entrustment of functions under Section 6 was done in favour of the DRI

officers. This, however, is a glaring misapplication of Section 6 of the Act and is in ignorance of the applicable law which is in fact Sections 2(34) read with Section 5 of the Act, 1962. Therefore, in light of the judgment of this Court in ***Yashwant Sinha (supra)***, we find that it is necessary to allow this review petition to do complete justice.

ix. ***Observations on the constitutional validity of Section 28 (11) of the Act, 1962***

131. The question as to who are the "proper officers" for the purpose of issuance of show cause notices under Section 28 was raised before the High Court of Delhi in the case of ***Mangali Impex*** *(supra).* The specific challenge therein was to the constitutional validity of Section 28(11) of the Act which was inserted by the Customs (Amendment and Validation) Act, 2011 (the "**Validation Act**") with effect from 16.09.2011.

132. A Division Bench of the High Court held that sub-section (11) of Section 28 could not validate the show cause notices issued by the DRI officers prior to 08.04.2011, i.e., the date when Section 28 was amended.

133. With a view to understanding the true purport of Section 28(11) and the issues pertaining thereto, it is necessary to first examine the changes to Section 28 that were introduced prior to the Validation Act. Section 28 as it stood prior to the Finance Bill 2011 is reproduced below:

> *"**28. Notice for payment of duties, interest, etc.** (1) When any duty has not been levied or has been short-*

levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.

Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer sub-ordinate to him:

Provided also that where the amount of duty has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this subsection shall

be served except with the prior approval of the Chief Commissioner of Customs.

Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(2A) Where any notice has been served on a person under subsection (1), the proper officer –

(i) in case any duty has not been levied or has been short-levied, or the interest has not been paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year: and

(ii) in any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months,

from the date of service of the notice on the person under subsection (1).

(2B) Where any duty has not been levied, or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before

service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid:

Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 2. For the removal of doubts, it is hereby declared that the interest under Section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.

(2C) The provisions of sub-Section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill 2001 receives the assent of the President.

(3) For the purposes of sub-section (1), the expression "relevant date" means,-

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

134. Thereafter, Section 28 was re-cast and a new scheme of the section was introduced *vide* the Finance Act, 2011 promulgated with effect from 08.04.2011. Section 28, as it stands after the amendment, is reproduced below:

> "***28. Recovery of duties not levied or short-levied or erroneously refunded.***
> *(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,-*
> *(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*
> *(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-*
> *(i) his own ascertainment of such duty; or*
> *(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.*
>
> *(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.*

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).

(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-
(a) collusion; or
(b) any wilful mis-statement; or
(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty five per cent. of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub- section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) (ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).

(7) In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub-section (8),- (a) within six months from the date of notice in respect of cases falling

under clause (a) of sub- section (1); (b) within one year from the date of notice in respect of cases falling under sub-section (4).

(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

Explanation 1 -- For the purposes of this section, "relevant date" means,-
(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;
(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;
(c) in a case where duty or interest has been erroneously refunded, the date of refund;
(d) in any other case, the date of payment of duty or interest.

Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which such assent is received."

135. Parliament, therefore, made changes to the scheme of Section 28 and added the Explanation 2 which stated that any non-levy, short-levy or erroneous refund before the date of presidential assent to the Finance Bill, 2011 shall be governed by the provisions of Section 28 as it stood prior to the amendment.

136. On 06.07.2011, Customs Notification No. 44/2011 was issued under Section 2(34), which designated *inter alia* DRI officers as proper officers for the purposes of Sections 17 and 28 of the Act, 1962 and empowered such officers to perform functions under Section 28 including the function of issuing show cause notices.

137. Subsequently, on 16.09.2011, sub-section (11) of Section 28 came to be enacted *vide* the Validation Act. It provided that:

> "*(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."*

138. As stated in the foregoing extract, sub-section (11) was introduced in the statute to remedy the defects highlighted by this Court in the case of ***Sayed Ali*** *(supra)* and the same retrospectively empowered all officers of customs appointed under Section 4(1) before 06.07.2011 to conduct assessments under Section 17 of the Act and to be proper officers for the purpose of Section 28.

139. The Statement of Objects and Reasons of the Validation Act explained that the introduction of Section 28(11) was necessary because the position of law on the functions of proper officers as interpreted by this Court in ***Sayed Ali***

(supra) and the consequent invalidation of show cause notices issued by the Commissionerates of Customs (Preventive), DRI and others, was not the legislative intent. Parliament clarified that show cause notices issued by officers of the Commissionerates of Customs (Preventive), DRI, Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded under Section 28 in respect of goods imported are valid, irrespective of whether any specific assignment as proper officer was issued.

140. The Validation Act was first challenged before the High Court of Bombay in the case of ***Sunil Gupta*** *(supra)* on the grounds that it is violative of Articles 14, 19 and 21 of the Constitution and that it fails to take note of Explanation 2 to Section 28. Relying on ***Sayed Ali*** *(supra)*, the petitioners therein challenged the Validation Act on the ground that it is only the officers of customs who are assigned functions of assessment including the reassessment and they alone are competent to issue notice under Section 28.

x. *Bombay High Court decision in Sunil Gupta (supra)*

141. Similar grounds were taken by the petitioners before the High Court of Delhi in the case of ***Mangali Impex*** *(supra)* wherein it was submitted that there was an apparent conflict between Explanation 2 and Section 28(11) which rendered the Validation Act inapplicable to show cause notices issued prior

to 08.04.2011 i.e., the date on which the new Section 28 came into force. It was further submitted that Section 28(11), by conferring powers of the proper officer to multiple sets of customs officers without any territorial or pecuniary jurisdictional limit, would result in utter chaos and confusion as envisaged in ***Sayed Ali*** *(supra)* and therefore, does not cure the defects pointed out therein.

142. The very same argument has been canvassed before us by the respondents herein. To comprehensively address the submissions made before us, we find it necessary to address the following three issues:

(i) What is the scope of Explanation 2 to Section 28?

(ii) Whether the field of operation of Section 28(11) and Explanation 2 overlaps? In other words, what is the scope of the non-obstante clause in sub-section (11)?

(iii) Whether Section 28(11) cures the defect pointed out in ***Sayed Ali*** *(supra)*?

143. Explanation 2 was introduced as a part of the new Section 28 enacted by the Finance Act, 2011 with effect from 08.04.2011. Explanation 2 to Section 28 reads as follows:

> "*Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood*

immediately before the date on which such assent is received."

144. It was vehemently argued on behalf of the respondents that reading Section 28(11) with Explanation 2 narrows down the period for the purposes of retrospective validation of the show cause notices issued and limits the application of sub-section (11) to the period from 08.04.2011 (enactment of new Section 28) to 16.09.2011 (enactment of the Validation Act). This challenge is based on the reasoning that the non-obstante clause contained in Section 28(11) is limited to "*…judgment, decree or order of any court of law, tribunal or other authority…*" and does not oust the application of other provisions of the Act including Explanation 2. It was argued that the phrase "*…this section…*" in sub-section (11) when read harmoniously with Explanation 2 refers to the new Section 28 only and will not be applicable to the old provision as it stood prior to 08.04.2011.

145. The determination of the soundness of the aforesaid argument necessitates a comparison of Section 28, prior to the amendment and subsequent to the amendment.

Provisions of old Section 28 [running in continuation from sub-sections (1) to (3)]	**Corresponding provisions of new Section 28**	**Comparison and Remarks**
28. Notice for payment of duties, interest, etc.	***28. Recovery of duties not levied or short-levied or erroneously refunded.***	

*(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer **may**,* *(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, within one year;* *(b) in any other case, **within six months**, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:*	*(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,* *(a) the proper officer **shall**, within **one year** from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*	The legislature *vide* the amendment, has removed the distinction between the purposes for which the imports are to be used. Sub-section (1)(b) of the old Section 28 is analogous to the sub-section (1)(a) of the new Section 28. The only change that has been made herein is the period of limitation for service of show cause notice which has been increased from six months to one year.
Provided that where any duty has been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.	*(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-* *(a) collusion; or* *(b) any wilful mis-statement; or* *(c) suppression of facts, by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.* *(5) Where any duty has not been levied or has been short- levied or the interest has not been charged*	In respect of the provision relating to issuance of show cause notice for non-levy, short-levy, not-paid, part-paid and erroneous refund of duty by reasons of collusion, wilful mis-statement or suppression of facts, no change has been made and the time period of five years for service of notice has been retained. The legislature has further clarified the procedure following the service of notice. Sub-section (5) of the new Section 28 provides for the levy of interest on the amount due and permits part-payment of the amount mentioned in the notice to the extent that the short-fall in duty has

	or has been part- paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty- five per cent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing. *(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-* *(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub- section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or* *(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such*	been accepted by the noticee. Sub-section (6) of the new Section 28 lays down the manner in which the proceedings following the service of the show cause notice will be either closed on payment of the full amount mentioned in the notice or adjudication and determination of the total amount to be recovered if part-payment has been made by the noticee.

	amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).	
Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer sub-ordinate to him: *Provided also that where the amount of duty has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this sub- section shall be served except with the prior approval of the Chief Commissioner of Customs.*		The legislature has removed the pecuniary distinction and the consequent approvals from different authorities for issuance of show cause notices.
Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.	*(7) In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.*	This is an analogous provision.
(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and	*(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in*	This is an analogous provision and pertains to the adjudication / determination of the amount specified in the show-cause notice when issued under sub-section (1) of the new Section 28.

thereupon such person shall pay the amount so determined.	*excess of the amount specified in the notice.*	
(2A) Where any notice has been served on a person under sub-section (1), the proper officer - *(i) in case any duty has not been levied or has been short-levied, or the interest has not been paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year: and* *(ii) in any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub- section (1).*	*(9) The proper officer shall determine the amount of duty or interest under sub-section (8),-* *(a) within six months from the date of notice in respect of cases falling under clause (a) of sub- section (1);* *(b) within one year from the date of notice in respect of cases falling under sub-section (4).*	This is an analogous provision. Sub-section (9)(a) of the new Section 28 is analogous to sub-section (2A)(ii) of the old provision and provides for a time period of six months for adjudication of notices issued under new Section 28(1)(a). Sub-section (9)(b) of the new Section 28 is analogous to sub-section (2A)(i) of the old provision and provides for a time period of one year for adjudication of notices issued in cases of collusion, wilful mis-statement and suppression of facts.
(2B) Where any duty has not been levied, or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid:	*(1) ...* *(a) ...* *(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-* *(i) his own ascertainment of such duty; or* *(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.*	In both the old and new Section 28, the law has provided an opportunity to the person chargeable with duty or interest to make payment before the show cause notice is issued to him and inform the proper officer of such payment in writing. The legislature, in the new Section 28(1)(b) has clarified the basis for ascertainment of amount to be paid prior to issuance of show cause notice.

	(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.	
Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.	*(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).*	These provisions are analogous.
Explanation 2. For the removal of doubts, it is hereby declared that the interest under Section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.	*(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.*	This provision is for the recovery of interest.
(2C) The provisions of sub-Section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill 2001 receives the assent of the President.		
(3) For the purposes of sub-section (1), the expression "relevant date" means,-	*Explanation 1 - For the purposes of this section, "relevant date" means,-*	This provision is identical to the old provision.

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods; *(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;* *(c) in a case where duty or interest has been erroneously refunded, the date of refund;* *(d) in any other case, the date of payment of duty or interest."*	*(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;* *(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;* *(c) in a case where duty or interest has been erroneously refunded, the date of refund;* *(d) in any other case, the date of payment of duty or interest.*	
	Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which such assent is received."	The Explanation 2 was added to the new Section 28 to demarcate the date from which the said section shall become applicable and any recoveries of duty prior to such date would be governed by the old Section 28.

146. What is discernible from the aforesaid modifications made by the Parliament is as under:

(a) **Distinction in the time-period**: In sub-section (1) of new Section 28, the difference in the purpose of the duty has been removed and for all cases of short-levy, non-levy, part-payment, non-payment and erroneous refund except for cases falling under new Section 28(4), the

period of one year has been provided for the service of the show cause notice, which under the old provision was six months.

(b) **Additional provision in respect of short-levy, non-levy, part-payment, non-payment and erroneous refund by reasons of collusion, willful misstatement and suppression of facts**: An additional provision has been inserted by way of Section 28(5) stipulating that, to the extent the amount mentioned in the show cause notice has been accepted by the person chargeable with payment of such duty, the payment of a part of such amount is allowed.

(c) **Self-ascertainment of recovery amount before the issuance of a show cause notice**: Parliament introduced the mechanism of self-ascertainment of the recovery amount by the person chargeable with the payment of duty and payment of such amounts before the service of a show cause notice, subject to final adjudication or determination by the proper officer.

(d) **Insertion of Explanation 2**: For the removal of doubts regarding the applicable provision for recoveries of duty arising before and after the enactment of new Section 28, Parliament added Explanation 2 to clarify that recoveries arising prior to 08.04.2011 shall be governed by old Section 28 of the Act.

147. Having analysed the aforesaid modifications made by Parliament to old Section 28, we can say with certainty that none of the changes made by the amendments to Section 28 has any impact on the competence of the proper officer for the purposes of fulfilment of functions under Section 28. In our considered view, the only major change that warrants the clarification provided under Explanation 2 is the distinction with respect to the limitation period for the issuance of show cause notices.

148. Therefore, the application of sub-section (11), which pertains only to the empowerment of proper officers to issue show cause notices under Section 28, cannot be said to be limited only to new Section 28 but also to the provision as it stood prior to 08.04.2011. The legislative intent is that sub-section (11) was meant to apply to Section 28 without any restriction as to time. This is apparent from the Statement of Objects and Reasons of the Validation Act. Therefore, the contention of the respondent that the phrase *"…this section…"* in sub-section (11) means only new Section 28, which was also accepted by the High Court of Delhi in ***Mangali Impex*** *(supra)*, is erroneous.

149. Since, there is no overlap in the field of operation of Section 28(11) and Explanation 2, the interpretation of the non-obstante clause in Section 28(11) and the consequent harmonious construction of the two provisions in ***Mangali Impex*** *(supra)* is otiose.

150. Thus, we are in complete agreement with the view taken by the High Court of Bombay in the case of ***Sunil Gupta*** *(supra)* with respect to the first two questions raised by us in this case. The relevant portion of that judgment is reproduced below:

> *"25. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which was specifically dealt with by sub- section (11) of section 28 of the Act, that we are of the opinion that the challenge in the writ petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by section 28 and whether initiated prior to the Finance Bill 2011 receiving the assent of the President shall continue to be governed by section 28, as it stood immediately before the date on which such assent is received. The reference to the Finance Bill therein denotes the Bill by the section itself was substituted by Act 8 of 2011 with effect from April 8, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and section 28 was resorted to by the authorities.* ***Explanation 2 clarifies that they will proceed in terms of the unamended provision. The position dealt with by insertion of section 28 (11) is distinct and that is about competence of the officer. The officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of section 28 unamended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail.****"*
>
> **[Emphasis supplied]**

151. Further, the finding in ***Mangali Impex*** *(supra)* that Section 28(11) is overbroad and confers the powers of the proper officer to multiple sets of

customs officers without any territorial or pecuniary jurisdictional limit which in turn may lead to "utter chaos and confusion" as highlighted in ***Sayed Ali*** *(supra)*, is misconceived in our view. The apprehension of the petitioner therein was that plurality of proper officers empowered under Section 28 would result in more than one show cause notice and a consequent misuse of the provision, which would be detrimental to the interests of the persons chargeable with the payment of duty. Although, ***Mangali Impex*** *(supra)* declared Section 28(11) to be invalid on this ground, it suggested that the Board should issue instructions in its administrative capacity that once a show cause notice is issued specifying an adjudicating authority subject to such an officer being the proper officer for the purposes of Section 28, then he or she alone should proceed to adjudicate that particular show cause notice to the exclusion of all other officers who may have power in relation to that subject matter. We find this to be a reasonable construal of the import and application of Section 28(11).

152. It is a settled position of law that the possibility of misuse or abuse of a law which is otherwise valid cannot be a ground for invalidating it. This principle of law has been expounded by this Court in the case of ***Shreya Singhal v. Union of India*** reported in **(2015) 5 SCC 1**. The relevant portion of the judgment is reproduced below:

> *"In The* ***Collector of Customs, Madras v. Nathella Sampathu Chetty & Anr., [1962] 3 S.C.R. 786****, this*

Court observed: "....This Court has held in numerous rulings, to which it is unnecessary to refer, that ***the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void.*** *Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:*

> *"If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably" and treating this as a ground for holding the statute invalid Viscount Simonds observed in Belfast Corporation v. O.D. Commission [1960 AC 490 at pp. 520-521] : "It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases.... If it is not so exercised (i.e. if the powers are abused) it is open to challenge and there is no need for express provision for its challenge in the statute."*
>
> ***The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid*** *and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements." (at page 825)"*

[Emphasis supplied]

153. We were apprised by the learned Additional Solicitor General during the course of the hearing that the Customs department has been following the protocol suggested in ***Mangali Impex*** *(supra)* since 1999. Further, no substantial empirical evidence of the misuse of Section 28(11) which was enacted over a decade ago, was presented by the parties. Therefore, we are inclined to accept the policy of the Customs department that once a show cause notice is issued, the jurisdiction of other empowered proper officers shall be excluded for such notice. We find that such policy acts as a sufficient safeguard against the apprehension of chaos or confusion or misuse.

154. Thus, we are of the considered view that the enactment of sub-section (11) of Section 28 cures the defect pointed out in ***Sayed Ali*** *(supra)* and the judgment in ***Mangali Impex*** *(supra)* deserves to be set aside.

155. It follows from the above discussion that sub-section (11) of Section 28 is constitutionally valid, and its application is not limited to the period between 08.04.2011 and 16.09.2011.

156. For the reasons in the foregoing paragraphs, we hold that the Bombay High Court judgment in ***Sunil Gupta*** *(supra)* lays down the correct position of law, whereas the Delhi High Court decision in ***Mangali Impex*** *(supra)* is incorrect and is consequently set aside.

xi. ***Amendments made by the Finance Act, 2022***

157. The third cluster of the present batch of cases relates to the challenge to the constitutional validity of Sections 86, 87, 88, 94 and 97 of the Finance Act, 2022 respectively. We take this opportunity to consider this issue as the constitutional validity of the said provisions has been challenged with specific reference to the findings made in ***Canon India*** *(supra)*, which is the judgment under review herein.

158. The validation amendment *vide* Section 97 has been challenged before this Court specifically in **WP (C) 526 of 2022** titled ***Daikin Air Conditioning India Pvt. Ltd. v. Union of*** **India**. The respondent herein has canvassed the following grounds for declaring the provision unconstitutional on the touchstone of Article 14 of the Constitution:

(i) The Finance Act, 2022 does not cure the defect pointed out in ***Canon India*** *(supra)* and no notification or amendment of law deeming DRI officers to be the proper officers would cure the defect of ouster of jurisdiction of DRI once the original act of assessment has been undertaken by a different group of officers. The Finance Act, 2022 is manifestly arbitrary as no attempt has been made to cure the defect highlighted in ***Canon India*** *(supra)*.

(ii) This Court in ***Canon India*** *(supra)* made a determination of fact that the DRI officers did not have jurisdiction to perform functions under

Section 28 of the Act, 1962. Such judicial determination of fact relating to actual exercise of jurisdiction cannot be retrospectively overruled.

(iii) The legislature has selectively adhered to the legal findings made in ***Canon India*** *(supra)* only for future actions by enactment of Section 110AA and has proceeded to ignore the findings for past show cause notices by validating the same *vide* Section 97 of the Finance Act, 2022. Such a distinction creates two classes of assessees without any reasonable basis for this differentiation.

(iv) Section 97 of the Finance Act, 2022 fails the test of proportionality as it is a sweeping validation of all acts under the chapters specified in the section and does not provide certainty to the assessees as to which rights have been abrogated.

(v) The writ petitioner in the **WP (C) No. 520 of 2022** titled ***Dish TV India Ltd. v. Union of India and Ors.*** has also challenged the application of Section 97 on the ground that Section 97(iii) of the Finance Act, 2022 gives the amendments made to Sections 2, 3 and 5 retrospective effect which would make sub-sections (4) and (5) of Section 5 applicable to the show cause notices issued in the past. It is the case of the writ petitioner that Customs Notifications Nos. 44/2011 dated 06.07.2011 and 40/2012 dated 02.05.2012 do not in any way satisfy the mandatory and salutary criteria laid down in Sections 5(4) and 5(5).

159. From the grounds summarized above, we find that the writ petitioners have challenged the constitutionality of the validation of past actions by Section 97 of the Finance Act, 2022. Therefore, we shall limit our ruling to this provision alone.

160. It is a settled position of law that the legislature is empowered to enact validating legislations to validate earlier acts declared illegal and unconstitutional by courts by removing the defect or lacuna which led to the invalidation of the law. With the removal of the defect or lacuna resulting in the validation of any act held invalid by a competent court, the act may become valid, if the validating law is lawfully enacted.

161. This Court in the case of ***Empire Industries Ltd. v. Union of India*** reported in **(1985) 3 SCC 314** observed that:

> "*51. In the view we have taken of the expression "manufacture", the concept of process being embodied in certain situation in the idea of manufacture, the impugned legislation is only making "small repairs" and that is a permissible mode of legislation. In 73rd vol. of Harvard Law Review p. 692 at p. 795, it has been stated as follows:*
>
> > *"**It is necessary that the Legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called "small repairs". Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the***

> ***individual's interest in benefiting from the defect*** *.... The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it…*"
>
> **[Emphasis supplied]**

162. This Court has laid down the tests for determining whether a validating law is enacted within permissible limits in the case of ***Indian Aluminium Company Co.*** **vs.** ***State of Kerala*** reported in **(1996) 7 SCC 637** and the relevant observations therein are reproduced below:

> *"**56.** From a resume of the above decisions the following salient principles would emerge:*
> *...*
> *(3) In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh Schedule to make the law which includes power to amend the law.*
> *(4) The Court, therefore, need to carefully scan the law to find out:* ***(a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution****.*
> *(5) The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not an encroachment on judicial power.*

> *(6)* ***In exercising legislative power, the Legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decisions ineffective by enacting valid law on the topic within its legislative field, fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as including power to amend the law.*** *It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date."*
>
> **[Emphasis supplied]**

163. We shall now proceed to determine whether the enactment of Section 97 of the Finance Act, 2022 fulfils the tests laid down by this Court for a validation Act to be legally sustainable. The first leg of such determination would be to satisfy ourselves as to whether Section 97 cures the defect pointed out by this Court in ***Canon India*** *(supra)*. In this respect, the following aspects are relevant:

a) The Coordinate Bench in ***Canon India*** *(supra)* observed that:

> *"**14.** It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28 (4) to recover duties which have escaped assessment is in the*

nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or ***any other officer who has been assigned the function of assessment****. In other words, an officer who did the assessment, could only undertake re-assessment [which is involved in Section 28 (4)]*"

[Emphasis supplied]

b) According to ***Canon India*** *(supra)*, only "the proper officer" empowered to undertake the exercise of assessment or re-assessment under Section 17 in a jurisdictional area can perform the functions of "the proper officer" under Section 28 of the Act, 1962 as the exercise involved in Section 28 is the re-assessment of duty. The defect pointed out by the Court in ***Canon India*** *(supra)* is that the DRI officers were not "the proper officers" who undertook the exercise of assessment under Section 17. Hence, they lacked the jurisdiction to issue show cause notices under Section 28. The reasoning given by the Court was that any other reading of the expression "proper officers" would lead to a multiplicity of proper officers competent to perform functions under Section 28, which would result in the perpetuation of chaos and confusion as pointed out in ***Sayed Ali*** *(supra).*

c) However, the apprehension expressed is unfounded in our opinion especially in context of the Customs department's policy of exclusion of jurisdiction of other competent proper officers once a particular

proper officer empowered to issue a show cause notice under Section 28 has issued it. Such a policy acts as an adequate safeguard in our view.

d) We find that the ouster of jurisdiction of DRI to issue show cause notices under Section 28 once an assessment has been done under Section 17 is not a defect at all in light of Notification No. 44/2011 dated 06.07.2011 and new Section 17 as amended by the Finance Act, 2011. We have already recorded a finding in the foregoing segments of this judgment that these facts were not considered in ***Canon India*** *(supra)* and therefore, become the basis of the review petition herein.

e) Notification No. 44/2011 dated 06.07.2011 specifically assigned the functions of the proper officers under Sections 17 and 28 to DRI officers. Such assignment of functions of assessment is sufficient for the DRI officers to fall in the category of "*any other officer who has been assigned the function of assessment*" as mentioned in ***Canon India*** *(supra).*

f) Furthermore, as discussed previously, the functions of assessment and re-assessment under Section 17 and recovery of duty under Section 28 are distinct. ***Canon India*** *(supra)* held erroneously that Section 28(4) involves the function of re-assessment. The function of recovery of short-levy, non-levy, part-paid, non-paid and erroneous

refund under Section 28 is not the same as the assessment or re-assessment of the bill(s) of entry. It necessarily has to be a process subsequent to the completion of functions under Section 17. Further, such function of determining duty to be recovered requires application of judicial mind and therefore, cannot be an administrative review of an act. This is especially so after the introduction of self-assessment in Section 17 *vide* the Finance Act, 2011.

g) Therefore, the validating provision under Section 97 of the Finance Act, 2022 is a mere surplusage with respect to validation of the show cause notices issued by DRI officers under Section 28. It cannot be challenged on the ground that it does not cure the defect pointed out in ***Canon India*** *(supra)* when no defect can be made out therein as a result of this review petition.

164. The contention that Section 97 could not have overruled the finding of fact relating to the actual exercise of jurisdiction in ***Canon India*** *(supra)* is untenable for the following reasons:

(a) The argument that once a particular officer has exercised the function of assessment, it is a jurisdictional fact that has occurred to the exclusion of all other groups in the Customs Department and therefore, only that officer or his superiors, who had undertaken assessment under

Section 17 in the first place, shall have the jurisdiction to issue notices for recovery of duty under Section 28, does not hold water.

(b) As discussed above, the functions of assessment and re-assessment under Section 17 and the recovery of duty under Section 28 are distinct. Therefore, the exercise of functions under Section 17 can only act as a "jurisdictional fact" for the purpose of excluding the jurisdiction of other proper officers empowered under that section for the exercise of the rest of the functions specified therein. Similarly, the exercise of the function of issuing show cause notices under Section 28 by a particular proper officer serves as a jurisdictional fact which would exclude the jurisdiction of other proper officers empowered under Section 28.

(c) ***Canon India*** *(supra)* proceeded on an erroneous assumption that the jurisdiction of the proper officer under Sections 17 and 28 is linked. This is due to the erroneous understanding of the provisions of Act, 1962 that functions under Section 28 involve re-assessment.

(d) Therefore, the very basis of the determination of jurisdictional fact for exercise of functions under Section 28 has been clarified by us. Thus, we are of the considered view that the challenge to Section 97, on the ground of inability of a validating Act to overrule a finding of fact, is unfounded and liable to be dismissed.

165. While challenging the constitutional validity, it was argued that the insertion of Section 110AA for future actions while validating the past actions (which in words of the writ petitioners was contrary to the intent of Section 110AA) does not create a reasonable classification as there is no intelligible differentia. It was further argued that Section 97 is manifestly arbitrary and fails the test of proportionality under Article 14. In our view, these submissions are not tenable in law for the following reasons:

a) It is a settled position of law that matters of economic policy are best left to the wisdom of the legislature and in policy matters, the accepted principle is that the courts should not interfere. This principle has been laid down in the case of ***Bhavesh D. Parish v. Union and India*** reported in **(2000) 5 SCC 471**, wherein this Court held that:

> *"26. The services rendered by certain informal sectors of the India economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organised system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question.* ***Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with.*** *The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation station of the infirmities in the economy can be put in serious jeopardy and, therefore, it is*

necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all."

[Emphasis supplied]

b) A Constitution Bench of this Court in the case of ***Shri Prithvi Cotton Mills Ltd. and Ors.* v. *Broach Borough Municipality & Ors.***, reported in **(1969) 2 SCC 283** set out the modus of validation of tax through validating statutes and observed as follows:

"4. ...
Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. ***Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts.*** *The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence*

which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax."

[Emphasis supplied]

c) We are of the opinion that the introduction of Section 110AA was a valid exercise of legislative power to amend the provisions of the Act, 1962 and it was done with the objective of following the principle of comity to give effect to the suggestions of this Court in ***Sayed Ali*** *(supra)* and ***Canon India*** *(supra)*. However, we clarify that a change in law, which the legislature was competent to enact, having prospective application cannot be a ground for the writ petitioners to question the sanctity and wisdom of the legislature in following a different mechanism to assess/re-assess bills of entry(s) and recover duty under Sections 17 and 28 respectively.

d) No occasion arises for us to discuss the validity of Section 97 with respect to the test of reasonable classification as the introduction of Section 110AA does not create a class of assessees to whom the law would apply differentially to, at the same point in time. The differential mechanism for the exercise of functions under Section 28 is not for a different class of assessees but rather for the show cause notices issued during different periods of time that is, prior to the Finance Act, 2022 and after its enactment.

e) On the strength of such reasoning, we are of the view that Section 97 is not manifestly arbitrary and discriminatory and is not disproportional to the object sought to be achieved by it.

166. It is also the contention of the writ petitioners that Section 97 (iii) gives retrospective effect to the amendments made in Section 5 thereby making previous show cause notices subject to the provisions of the newly inserted provisions, i.e., sub-sections (4) and (5) of Section 5. It is their case that the previous notifications empowering DRI officers to issue show cause notices under Section 28 do not fulfil the mandate of Section 5(4) as they cannot be placed in any of the criteria envisaged therein. We find no merit in the said contention:

a) Section 5(4) reads as follows:

> *"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board **may** consider any one or more of the following criteria, including, **but not limited to***
> *(a) territorial jurisdiction;*
> *(b) persons or class of persons;*
> *(c) goods or class of goods;*
> *(d) cases or class of cases;*
> *(e) computer assigned random assignment;*
> *(f) **any other criterion as the Board may, by notification, specify**."*
>
> **[Emphasis supplied]**

b) From a plain reading of the above-referred sub-section, we find that the Board has been entrusted with wide powers in respect of determination

of criteria and the use of the word "may" is indicative of the Board's discretion in this regard. Therefore, the writ petitioners are wrong in construing the sub-section as a mandatory provision for the purpose of invalidation of the show cause notices issued.

c) A purposive interpretation of Section 97 indicates that clause (i) therein is the object of its enactment and clause (iii) is an extension thereof to further clarify that any deficiencies in law under Sections 2, 3 and 5 of the Act, 1962 as they stood prior to the Finance Act, 2022 would not be an obstacle to the validating act under clause (i).

d) Therefore, the retrospective application of Sections 2, 3 and 5 of the Act, 1962 respectively is not stand-alone but is restricted to achievement of the ultimate object of validation under clause (i) of Section 97. Any interpretation of the amended Sections 2, 3 and 5 arising from the retrospective application thereof, which is contrary to or not in furtherance of the Section 97 (i) would not hold good in law.

e) This Court in the case of ***Vivek Narayan v. Union of India*** reported in **(2023) 3 SCC 1** has held that:

> *"**140.** The principle of purposive interpretation has also been expounded through a catena of judgments of this Court. A Constitution Bench of this Court in M. Pentiah v. Muddala Veeramallappa [M. Pentiah v. Muddala Veeramallappa, (1961) 2 SCR 295 : AIR 1961 SC 1107] was considering a question, as to whether the term prescribed in Section 34 would apply to a member of a "deemed" committee under the provisions of the*

Hyderabad District Municipalities Act, 1956. An argument was put forth that, upon a correct interpretation of the provisions of Section 16, the same would be permissible. Rejecting the said argument, K. Subba Rao, J., observed thus : (AIR pp. 1110-11, para 6)

"6. Before we consider this argument in some detail, it will be convenient at this stage to notice some of the well-established rules of construction which would help us to steer clear of the complications created by the Act. Maxwell on the Interpretation of Statutes, 10th Edn., says at p. 7 thus:

'… if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.'*…"*

[Emphasis supplied]

f) A seven-Judge Bench of this Court in the case of ***Abhiram Singh v. C.D. Commachen (Dead) By Lrs. & Ors.,*** reported in **(2017) 2 SCC 629** has held that:

"***36.*** *The conflict between giving a literal interpretation or a purposive interpretation to a statute or a provision in a statute is perennial. It can be settled only if the draftsman gives a long-winded explanation in drafting the law but this would result in an awkward draft that might well turn out to be unintelligible. The interpreter has, therefore, to consider not only the text of the law but the context in which the law was enacted and the social context in which the law should be interpreted. This was articulated rather felicitously by Lord Bingham of Cornhill in R. (Quintavalle) v. Secy. of State for Health [R. (Quintavalle) v. Secy. of State for Health, 2003 UKHL 13 : (2003) 2 AC 687 : (2003) 2 WLR*

692 (HL)] when it was said : (AC p. 695 C-H, paras 8-9)

> *"8.* ***The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise.*** *It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute.* ***Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment****."*
>
> **[Emphasis supplied]**

g) Thus, we are of the opinion that the retrospective application of Section 5(4) cannot be the basis for the challenge to the validity of Section 97 of the Finance Act, 2022.

167. For the foregoing reasons, we hold that the challenge to the constitutional validity of the Finance Act, 2022 and more particularly Section 97 thereof, being unfounded should fail. We say so more particularly in light of the

judgment in the review of ***Canon India*** *(supra)* and the various judicial pronouncements of this Court. Therefore, we hold that Section 97 of the Finance Act, 2022 is constitutionally valid and the challenge to it is rejected accordingly.

F. CONCLUSION

168. In view of the aforesaid discussion, we conclude that:

(i) DRI officers came to be appointed as the officers of customs *vide* Notification No. 19/90-Cus (N.T.) dated 26.04.1990 issued by the Department of Revenue, Ministry of Finance, Government of India. This notification later came to be superseded by Notification No. 17/2002 dated 07.03.2002 issued by the Department of Revenue, Ministry of Finance, Government of India, to account for administrative changes.

(ii) The petition seeking review of the decision in ***Canon India*** *(supra)* is allowed for the following reasons:

a. Circular No. 4/99-Cus dated 15.02.1999 issued by the Central Board of Excise & Customs, New Delhi which empowered the officers of DRI to issue show cause notices under Section 28 of the Act, 1962 as well as Notification No. 44/2011 dated 06.07.2011 which assigned the functions of the proper officer for

the purposes of Sections 17 and 28 of the Act, 1962 respectively to the officers of DRI were not brought to the notice of this Court during the proceedings in ***Canon India*** *(supra)*. In other words, the judgment in ***Canon India*** *(supra)* was rendered without looking into the circular and the notification referred to above thereby seriously affecting the correctness of the same.

b. The decision in ***Canon India*** *(supra)* failed to consider the statutory scheme of Sections 2(34) and 5 of the Act, 1962 respectively. As a result, the decision erroneously recorded the finding that since DRI officers were not entrusted with the functions of a proper officer for the purposes of Section 28 in accordance with Section 6, they did not possess the jurisdiction to issue show cause notices for the recovery of duty under Section 28 of the Act, 1962.

c. The reliance placed in ***Canon India*** *(supra)* on the decision in ***Sayed Ali*** *(supra)* is misplaced for two reasons – *first*, ***Sayed Ali*** *(supra)* dealt with the case of officers of customs (Preventive), who, on the date of the decision in ***Sayed Ali*** *(supra)* were not empowered to issue show cause notices under Section 28 of the Act, 1962 unlike the officers of DRI; and *secondly*, the decision in ***Sayed Ali*** *(supra)* took into consideration Section 17 of the Act,

1962 as it stood prior to its amendment by the Finance Act, 2011. However, the assessment orders, in respect of which the show cause notices under challenge in ***Canon India*** *(supra)* were issued, were passed under Section 17 of the Act, 1962 as amended by the Finance Act, 2011.

(iii) This Court in ***Canon India*** *(supra)* based its judgment on two grounds: (1) the show cause notices issued by the DRI officers were invalid for want of jurisdiction; and (2) the show cause notices were issued after the expiry of the prescribed limitation period. In the present judgment, we have only considered and reviewed the decision in ***Canon India*** *(supra)* to the extent that it pertains to the first ground, that is, the jurisdiction of the DRI officers to issue show cause notices under Section 28. We clarify that the observations made by this Court in ***Canon India*** *(supra)* on the aspect of limitation have neither been considered nor reviewed by way of this decision. Thus, this decision will not disturb the findings of this Court in ***Canon India*** *(supra)* insofar as the issue of limitation is concerned.

(iv) The Delhi High Court in ***Mangali Impex*** *(supra)* observed that Section 28(11) could not be said to have cured the defect pointed out in ***Sayed Ali*** *(supra)* as the possibility of chaos and confusion would continue to subsist despite the introduction of the said section with retrospective

effect. In view of this, the High Court declined to give retrospective operation to Section 28(11) for the period prior to 08.04.2011 by harmoniously construing it with Explanation 2 to Section 28 of the Act, 1962. We are of the considered view that the decision in ***Mangali Impex*** *(supra)* failed to take into account the policy being followed by the Customs department since 1999 which provides for the exclusion of jurisdiction of all other proper officers once a show cause notice by a particular proper officer is issued. It could be said that this policy provides a sufficient safeguard against the apprehension of the issuance of multiple show cause notices to the same assessee under Section 28 of the Act, 1962. Further, the High Court could not have applied the doctrine of harmonious construction to harmonise Section 28(11) with Explanation 2 because Section 28(11) and Explanation 2 operate in two distinct fields and no inherent contradiction can be said to exist between the two. Therefore, we set aside the decision in ***Mangali Impex*** *(supra)* and approve the view taken by the High Court of Bombay in the case of ***Sunil Gupta*** *(supra)*.

(v) Section 97 of the Finance Act, 2022 which, *inter-alia,* retrospectively validated all show cause notices issued under Section 28 of the Act, 1962 cannot be said to be unconstitutional. It cannot be said that Section 97 fails to cure the defect pointed out in ***Canon India*** *(supra)*

nor is it manifestly arbitrary, disproportionate and overbroad, for the reasons recorded in the foregoing parts of this judgment. We clarify that the findings in respect of the *vires* of the Finance Act, 2022 is confined only to the questions raised in the petition seeking review of the judgment in ***Canon India*** *(supra)*. The challenge to the Finance Act, 2022 on grounds other than those dealt with herein, if any, are kept open.

(vi) Subject to the observations made in this judgment, the officers of Directorate of Revenue Intelligence, Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence and Commissionerates of Central Excise and other similarly situated officers are proper officers for the purposes of Section 28 and are competent to issue show cause notice thereunder. Therefore, any challenge made to the maintainability of such show cause notices issued by this particular class of officers, on the ground of want of jurisdiction for not being the proper officer, which remain pending before various forums, shall now be dealt with in the following manner:

a. Where the show cause notices issued under Section 28 of the Act, 1962 have been challenged before the High Courts directly by way of a writ petition, the respective High Court shall dispose of such

writ petitions in accordance with the observations made in this judgment and restore such notices for adjudication by the proper officer under Section 28.

b. Where the writ petitions have been disposed of by the respective High Court and appeals have been preferred against such orders which are pending before this Court, they shall be disposed of in accordance with this decision and the show cause notices impugned therein shall be restored for adjudication by the proper officer under Section 28.

c. Where the orders-in-original passed by the adjudicating authority under Section 28 have been challenged before the High Courts on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, the respective High Court shall grant eight weeks' time to the respective assessee to prefer appropriate appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT).

d. Where the writ petitions have been disposed of by the High Court and appeals have been preferred against them which are pending before this Court, they shall be disposed of in accordance with this decision and this Court shall grant eight weeks' time to the

respective assessee to prefer appropriate appeals before the CESTAT.

e. Where the orders of CESTAT have been challenged before this Court or the respective High Court on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, this Court or the respective High Court shall dispose of such appeals or writ petitions in accordance with the ruling in this judgment and restore such notices to the CESTAT for hearing the matter on merits.

f. Where appeals against the orders-in-original involving issues pertaining to the jurisdiction of the proper officer to issue show cause notices under Section 28 are pending before the CESTAT, they shall now be decided in accordance with the observations made in this decision.

169. In view of the aforesaid, we allow the Review Petition No. 400/2021 titled ***Commissioner of Customs v. M/s Canon India Pvt. Ltd.*** and the connected Review Petition Nos. 401/2021, 402/2021 and 403/2021 insofar as the issue of jurisdiction of the proper officer to issue show cause notice under Section 28 is concerned. As discussed, the findings of this Court in ***Canon India*** *(supra)* in respect of the show cause notices having been issued beyond the limitation period remain undisturbed.

170. We set aside the decision of the High Court of Delhi rendered in the case of ***Mangali Impex*** *(supra)* and uphold the view taken by the High Court of Bombay in the case of ***Sunil Gupta*** *(supra).* We also uphold the constitutional validity of Section 97 of the Finance Act, 2022.

171. The Registry shall take steps to list the connected civil appeals and writ petitions before the appropriate Bench and they shall be disposed in terms of the observations made in this judgment.

172. The review petitions are accordingly disposed of.

..... CJI.
(Dr. Dhananjaya Y. Chandrachud)

..... J.
(J.B. Pardiwala)

..... J.
(Manoj Misra)

New Delhi;
7th November, 2024

F. No. 437/9/98-Cus.IV

Circular No. 4/99-Cus
dated 15/2/1999

Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Issuance of Show Cause Notice by the Officers of Directorate of Revenue Intelligence - regarding-

A doubt has been recently raised as to whether the Officers of Directorate of Revenue Intelligence could issue show cause notices in cases investigated by them - a practice started last year apparently in tune with the practice of the Directorate General of Anti Evasion. The matter has been examined in the Board.

2. It has been observed that in terms of Customs Notification No. 19/90-Cus (NT.), dated 26.4.90, as amended from time to time, the Officers of Directorate of Revenue Intelligence of different categories have been notified and appointed as Commissioners of Customs, Deputy Commissioners of Customs or Assistant Commissioners of Customs for the are specified. These officers, therefore, can legally be entrust with discharge of functions normally performed by Commissioners Deputy Commissioners or Assistant Commissioners of Customs in their jurisdiction, as the case may be. Board can no doubt subject these powers/functions to certain restrictions/limitations as may be imposed, as provided under section 5(1) of the Customs Act.

3. Directorate of Revenue Intelligence Officer are, therefore, to undertake investigations of cases detected by them, and to issue the Show Cause Notices on completion of investigations. In line with the instructions issued (vide F.No. 208/23/97-CX-8, dated 20.1.98) in respect of Officers of Directorate General Anti Evasion, Board has decided that in impact of cases investigated by the Directorate General of Revenue intelligence, the officers of said Directorate will be competent to and may issue show cause notices in cases investigated by them -though these will continue to be adjudicated by the concerned jurisdictional Commissioners, Additional Commissioners, Deputy Commissioners or Assistant Commissioners of Customs, as the case may be.

4. The Board has also decided that these instructions may kindly be brought to the notice of all departmental officers by issuing suitable standing orders.

Sd/-
(Rajendra Singh)
Under Secretary to the Government of India

[To be published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii)]

Government of India

Ministry of Finance

(Department of Revenue)

Notification No.44/2011-Customs (N.T.)

New Delhi, dated the 6 th July, 2011.

S.O. (E). - In exercise of the powers conferred by sub-section (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of section 17 and section 28 of the said Act, namely:-

Table

Sl.No.	Designation of the officers
(1)	(2)
1.	Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.
2.	Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).
3.	Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.
4.	Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.

[F.No. 437/143/2009-Cus.IV]

(Vikas)

Under Secretary to the Government of India

[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (ii)]

GOVERNMENT OF INDIA

MINISTRY OF FINANCE

(DEPARTMENT OF REVENUE)

(CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS)

Notification No.26/2022-Customs (N.T.)

New Delhi, dated the 31st March , 2022

S.O. (E). -In exercise of the powers conferred by sub-sections (1A), (4) and (5) of section 5 read with sub-section (34) of section 2 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the said Act) and in supersession of notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 40/2012 – Customs (N.T.), dated the 2nd May, 2012 published in the Gazette of India Extraordinary, Part II, Section 3, Sub-section (ii), *vide,* number S.O.993 (E), dated the 2nd May, 2012, except as respects things done or omitted to be done before such supersession, the Central Board of Indirect Taxes and Customs, hereby assigns the officers mentioned in column (2) of the Table and the officers above in rank to them, as the proper officers in relation to the various functions as specified in the sections of the said Act mentioned against the corresponding entry in column (3) of the said Table :

TABLE

S.No	Designation of Officers	Sections
(1)	(2)	(3)
1.	(i) Principal Commissioner of Customs or Commissioner of Customs (ii) Principal Commissioner of Customs (Preventive) or Commissioner of Customs (Preventive), in case of exercising jurisdiction under Customs Station.	Section 33
2.	(i) Additional Commissioner of Customs or Joint Commissioner of Customs (ii) Additional Commissioner of Customs (Preventive) or Joint Commissioner of Customs (Preventive), in case of exercising jurisdiction relating to Customs Station.	Third proviso to sub-sections (3), and (5) of section 46
3.	(i) Deputy Commissioner of Customs or Assistant Commissioner of Customs (ii) Deputy Commissioner of Customs (Preventive) or Assistant Commissioner of	(i) Sub-section (5) of section 17 (ii) Section 18 (iii) Section 21

S.No	Designation of Officers	Sections
(1)	(2)	(3)
	Customs (Preventive), in case of exercising jurisdiction relating to Customs Station.	(iv) Section 22 (v) Section 26A (vi) Section 28 (vii) Section 28AAA (viii) Section 28B (ix) Section 28BA (x) Section 28DA (xi) Section 30 (xii) Sub-section (2) of section 31 (xiii) Section 32 (xiv) Proviso to section 34 (xv) Section 35 (xvi) Section 42 (xvii) Sub-section (3) of section 45 (xviii) Second Proviso to sub-section (1) of section 46 and sub-section (2) of section 46 (xix) Section 48 (xx) Sub-section (3) of section 54 (xxi) Section 59 (xxii) Section 60 (xxiii) Section 61 (xxiv) Section 67 (xxv) Section 72 (xxvi) Section 73 (xxvii) Section 80 (xxviii) Section 85

S.No	Designation of Officers	Sections
(1)	(2)	(3)
		(xxix) Section 89 (xxx) Section 97 (xxxi) Section 99A (xxxii) Sub-section (1A) of section 110 (xxxiii) second proviso to Section 124 (xxxiv) Section 129A (xxxv) Section 129DD (xxxvi) Section 129E (xxxvii) Section 130D (xxxviii) Section 142 (xxxix) Section 149 (after grant of order for clearance of goods under section 47 or section 51)
4.	(i) Deputy Commissioner of Customs (Preventive) or Assistant Commissioner of Customs (Preventive) (ii) Deputy Director of Revenue Intelligence or Assistant Director of Revenue Intelligence	(i) Section 28 read with section 17, subject to section 110AA (ii)Section 28B (iii)Section 28DA
5.	(i) Appraisers or (ii) Superintendent Customs (Preventive) or (iii) Superintendents of Central Excise Department who are for the time being posted to a customs port, Customs Airport, Land customs station, Coastal port, customs preventive post, customs intelligence post or a customs warehouse.	(i) Section 14 (ii) Sub-sections (2), (3), and (4) of Section 17 (iii) Section 19 (iv) Section 30 (v) Section 30A (vi) Section 40 (vii) Section 41 (viii) Section 41A (ix) Clause (b) of sub-section 2 of Section 45 (x) Sub-sections (1) and (4) of Section 46 (xi) Section 47 (xii) Section 50 (xiii) Section 51 (xiv) Section 53

S.No	Designation of Officers	Sections
(1)	(2)	(3)
		(xv) Section 54 (xvi) Section 62 (xvii) Section 68 (xviii) Section 69 (xix) Section 79 (xx) Section 83 (xxi) Section 86 (xxii) Section 92 (xxiii) Section 93 (xxiv) Section 149 (before grant of order for clearance of goods under Section 47 or Section 51)
6.	Intelligence Officer in the Directorate General of Revenue Intelligence	(i) Section 37 (ii) Section 100 (iii) Section 103 (iv) Sections 106 (v) Section 106A (vi) Sub-sections (1) and (3) of Section 110 (vii) Section 144 (viii) Section 145
7.	(i) Examiners or (ii) Preventive Officers or (iii) Inspectors of Central Excise Department who are for the time being posted to a customs port, Customs Airport, Land customs station, Coastal port, customs preventive post, customs intelligence post or a customs warehouse.	(i) Sub-section (1) of Section 31 (ii) Section 34 excluding proviso to the Section (iii) Section 37 (iv) Section 38 (v) Section 39 (vi) Clause (a) of sub-section (2) of Section 45 (vii) Section 77 (viii) Section 94 (ix) Section 95 (x) Section 100 (xi) Section 103 (xii) Section 106 (xiii) Section 106A (xiv) Sub-sections (1) and (3) of Section 110 (xv) Section 144 (xvi) Section 145
8.	Principal Additional Director General of Revenue Intelligence or Additional Director General of Revenue Intelligence	(i) Section 108A (ii) Section 108B

S.No	Designation of Officers	Sections
(1)	(2)	(3)
9.	Inspector or Examiner posted in Commissionerate of Customs (Audit)	Section 99A

2. The functions to be performed by the officers referred in Table except at Sl.No.1 shall be as assigned in terms of sub-section (1B) of section 5 of the said Act.

3. This notification shall come into force from the date of publication in the Official Gazette.

[F.No.450/72/2021-Cus IV]

(Ananth Rathakrishnan)

Deputy Secretary (Customs)

PETITIONER:
M/S SUN EXPORT CORPORATION, BOMBAY

Vs.

RESPONDENT:
THE COLLECTOR OF CUSTOMS, BOMBAY & ANR

DATE OF JUDGMENT: 07/07/1997

BENCH:
S.C. SEN, K. VENKATASWAMI, V.N. KHARE

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

K. Venkataswami, J.

The appellant as well as the question of law is common in all these appeals. For that reason. the Customs. Excise and Gold (Control) Appellate Tribunal. New Delhi (hereinafter referred to as the 'Tribunal') has disposed of the appeals by a common order. Hence, these appeals are disposed of by this common Judgment.

Brief facts leading to the filing of these appeals are the following:

The appellant-Corporation imported six consignments of goods (Pre mix of vitamin Ad-3 Mix (feed grade, at Bombay and seven consignments of similar goods at Calcutta. These consignments were assessed to duty under the heading 29:01/45(17) of the Customs Tariff ACT, 1975 read with Item 68 of Central Excise Tariff Act. The Corporation paid the duty. Later on it claimed refund of the duty paid as countervailing duty contending inter alia that the goods imported were classifiable under item 23:01/07 as Animal Feed' and as per Notification 234/82 CE dated 1.11.82, those goods were exempted from levy of duty. Accordingly. Applications were filed for refund of the countervailing duty/additional duty Paid on such imports. The concerned Assistant Collector (Refunds) rejected the claim of the appellant holding that the goods imported were assessable to duty under the heading 29.01/45(17) of the then prevailing First Schedule to the Customs Tariff Act read with Item 68 of the Central Excise Tariff and. therefore, the exemption notification dated 1.11.82 was of no avail to the corporation.

Aggrieved by The rejection of refund applications the appellant preferred separate appeals one set before Collector of Customs (Appeals), Bombay, and another set before Collector of Customs (Appeals), Calcutta. The appellate authority at Bombay accepted the claim of the appellant and granted the relief holding the goods imported were in the nature of 'Animal Feed Additives, and as such fall under the heading 23: 01.07. However, the appellate authority at Calcutta rejected the claim of the appellant and dismissed the appeal accepting the view of Assistant

Collector (Refunds).

Against the order of the appellate authority at Calcutta the appellant preferred an appeal before the Tribunal and the Revenue preferred appeals before the Tribunal against the orders of the appellate authority at Bombay.

The Tribunal while unanimously holding that the goods imported fell under heading 29.01/45 (17) Of the Customs tariff Act differed on the question of exemption claimed by the appellant. The minority view was That the appellant was entitled to the benefit of exemption claimed by the appellant while the majority held otherwise.

Aggrieved by the common order Of the Tribunal of these appeals are preferred. Mr. Ramesh Singh learned counsel appearing for the appellant - corporation, supporting the minority view of the Tribunal invited our attention to a judgment of the Bombay High Court in Glindia Ltd. Vs. Union of India- 1988 (36) E.L.T. 479 wherein an identical question arose for consideration and the learned Single Judge took a view favourable to the assessee. In other words, the earned Judge held that animal feed supplements' would fall under the purview of Exemption Notification No.55/75-C.E. similar to the one under consideration.

The learned Additional solicitor General, Mr. K.N. Bhat on the other hand supporting the majority view of the Tribunal. submitted that a similar view taken by the Tribunal was challenged in appeal in this Court which was dismissed in limine at the admission stage. He further submitted that the view taken by the majority was the correct one.

In order to appreciate the rival submissions, it is necessary to set out the relevant Tariff Items as well as the relevant portion of the Exemption Notification. They are as follows:

23.01/07	Residues and waste or food industries (for example, inedible meat or fish flour or meals, milling residues, waste from sugar, brewing and distilling and starch industries; oil-cake and other residues from oil-extraction (except dregs) products of vegetable origin of a kind used for animal food, not elsewhere specified or included; sweetened forage and other prepared animal fodder.	
29.01/45	Organic compounds including antibiotics, Hormones sulpha drugs, Vitamins and other products specified in Notes 1 and 2 to this chapter.	
	.. .. ..	
	.. .. ..	
	17. Vitamins	100% 94%

The relevant Exemption Notification 234/82 dated 1.11.82 read as follows:

Exemption to certain specified goods. In exercise of the powers

conferred by sub-rule (I) Of rule of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) NO. 104/82-Central Excise, dated the 28th February, 1982, the central Government hereby exempts goods of the description specified in the Schedule hereto annexed and falling under item No.68 of the First Schedule to the Central Excises and salt Act, 1944 (I of 1944), from the whole of the duty of excise leviable thereon under section 3 of the said Act.

... ...

10. Animal feed including compound livestock feed.

This Notification was subsequently amended by bringing into new clause (10), which reads as follows:

"In exercise of the powers conferred by sub-rule (I) of rule 8 of the Central Excise Rules, 1944 the central Government hereby makes the following further amendments in the Notification of the Government of India in the Ministry of Finance (Department of Revenue No. 234/82-Central Excises, dated the 1st November, 1982, namely:-

In the said notification:-

(a) in the schedule, for serial No. 10 and the entry relating thereto, the following serial No. and entry shall be substituted, namely:

"10. Animal feed including compound live stock feed, animal feed supplements and animal; feed concentrates. "

(b) The Explanation shall be number ed as Explanation I, and after Explanation I as so numbered, the following Explanation shall be inserted, namely :-

" Explanation II -- For the purpose of this notification, the expression- (i) "animal feed supplements means an ingredient or combination of ingredients, added to the basic feed mix or parts thereof to fulfil a specific need, usually used in the micro quantities and requiring careful handling and mixing; (ii) "animal feed concentrates " means a feed intended to be diluted with other feed ingredients to produce complete feed optimum nutrient balance.

(Notification No. 6/84-C.E. dated 15.2.84)

Before proceeding further. it is necessary to state

that there is no dispute that the goods imported were pre-mix of vitamin AD-3 (feed grade) not for medicinal use. Again there is no dispute that the said pre-mix of vitamin AD-3 (feed grade) is an animal feed supplement. Even the majority view of the Tribunal proceeded on that footing. But they took the view that animal feed supplements by themselves are not animal feeds' for qualifying exemption under the notification dated 1.11.82.

Now, the question is whether the 'animal feed' supplement would fall under the Exemption Notification dated 1.11.82. As noticed earlier similar question was considered by the Bombay High Court and the learned Judge Expressed the View as follows :

> "The preparations in question are used to supplement animal feed. Sometimes animal feed or poultry feed is already fortified with these vitamins when sold. Sometimes, however, farmers prefer to add the vitamins either to animal feed or toe poultry feed separately. These products strengthen the nutritional quality of' animal' feeds. Thus, for example, items like Bournvita or Complan also acid nutrients to milk. But they are not for that reason, medicines. In a general sense every kind of nourishment strengthens the body against ailment. But such nourishment cannot be considered as a medicine or a drug. The two products are also known in the trade as animal feed supplements and they are sold by the suppliers of animal feed.
>
> It is next contended by the respondent that even if the two products fall under Tariff item 68 the benefit of the exemption notification no.55 of 1975 cannot be given to these products because these products are not animal feeds. They are merely animal feed supplements. This exemption notification has been amended by another notification No.6 of 1984 dated 15th February 1984 as result of which the item animal feed including compound live stock feed" is now substituted by "animal feed including compound live stock feed, animal feed supplements and animal feed concentrates." After the coming into force of this notification, the petitioners have been given the benefit of full exemption. The only question is whether prior to this notification, the petitioners are entitled to exemption under the original notification No.55 of 1975.
>
> In the case of the petitioners themselves namely Glaxo Laboratories India Ltd. V. The

State of Gujarat reported in 1979 43 sales Tax Cases, page 386 the Gujarat High Court was required to consider whether certain vitamin products including Vitablend WM Forte which were used for supplementing cattle and poultry feed should be classified as 'cattle feed" within the meaning Of Entry 21 Of Schedule of the Gujarat Entry tax Act. 1569 or "poultry feed" within the meaning of Entry 22 Of the Schedule 1 of that Act . The Gujarat High Court has held that the terms cattle feed" and "poultry feed" must include not only that food which is supplied to domestic animals or birds as an essential ration for the maintenance of life but also that feed which is supplied over and above the maintenance requirements for growth or fattening and or production purposes such as for production purposes such as for reproduction, for production of milk, eggs, meat, etc. or for efficient output of work The same reasoning would apply to the present case also. These products are also fed to animals or poultry to give them better nourishment. They would, therefore, quality as "animal feeds".

It was submitted by the respondents that the subsequent amendment expressly refers to animal feed supplements". This suggests that animal feed supplements were not previously included in The exemption notification.. This reasoning must be rejected. The amendment appears to be classificatory in nature. For example, the amendment now expressly refers also to animal feed concentrates which were not expressly referred to earlier. It cannot be said that animal feed concentrates are not animal feed and are generally added to animal feed and are generally added to animal fed are also covered by the generic terms "animal feed".

We are in agreement with the above view expressed by the Bombay High Court. NO doubt it was contended on behalf of the Revenue that the contrary view taken by the Tribunal has been challenged in this Court which was rejected in limine at the admission stage. we do not think that dismissal at the admission stage can be relied upon as a binding precedent. Even assuming that there are two views possible, it is well settled, that one favourable to the assessee in matters of taxation has to be preferred.

we have carefully gone through the minority and the

majority views of the Tribunal. We find that shri K. Gopal Hegde who has dealt with the issue in extenso, has taken note of the ratio laid down by the Bombay and Gujarat High Courts as well as a subsequent decision of the Tribunal itself in collector of central) Excise, Chandigarh vs. Punjab Bone Mills (Appeal No. 615/85-C with E/Cross/64/1988-C for coming to a conclusion that the goods imported by the appellants are eligible for exemption under Notification NO. 234/82. However, this view was minority view and, therefore, the exemption claimed by the appellant was denied. The majority view, appears, was influenced by the fact that a decision of the Tribunal in M/s. tries Aqro-Pet Industries pvt. ltd., VS. Collector of central Excise, Bombay, 1984 (16) ELT 467 taking a similar view, was challenged by filing civil Appeal NO. 17/84 and that was dismissed at the admission stage. It must be noted that presumably the admission stage. It must be noted that presumably the amendment to exemption Notification 234/82 by a subsequent notification No. 6/84-C.E. dated 15.2.84 was not before the court for consideration. The majority view also failed to take note of the subsequent amendment to the main exemption Notification as well as the effect of the amendment as noticed by the Bombay High Court in M/s. Glindia Limited case. Since we have already extracted in extenso the decision of the Bombay High Court, We do not think it necessary to repeat the same.

Accordingly, we hold that the appellant is entitled to the refund under the relevant Exemption Notification. However, it is for the concerned authority to further look into the refund applications and pass orders in the light of the ratio laid down bu this court in Mafatlal Industries Ltd. Vs. Union of India - 1997 (89) E.L.T. 247 (SC). The appeals are accordingly allowed. There will be no order as to costs.

2024 INSC 231

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4663 OF 2009

M/S. BISCO LIMITED APPELLANT(S)

VERSUS

COMMISSIONER OF CUSTOMS
AND CENTRAL EXCISE RESPONDENT(S)

J U D G M E N T

UJJAL BHUYAN, J.

Heard learned counsel for the parties.

2. This is a statutory appeal under Section 130E of the Customs Act, 1962 (briefly the 'Customs Act' hereinafter) against the final order dated 30.04.2009 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for short 'CESTAT' hereinafter) in Customs Appeal No.441 of 2005 dismissing the appeal filed by the appellant against the

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Anita Malhotra
Date: 2024.03.20
17:11:41 IST
Reason:

order dated 28.04.2005 passed by the Commissioner of Customs and Central Excise, Indore (for short 'the Commissioner' hereinafter).

2.1 By the aforesaid order dated 28.04.2005, the Commissioner had confirmed the duty demand of Rs.3,99,255.00 in respect of 27 cases not found in the warehouse and imposed penalty of Rs.1 lakh on the appellant under Section 112 of the Customs Act. That apart, the appellant was directed to pay interest on the duty confirmed in terms of Section 28AB of the Customs Act from the date of enforcement of the said section till the date of actual payment of duty. The Commissioner had also confiscated 264 cases of imported goods valued at Rs.48,79,776.00 seized from within the factory premises of the appellant but outside the approved warehouse under Section 111 of the Customs Act. However, the confiscated goods were permitted to be redeemed on payment of fine of Rs. 2 lakhs. Thirty days' time was granted to the appellant to exercise the option for redeeming the goods. Further, the Commissioner had confirmed customs duty amounting to Rs.39,03,821.00 in terms of Section 71 read with the proviso to Section 28A of the Customs Act. The appellant was also

required to pay interest amounting to Rs.18,88,425.00 on the customs duty confirmed on the 264 packages from the date of warehousing till the date of detection of the shortage in the warehouse; in addition, appellant was also required to pay interest on the duty confirmed in terms of Section 28AB of the Customs Act from the date of enforcement of the said section till the date of actual payment of duty confirmed on the 264 cases.

3. Appellant before us is M/s Bhanu Iron and Steel Company Limited, Plot No. 801, Sector III, Industrial Estate, Pithampur, District Dhar in the State of Madhya Pradesh ('BISCO' for short).

4. This appeal has a chequered history. Before finally landing in this Court, the appellant had gone through several rounds of appeal and remand. For a proper perspective, it would be apposite to briefly narrate the factual trajectory of the case.

5. Appellant had imported second hand steel mill machinery and parts thereof under Project Import Facility covered by Chapter Heading No.98.01 of the Schedule to the Customs Tariff Act, 1975.

6. A warehouse within the precincts of the industrial/factory premises of the appellant was notified as a public bonded warehouse on management basis with M/s Central Warehousing Corporation as warehouse keeper by the then Collector of Customs and Central Excise, Indore *vide* the notification dated 03.05.1989 for storage of the imported second hand steel mill machinery and parts thereof without payment of customs duty. According to the respondent, the appellant had imported in all 595 cases of machinery parts which were required to be warehoused in the notified public bonded warehouse. The breakup of the 595 cases of the machinery parts as provided by the respondent is as under:

Sl. No.	**Transit Bond No. & Date**	**No. of cases actually received in the customs bonded warehouse.**
1.	T-1592 dated 31.05.89	172
2.	T-7012 dated 04.12.89	146
3.	T-2014 dated 30.05.90	277
	Total	595

7. Acting on the basis of information received that the appellant had misused the warehousing facility, officials of the

respondent had searched the industrial premises of the appellant including the notified public bonded warehouse on 07.08.1992. In the course of the search, the stock lying within the notified public bonded warehouse were verified. On such verification, only 304 cases were found lying inside the warehouse; 264 cases were found outside the warehouse but within the industrial/factory premises of the appellant; remaining 27 cases were not found either inside the warehouse or outside the warehouse within the industrial/factory premises.

8. As no documents showing clearance of the goods contained in the 264 cases from within the warehouse but lying outside the warehouse on payment of duty and interest as required under Section 71 of the Customs Act could be produced, the said goods were seized in terms of Section 110 of the Customs Act. The value of the goods seized was estimated at Rs.48,79,776.00.

9. In his statement recorded under Section 108 of the Customs Act on 07.08.1992, Sh. Yashwant Singh Bisht, Project Officer (Commercial) of the appellant stated that the 264 cases

of imported goods were kept outside the bond under a shed as the trailers transporting the goods could not enter the notified warehouse in view of the soil becoming very sluggish on account of heavy rains and also because of paucity of space. The Collector, therefore, opined that the appellant had removed the 264 cases of warehoused goods valued at Rs.48,79,776.00 attracting duty of Rs.39,03,821.00 and interest of Rs.18,88,425.00 in violation of Section 71 read with Section 111(j) of the Customs Act. The seized goods were thus held liable for confiscation.

10. It was further alleged that appellant had unauthorisedly cleared 27 cases of the imported goods valued at Rs.4,99,068.00 attracting duty of Rs.3,99,255.00 with interest of Rs.2,41,326.00 which were liable to be recovered under Section 71 read with the proviso to Section 28(1) of the Customs Act.

11. That apart, it was alleged that M/s. Central Warehousing Corporation, Pithampur had abetted the appellant in clearing the warehoused goods without payment of duty and interest.

12. In the above circumstances, a show cause notice dated 22.01.1993 was issued to the appellant as well as to the warehouse keeper by the Collector (now the Commissioner) to explain and show cause as to why:

> (i) the seized quantity of 264 cases of goods valued at Rs.48,79,776.00 and attracting duty of Rs.39,03,821.00 plus Rs.18,88,425.00 due to interest should not be confiscated in terms of Section 71 read with Section 111(j) of the Customs Act.
>
> (ii) the amount of duty of Rs.3,99,255.00 plus interest of Rs.2,41,326.00 payable on 27 cases of goods valued at Rs.4,99,068.00 cleared and utilized by the appellant, should not be demanded from the appellant in terms of Section 71 read with the proviso to Section 28 (1) of the Customs Act.
>
> (iii) a penalty under Section 112 of the Customs Act should not be imposed for violation of Section 71 and Section 111(j) of the Customs Act.

13. Appellant submitted reply dated 02.04.1994. In its reply, appellant stated that there was heavy rain in the month of August 1989 and the soil outside the notified warehouse had

become very sluggish. As a result, the trailers carrying the consignment could not enter the notified warehouse. The goods were downloaded in the open outside the notified warehouse but within the factory premises. To prevent the goods from getting damaged, appellant had requested the concerned Superintendent of Customs and Central Excise to shift the machineries to under a shed within the factory premises under Section 64 of the Customs Act. Permission was granted by the Superintendent. In terms of such permission of the Superintendent, who was the proper officer, appellant had shifted the goods to under the shed to prevent further damage of the goods. It was contended that the goods were still under the bonded warehouse and could not be said to have been cleared. In this connection, reference to and reliance was placed on Section 15 of the Customs Act. This position was clarified by Sh. Yashwant Singh Bisht in his statement recorded on 07.08.1992. The appellant, therefore, requested the authority to drop the proceedings.

14. It may be mentioned that the Central Warehousing Corporation (for short 'the Corporation' hereinafter) had also submitted its reply dated 19.12.1993. In the reply it was stated

that an open area of 2,000 sq. meters in the premises of the appellant having fencing and a gate with locking arrangement was approved by the customs and central excise authorities as a public bonded warehouse. Appellant vide letter dated 30.08.1989 sought permission from the Superintendent, Customs and Central Excise, Range-III, Pithampur for unloading the cargo covered by Bond No.T-1592 dated 31.05.1989 outside the said warehouse on account of heavy rains, etc. It was pointed out that the trailers carrying the consignment could not enter the said warehouse because those got stuck in the soil outside the said warehouse as the soil had got sluggish due to heavy rains. The Superintendent gave permission for unloading the cargo outside the warehouse but within the factory premises on the body of the letter itself. The machinery parts had to be shifted to a shed outside the bonded warehouse but within the factory premises to protect those parts from further rusting and corrosion.

15. Commissioner by his adjudication order dated 28.08.1996 did not accept the reply of the appellant and confirmed the demand and interest. It was ordered as under:

(i) demand for duty of Rs.3,99,255.00 plus Rs.2,41,326.00 leviable on 27 cases cleared in a clandestine manner was confirmed for recovery from the appellant in terms of Section 71 read with the proviso to Section 28(1) of the Customs Act.

(ii) 264 cases of imported goods valued at Rs.48,79,776.00 seized from the premises other than the approved warehouse were confiscated under Section 111 of the Customs Act but permitted to be redeemed on payment of fine of Rs.12,00,000.00 (Rs. twelve lakhs only). Appellant would also suffer duty of Rs.39,03,821.00 plus interest at the time of their ultimate clearance.

(iii) penalty of Rs.5,00,000.00 (Rs. five lakhs only) was imposed on the appellant under Section 112 of the Customs Act.

(iv) penalty of Rs.25,000.00 (Rs. twenty five thousand only) was imposed on the Central Warehousing Corporation under Section 112 of the Customs Act.

16. Aggrieved by the aforesaid order of the Commissioner, appellant preferred an appeal before the then Central Excise and Gold Appellate Tribunal (CEGAT). By order dated 18.02.1999, CEGAT disposed of the appeal by setting

aside the order of the Commissioner and remanding the matter back to the Commissioner for fresh adjudication. The Commissioner was directed to look into the new facts and documents brought on record by the appellant and thereafter decide the case *de novo* in accordance with the principles of natural justice.

17. Following the remand, a fresh adjudication order was passed by the Commissioner on 31.12.2002. In this order, the Commissioner recorded that the warehoused goods were removed to a place outside the approved warehouse without following the procedure set out under Sections 67, 68 and 69 of the Customs Act. The Commissioner, thereafter, reiterated the first adjudication order dated 28.08.1996.

18. Assailing the aforesaid order of the Commissioner dated 31.12.2002, appellant preferred appeal before the CESTAT. In its order dated 08.10.2003, CESTAT observed that the Commissioner had not looked into the additional documents which were part of the record. CESTAT, therefore, opined that the matter should be remanded back to the adjudicating authority for fresh adjudication after taking into

consideration the documents produced by the appellant, including those produced before the CESTAT. Thus, by the order dated 08.10.2003, CESTAT allowed the appeal of the appellant by remanding the matter back to the Commissioner for re-adjudication after affording an opportunity of hearing to the appellant.

19. The matter was taken up by the Commissioner afresh on remand. By a detailed order dated 28.04.2005, the Commissioner directed as under:

> (i) demand of Rs.3,99,255.00 leviable on the 27 cases found not warehoused was confirmed for recovery from the appellant in terms of the conditions of transit bond.
>
> (ii) appellant should pay interest on the duty confirmed in terms of Section 28AB of the Customs Act from the date of enforcement of the said section till the date of actual payment of duty. The interest amount was directed to be worked out and communicated to the appellant by the Assistant Commissioner, Central Excise Division, Pithampur.
>
> (iii) 264 cases of imported goods valued at Rs.48,79,776.00 seized from the premises of the

appellant outside the approved warehouse were confiscated under Section 111 of the Customs Act. As the goods were within the factory premises but outside the bonded warehouse, a lenient view was taken; the goods were permitted to be redeemed on payment of fine of Rs.2,00,000.00 (Rupees two lakhs only). The option for redeeming the goods was to be exercised by the appellant within 30 days from the date of receipt of the order.

(iv) customs duty amounting to Rs.39,03,821.00 for recovery from the appellant in terms of Section 71 read with the proviso to Section 28A of the Customs Act was confirmed.

(v) appellant was required to pay interest amounting to Rs.18,88,425.00 on the customs duty confirmed on the 264 packages from the date of warehousing till the date of detection of the shortage in the warehouse, i.e. from 04.02.1989 to 07.08.1992, in terms of Section 71 of the Customs Act.

(vi) appellant was also required to pay interest on the duty confirmed in terms of Section 28AB of the Customs Act from the date of enforcement of the said section to till the date of actual payment of duty confirmed on the 264 packages. The interest amount was directed to

be worked out and communicated to the appellant by the Assistant Commissioner, Central Excise Division, Pithampur.

(vii) penalty of Rs.1,00,000.00 (Rupees one lakh only) was imposed on the appellant under Section 112 of the Customs Act.

20. It was against this order that the related appeal was filed by the appellant before the CESTAT. By the impugned order dated 30.04.2009, CESTAT dismissed the appeal.

21. Hence the present appeal. This Court by order dated 21.08.2009 had issued notice.

22. Respondent has filed counter affidavit. It is stated that during the visit of the officials of the Preventive Branch of the Commissionerate on 07.08.1992, the impugned goods were found outside the notified warehouse. That apart, there was no explanation for the imported goods contained in the 27 cases which were neither found within the bonded warehouse nor outside the bonded warehouse within the factory premises. In such circumstances, the respondent has justified the order dated 28.04.2005 which was affirmed by the CESTAT *vide* order dated 30.04.2009.

23. It may be mentioned that appellant has brought on record two additional documents. Appellant had sought for information from the Central Warehousing Corporation under the Right to Information Act, 2005 *vide* letter dated 22.09.2009 regarding payment of custom establishment charges by the Corporation. Appellant was informed by the Central Warehousing Corporation *vide* letter dated 18.12.2009 that the Corporation had deposited a sum of Rs.56,10.294.00 under the head of 'Pithampur Warehousing (Bhanu Iron and Steel Company Limited along with wind up Warehouse) custom establishment charges' for the financial year 1992-1993 to 2007-2008.

24. Learned counsel for the appellant submits that CESTAT had failed to consider the fact that it was on the basis of specific permission granted to the appellant by the proper officer that the impugned goods were found outside the warehouse but within the industrial/factory premises of the appellant. Therefore, in terms Section 64(d) of the Customs Act respondent could not have treated the said goods as having been removed from the warehouse. He submits that since the appellant had not cleared the warehoused goods, Section 64 of

the Customs Act would come into play. Therefore, CESTAT was clearly in error in upholding the order of the respondent applying Section 15(1)(b) of the Customs Act for determining the rate of duty in respect of those goods. According to him, in the facts of the present case the only provision that would be applicable is the residuary provision i.e., Section 15 (1) (c) of the Customs Act.

24.1. Learned counsel has also placed reliance on the circular dated 12.07.1989 of the Central Board of Excise and Customs which was fully applicable to the case of the appellant. Though this circular was subsequently superseded by circular dated 14.08.1997, it would be the former circular which would be applicable to the facts of the present case.

24.2. Learned counsel further submits that CESTAT was not justified for upholding the order of the respondent applying Section 71 of the Customs Act read with Section 28AB of the said Act while imposing interest on the confiscated goods. Confiscation itself was not justified.

24.3. Finally, it is contended that both the respondent as well as CESTAT had overlooked the fact that the goods in

question were denied to the appellant for a long time. Therefore, a lenient view ought to have been taken.

25. Learned counsel for the respondent, on the other hand, submits that on the basis of reliable information received about suspected misuse of the warehousing facility by the appellant, officers of the Preventive Branch of the Collectorate of Central Excise and Customs, Indore had searched the premises of the appellant on 07.08.1992 and physically verified the stock. On verification, it was found that 304 cases were stocked inside the warehouse while 264 cases were found outside the warehouse but within the factory premises. Remaining 27 cases were found neither inside the warehouse nor within the factory premises. It was thereafter that action was taken under the relevant provisions of the Customs Act following which show cause notice was issued to the appellant.

25.1. Learned counsel has justified the ultimate adjudication order as well as the impugned order of the CESTAT confirming the said adjudication order.

25.2. In such circumstances, he submits that there is no merit in the appeal and, therefore, the same should be dismissed.

26. Submissions made have been duly considered.

27. We may now refer to some of the relevant provisions of the Customs Act. Section 2(43) defines a 'warehouse' to mean a public warehouse licensed under Section 57 or a private warehouse licensed under Section 58 or a special warehouse licensed under Section 58A of the Customs Act. 'Warehoused goods' has been defined under Section 2(44) to mean goods deposited in a warehouse.

28. Section 12 of the Customs Act deals with dutiable goods. Sub-Section(1) thereof says that duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 on goods imported into or exported from India.

29. Date for determination of rate of duty and tariff valuation of imported goods is dealt with in Section 15. Sub-Section(1) of Section 15 says that the rate of duty and tariff valuation, if any, applicable to any imported goods shall be the rate and valuation in force-

> (a) in the case of goods entered for home consumption under Section 46, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse under Section 68, on the date on which the goods are actually removed from the warehouse;

(c) in the case of any other goods, on the date of payment of duty.

30. While Section 28 provides for recovery of duties not levied or short levied, Section 28AA deals with interest on delayed payment of duty. On the other hand, Section 28AB provided for interest on delayed payment of duty in special cases. Substance of Section 28AB (since deleted) was that where any duty was not levied or paid or short levied etc., the person who was liable to pay the duty would also be liable to pay interest in addition to duty at such rate not below 10% and not exceeding 36% per annum as may be fixed by the central government by notification in the official gazette.

31. Chapter IX of the Customs Act comprising of Sections 57 to 73A deal with warehousing. Section 57 provides for licensing of public warehouses where dutiable goods may be warehoused. As per Section 58, as it stood at the relevant time, the proper officer may license a private warehouse where

dutiable goods imported by or on behalf of the licensee or any other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited. Sub-Section(2) provides for cancellation of license so granted by giving a month's written notice in advance if the licensee had contravened any of the provisions of the Customs Act or committed breach of any of the conditions of the license. However, before such cancellation, the licensee was required to be given a reasonable opportunity of being heard.

32. 'Warehousing bond' is provided for in Section 59. As per sub-Section(1), the importer of any goods specified in Section 61(1) which had been entered for warehousing and assessed to duty under Sections 17 or 18 shall execute a bond binding himself in a sum equal to thrice the amount of the duty assessed on such goods.

33. As per Section 60, as it stood at the relevant point of time, when the provisions of Section 59 have been complied with in respect of any goods, the proper officer may make an order permitting the deposit of goods in a warehouse.

34. Section 61 mentions the period for which the goods may remain warehoused. Sub-Section (1) says that any warehoused goods may be left in the warehouse in which they are deposited or in any warehouse to which they may be removed-

> (a) in the case of capital goods intended for use in any hundred percent export-oriented undertaking, till the expiry of five years;
>
> (aa) in the case of goods other than capital goods intended for use in any hundred percent export-oriented undertaking, till the expiry of three years; and
>
> (b) in the case of any other goods, till the expiry of one year;

after the date on which the proper officer has made an order under Section 60 permitting the deposit of the goods in a warehouse. However, proviso (i) (B) says that in the case of any goods which are not likely to deteriorate and which are not intended for use in any hundred percent export oriented undertaking, the period specified in clauses (a), (aa) or (b) may, on sufficient cause being shown, be extended by the Principal Commissioner or Commissioner of Customs for a period not

exceeding six months and by the Principal Chief Commissioner or Chief Commissioner of Customs for further period as he may deem fit.

35. Section 64 deals with owner's right to deal with warehoused goods. Section 64, as it stood at the relevant point of time, read as under:

> 64. *Owner's right to deal with warehoused goods.*- With the sanction of the proper officer and on payment of the prescribed fees, the owner of any goods may either before or after warehousing the same-
>
> (a) inspect the goods;
>
> (b) separate damaged or deteriorated goods from the rest;
>
> (c) sort the goods or change their containers for the purpose of preservation, sale, export or disposal of the goods;
>
> (d) deal with the goods and their containers in such manner as may be necessary to prevent loss or deterioration or damage to the goods;
>
> (e) show the goods for sale; or
>
> (f) take samples of goods without entry for home consumption, and if the proper officer so permits, without payment of duty on such samples.

35.1. Thus, this section provided that the owner of any goods with the sanction of the proper officer and on payment of the prescribed fees may either before or after warehousing the same, deal with the goods and their containers in such manner as may be necessary to prevent loss or deterioration or damage to the goods.

36. Section 67 deals with removal of goods from one warehouse to another. It says that the owner of any warehoused goods may with the permission of the proper officer, remove them from one warehouse to another subject to such conditions as may be prescribed for the due arrival of the warehoused goods at the warehouse to which removal is permitted.

37. Heading of Section 68 is 'Clearance of warehoused goods for home consumption'. This section, as it stood at the relevant point of time, provided that the importer of any warehoused goods may clear those goods from the warehouse for home consumption if –

> (a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

(b) the import duty leviable on such goods and all penalties rent, interest and other charges payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for home consumption has been made by the proper officer.

38. There is an embargo provided in Section 71 from taking out goods from a warehouse. As per Section 71, no warehoused goods shall be taken out of a warehouse except on clearance for home consumption or re-exportation or for removal to another warehouse or as otherwise provided by the Customs Act.

39. Section 71 is followed by Section 72 which deals with goods improperly removed from warehouse, etc. As per sub-Section(1)(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under Section 61 to remain in a warehouse, the proper officer may demand and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties,

rent, interest and other charges payable in respect of such goods.

40. Once the goods covered by any bond executed under Section 59 have been cleared for home consumption or exported or transferred or are otherwise duly accounted for, and when all amounts due on account of such goods have been paid, the proper officer shall cancel the bond as discharged in full and deliver the same after cancellation to the person who has executed or is entitled to receive it.

41. Section 110(1) of the Customs Act empowers the proper officer to seize any goods if he has reason to believe that such goods are liable to confiscation under the Customs Act.

42. As per Section 111(j), any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission, shall be liable for confiscation.

43. In the event of such an act, the concerned person shall be liable to pay penalty under Section 112.

44. Central Board of Excise and Customs had issued Circular No.98/95-Cus. dated 12.07.1989. Subject matter of this circular was what would be the relevant date for calculation of customs duty in cases where warehoused goods were cleared after expiry of the warehousing period. Reference was made to the instructions of the Board dated 17.03.1987 where it was clarified that in cases where warehoused goods were cleared from a warehouse after expiry of the bond period, the rate of duty would be the one which was prevalent on the date of expiry of the bond. The issue was reconsidered in the tripartite meeting held between the Ministry of Law, Department of Revenue and the Comptroller and Auditor General. It was observed in the meeting that on expiry of the warehousing period, the goods kept in a warehouse ceased to be warehoused goods and, therefore, their removal from the warehouse could not be regarded as covered by the provisions of Section 15(1)(b) of the Customs Act. After noting that there was no specific legal provision to determine the rate of duty in such cases of warehoused goods where the bond period had expired, it was concluded that the residual clause of Section 15(1)(c) of the Customs Act could apply to cases where the goods were

removed from the warehouse after expiry of the warehousing period and that the rate of duty in such cases would be the rate prevalent on the date of payment of duty. It was further clarified that provisions of Section 15(1)(b) of the Customs Act would continue to apply in cases where goods were cleared from the warehouse after extension of the warehousing period but before expiry of the extended period for which applications from the importers for extension of the warehousing period should be received before expiry of the permitted period of warehousing. These conclusions reached in the tripartite meeting were accepted by the Board and by the aforesaid circular dated 12.07.1989, direction was issued for their immediate implementation superseding the instructions dated 17.03.1987.

45. The above provision continued to hold the field till the decision of this Court in *Kesoram Rayon versus Collector of Customs, Calcutta,* (1996) 5 SCC 576. The question for consideration in *Kesoram* was the rate at which customs duty was to be levied on goods that remained in a bonded warehouse beyond the permitted period. A two judge bench of this Court after referring to various provisions of the Customs Act held that

Section 15(1)(b) would apply to the case of goods cleared under Section 68 from a warehouse upon presentation of a bill of entry for home consumption; payment of duty, interest, penalty, rent and other charges; and an order for home clearance. This Court clarified that provisions of Section 68 and consequently Section 15(1)(b) would apply only when goods have been cleared from the warehouse within the permitted period or its permitted extension and not when by reason of their remaining in the warehouse beyond the permitted period or its permitted extension, the goods would be deemed to have been improperly removed from the warehouse under Section 72. In the facts of that case, it was found that there was nothing on record to suggest that clearance of the goods in question under Section 68 was ordered and, therefore, Section 15(1)(b) had no application. Finally, this Court held that the consequence of non-removal of the warehoused goods within the permitted period or the permitted extension by virtue of Section 72 is certain. The date on which it comes to an end is the date relevant for determining the rate of duty; when the duty is in fact demanded is not relevant.

46. Following the decision of this Court in *Kesoram*, the Central Board of Excise and Customs issued Circular No.31/97-Cus. dated 14.08.1997. The Board held that in view of this Court's judgment, the date of payment of duty in the case of warehoused goods removed after expiry of the permissible or extended period would be the date of expiry of the warehousing period or such other extended period, as the case may be, and not the date of payment of duty. Goods not removed from a warehouse within the permissible period or the extended period are to be treated as goods improperly removed from the warehouse.

47. In *Simplex Castings Ltd. versus Commissioner of Customs, Vishakhapatnam,* (2003) 5 SCC 528, the appellant had questioned filing of appeal by the Commissioner before the CEGAT in view of the circular dated 12.07.1989 issued by the Central Board of Excise and Customs. It was argued that it was not open to the Commissioner to take the stand that non-removal of the goods from the warehouse after the period of warehousing was over would be deemed removal from the warehouse and that the rate of duty would be leviable from the date the period of warehousing was over. The Commissioner

had appealed against the decision of the Collector of Customs (Appeals) in which the circular dated 12.07.1989 was followed. The appeal filed by the Commissioner was allowed by the CEGAT by relying upon the decision of this Court in *Kesoram*. This Court referred to its earlier decision in *Paper Products Ltd. versus Commissioner of Central Excise,* (1999) 7 SCC 84, and held that the circular dated 12.07.1989 was binding on the Department and, therefore, it was not open to the Department to prefer appeal before CEGAT contrary to what was laid down in the circular dated 12.07.1989 in which it was specifically provided that the residual Section 15(1)(c) of the Customs Act would apply to cases where the goods were removed from a warehouse after expiry of the warehousing period and that the rate of duty in such cases would be the rate prevalent on the date of payment of duty. This Court noted that the aforesaid circular dated 12.07.1989 was withdrawn by the subsequent circular dated 14.08.1997. But, at the relevant point of time, the circular dated 12.07.1989 was holding the field. Thus, the appellate order passed by the Collector of Customs (Appeal) could not be said to be in anyway illegal or erroneous and, therefore, it was not open to the Department to challenge the

said order before the CEGAT in contravention of the circular dated 12.07.1989.

48. The decision in *Kesoram* was approved and applied by a coordinate bench of this Court in *SBEC Sugar Ltd versus Union of India*, (2011) 4 SCC 668. This Court held that Section 15(1)(b) would be applicable only when the goods are cleared from the warehouse under Section 68 of the Customs Act i.e. within the initially permitted period or during the permitted extended period. When the goods are cleared from the warehouse after expiry of the permitted period or its permitted extension, the goods are deemed to have been improperly removed under Section 72(1)(b) of the Customs Act with the consequence that the rate of duty has to be computed according to the rate applicable on the date of expiry of the permitted period under Section 61.

49. Let us now briefly recap the facts. Appellant had imported second hand steel mill machinery and parts covered by three transit bonds totalling 595 cases. The customs authority had notified an open area of 2000 square meters within the industrial/factory premises of the appellant as a

public bonded warehouse. This open area was fenced and had gate with locking arrangement. The imported goods covered by the 595 cases were required to be warehoused in the said notified public bonded warehouse without payment of customs duty. Appellant had written a letter dated 30.08.1989 to the concerned Superintendent seeking permission to unload a portion of the cargo outside the warehouse but within the factory premises. It was pointed out that the trailers carrying the consignment could not enter the said warehouse as because those trailers had got stuck in the soil outside the warehouse but within the factory premises as the soil had become very sluggish due to heavy rain and also because of paucity of space within the notified open area. The Superintendent gave permission on the body of the letter itself for unloading the cargo outside the warehouse but within the factory premises. The machinery parts which were thus unloaded were shifted to a shed outside the bonded warehouse but within the factory premises of the appellant so that those machinery parts did not get damaged, lying in the open and getting exposed to the elements.

49.1. Officials of the Preventive Branch of the Commissionerate searched the industrial premises of the appellant, including the notified public bonded warehouse, on 07.08.1992 and physically verified the stock in the notified public bonded warehouse as well as outside but within the industrial/factory premises of the appellant. On such verification, it was found that only 304 cases were stocked inside the warehouse, whereas 264 cases were found outside the warehouse but within the industrial/factory premises of the appellant. Remaining 27 cases were neither found inside the warehouse nor outside the warehouse but within the industrial/factory premises of the appellant.

49.2. After issuance of show cause notice and hearing, respondent passed adjudication order dated 28.08.1996 which suffered several rounds of appeals and remand. Ultimately, the Commissioner passed the final adjudication order dated 28.04.2005 whereby demand of Rs.3,99,255.00 leviable on the 27 cases found not warehoused was confirmed. Appellant was also directed to pay interest on the said duty in terms of Section 28AB of the Customs Act. The 264 cases of imported goods found outside the notified warehouse were confiscated but

option of redemption was given to the appellant on payment of fine of Rs.2,00,000.00. For the goods covered by the 264 cases, customs duty amounting to Rs.39,03,821.00 was directed to be recovered from the appellant in terms of Section 71 read with the proviso to Section 28A of the Customs Act. That apart, appellant was directed to pay interest of Rs.18,88,425.00 on the aforesaid quantum of customs duty in respect of the 264 cases from the date of warehousing till the date of detection of the shortage in the warehouse. Further, appellant was directed to pay interest under Section 28AB in respect of the 264 cases from the date of enforcement of the said section to till the date of actual payment of the duty. Penalty of Rs.1,00,000.00 was also imposed on the appellant under Section 112 of the Customs Act.

49.3. In appeal, CESTAT by the impugned order affirmed the aforesaid decision of the Commissioner.

50. We may mention that the permission granted by the Superintendent to the appellant on 30.08.1989 to unload a portion of the cargo outside the open space which was notified as public bonded warehouse but within the factory premises of

the appellant was neither cancelled nor revoked by the Superintendent or even by the Commissioner. Infact, a view can reasonably be taken that the appellant as the owner of the goods had exercised its right under Section 64(d) which was endorsed by the Superintendent. Therefore, it would not be correct to say that the 264 cases found outside the notified warehouse but within the factory premises of the appellant were improperly or unauthorisedly removed from the notified public bonded warehouse.

51. It has also come on record that Central Warehousing Corporation had deposited a sum of Rs.56,10,294.00 with the respondent as custom establishment charges in respect of the aforesaid notified public bonded warehouse for the period 1992-1993 to 2007-2008. This would mean that the warehousing in the aforesaid notified public bonded warehouse continued during the said period. Thus, the period of warehousing had not expired and continued to remain operational in terms of the proviso to Section 61 of the Customs Act.

52. This would further be borne out from the fact that it is not the case of the respondent that the 304 cases found inside

the notified warehouse were kept there beyond the warehousing period. In fact, the allegation of the respondent is that 264 cases were improperly or unauthorisedly removed from the notified warehouse as those were found lying outside the notified area but within the industrial/factory premises of the appellant. That apart, 27 cases were neither found inside the notified warehouse nor outside the said warehouse but within the factory premises of the appellant.

53. In such a scenario, the provisions of Sections 71 and 72 would not be applicable. Therefore, the decision of the respondent to invoke Section 71 and thereafter levy interest on the goods covered by the 264 cases under Section 28AB of the Customs Act was not justified. Since the imported goods covered by the 264 cases were never warehoused inside the notified public bonded warehouse but were unloaded outside the notified area but within the factory premises of the appellant and kept under a shed on permission granted by the Superintendent which permission was neither cancelled nor revoked, question of warehousing the goods covered by the 264 cases within the notified public bonded warehouse did not arise. As a corollary, the further question of improperly or

unauthorisedly removing the 264 cases from the notified warehouse to outside the said area but within the factory premises of the appellant attracting Section 71 and the consequences following the same did not arise. Inference drawn by the respondent that the permission granted by the Superintendent was only temporary and therefore, the rigor of Section 71 would be attracted, in our view, would not be a correct understanding of the situation and the law.

54. Having said that, we find that there is no explanation on the part of the appellant *qua* the missing 27 cases. Therefore, the view taken by the respondent and affirmed by the CESTAT that those 27 cases were improperly or unauthorisedly removed from the notified public bonded warehouse is correct and requires no interference.

55. Reverting back to the 264 cases, we are of the view that in a case of this nature, Section 15(1)(b) would have no application. Rather, Section 15(1)(c) would be attracted.

56. In so far the Board's circular dated 12.07.1989 is concerned, the subject matter of the said circular was what would be the relevant date for calculation of customs duty in cases where warehoused goods were cleared after expiry of the

warehousing period. In that context, it was clarified that provisions of Section 15(1)(b) of the Customs Act would apply to cases where the goods were cleared from the warehouse after extension of the warehousing period but before expiry of such extended period. On the other hand, in respect of cases where the goods were removed after expiry of the warehousing period, the residual clause of Section 15(1)(c) of the Customs Act would apply. Evidently, this circular dated 12.7.1989 would not be applicable to the facts of the present case in as much as it is not the case of the respondent that either the warehousing period had expired or that the warehousing period was extended. As we have seen, the warehousing in the notified public bonded warehouse continued as the Corporation had deposited with the respondent a sum of Rs. 56,10,294.00 in respect of the notified warehouse as custom establishment charges for the period from 1992-1993 to 2007-2008. That apart, we can refer to the fact that respondent had not levied any customs duty on the 304 cases found within the notified area which would mean that the notified warehousing continued. Therefore, this is not a case where Section 15(1)(b) could have been invoked.

57. As regards, the decision of this Court in *Kesoram* is concerned, the question for consideration in that case was the rate at which customs duty could be levied on goods that remained in a bonded warehouse beyond the permitted period. It was in that context that this Court held that Section 68 would not be applicable since Section 68 operates in a different context. On the contrary, Section 72 would apply. Thus, this Court clarified that the date on which the warehousing period comes to an end, would be the date relevant for determining the rate of duty and when the duty is actually demanded would not be relevant. It was further clarified that Section 15(1)(b) would apply to goods cleared under Section 68. Goods which remain in the bonded warehouse beyond the permitted period would be deemed to have been improperly removed from the warehouse under Section 72. It is quite evident that this decision would not be applicable to the facts of the present case.

58. Thus, having regard to the discussions made above, we are of the view that the demand raised by the respondent against the appellant and affirmed by the CESTAT *qua* the 264 cases including levy of customs duty and interest cannot be sustained. Those are accordingly set aside and quashed. Parties

are directed to work out their remedies in respect of the 264 cases of goods under Section 15(1)(c) of the Customs Act within a period of eight weeks from the date of receipt of a copy of this order. In so far the demand of customs duty and interest on the 27 cases is concerned, the same is hereby sustained. The decision imposing penalty of rupees one lakh on the appellant under Section 112 of the Customs Act is also not disturbed in view of the conduct of the appellant in unauthorisedly removing the 27 cases of imported goods not only from the notified public bonded warehouse but also from the industrial/factory premises of the appellant.

59. Impugned order of CESTAT would stand modified accordingly.

60. Appeal is allowed in part in the above terms. No costs.

.....J.
[B. V. NAGARATHNA]

.....J.
[UJJAL BHUYAN]

NEW DELHI;
20.03.2024

'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1633-1638 OF 2004

COMMISSIONER OF CUSTOMS (IMPORT), RAIGAD ... Appellant

VERSUS

M/S. FINACORD CHEMICALS (P) LTD. & ORS. ... Respondents

WITH

CIVIL APPEAL NO. 6541 OF 2010

CIVIL APPEAL NO. 3410 OF 2006

J U D G M E N T

A. K. SIKRI, J.

CIVIL APPEAL NOS. 1633-1638 OF 2004

In August, 1991, respondent nos. 1 and 2 herein imported 2 and 3 containers respectively of alcohol under the description "Undenatured Ethyl Alcohol' (Malt Spirit plus or minus 59.3% Vol.) from an intermediary, M/s. Ravco International Ltd., England (hereinafter referred to as 'RIL' for short). As per the Department, these imports were under invoiced at pound 1.40 per litre whereas the actual price of the said goods was pound 3.78 per litre. This led to issuance of a show cause notice dated 28.09.1992 upon the importers/respondents herein. It was alleged that the correct transaction value of the imported goods was pound

3.78 per bulk litre and that the goods were imported against invalid licenses. Accordingly, demand of customs duty was raised against respondent nos. 1 and 2. It also proposed confiscation of the goods and penal action against the respondents.

The Collector of Customs vide Order-in-Original dated 28.02.1995 upheld the misdeclaration and undervaluation and further held respondent no. 1 to pay customs duty of Rs.1,63,74,648/- along with penalty of Rs.1,64,00,000 and goods to be confiscated. Respondent no.2 goods valued at Rs.83,04,501/- to be confiscated. However, the same were provisionally released on furnishing Bank Guarantee of Rs. 1 crore, differential duty to the tune of Rs. 77,34,994/-. A further penalty of Rs. 2.63 crores was imposed. Respondent no. 3 was directed to pay Rs. 20 lakhs as penalty, respondent no. 4 was imposed the penalty of Rs. 1 crore and respondent no. 5 was to pay Rs. 1 lakh as penalty.

JUDGMENT

Aggrieved, the respondents filed appeals before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') and the CESTAT vide its final order dated 10.09.2003, partly allowed the appeals thereby setting aside the order of the Collector regarding enhancement of the unit price, while upholding that import of the said goods was unauthorised and was liable for confiscation. However, the CESTAT reduced the amount of

fine imposed and set aside the penalties imposed on the respondents. Hence the present Appeals.

Insofar as the Revenue /Department is concerned, it is aggrieved by the following findings arrived at by the CESTAT in the impugned judgment: -

1. Accepting the version of the respondents-assessees that the goods in question were imported at UK pound 1.40 per bulk litre and not UK pound 3.78 per bulk litre as claimed by the Revenue.
2. The reduction of redemption fine from Rs.51,62,413/- to Rs. 10 lakhs.
3. The reduction of penalty on Mr. S. R. Nagpal from Rs.22,65,006 to Rs. 10 lakhs.

We may mention at this stage that against the other findings of the Tribunal which have gone against the assessee, the assessee has also filed the appeal which is pending before the Bombay High Court.

Insofar as the first issue of import price of the liquor in question is concerned, the order of the Collector reveals that the respondents-assessees have relied upon a letter indicating that the goods were imported at the rate of UK pound 1.40 per bulk litre. After discussing elaborately, the Collector rejected the authenticity or evidentiary value of the said letter. However, apart from

this letter, the respondents had also produced invoices and in these invoices price of UK pound 1.40 per bulk litre is specifically mentioned. The Collector has not taken into account or considered the import of these invoices. On the other hand, the CESTAT has remarked and rightly so, that when the invoices are produced showing the purchase price of the goods in question and authenticity of these invoices is not doubted by the Department, these will form as the primary evidence in support of the contention of the respondents that the imported goods were purchased at UK pound 1.40 per bulk litre. We thus, do not find any flaw in the reasoning of the CESTAT while deciding this issue.

Insofar as the reduction of redemption fine as well as the penalty is concerned, the CESTAT has given the following reasons in doing so: -

> "Redemption Fine
>
> In view of our finding on issue (i) that the goods are liable to confiscation as they have been imported without cover of a valid licence. We hold that levy of fine is warranted. However we note that for the first time in the case of Bussa Overseas Properties Ltd. vs. CC(I) Mumbai 2002(148) ELT 328, the Tribunal held that over-proof whisky having more than 55% alcohol content by vol. is a concentrate of alcoholic beverages and until this decision, a practice to allow clearances of similar goods under REP licence was prevalent. We also note that a long period has lapsed since the import and that the goods are raw materials for manufacture of alcoholic beverages that this is not a case of duty evasion as the finding on undervaluation has on set aside by us thereby reducing the gravamen of the charge. The assessable value of the goods imported by FCPL is Rs.15,08,040/- while the assessable value of the goods imported by SRN is Rs.22,78,578/-. The

fine levied by the Commissioner on FCPL is Rs.51,62,413/- and that of SRN is Rs.22,65,006/-. We are not able to fathom the logic behind fixing the above quantum of fines. There is nothing in the impugned order to indicate the basis on which the quantum was arrived at. Having regard to the above factors including the fact that the import Policy was liberalised subsequently and that only the charge of ITC violation has been sustained by us, we reduce the fine levied on FCPL to Rs. 10 lakhs and on SRN to Rs. 15 lakhs."

We are of the opinion that the CESTAT has given valid reasons for reducing the penalty and fine and the discretion exercised by the CESTAT on valid considerations does not call for any interference. These appeals are accordingly, dismissed. We make it clear that the dismissal of the appeals would not impact in any way the appeal which is preferred by the respondents-assessees and is pending in the Bombay High Court. The said appeal shall be decided by the Bombay High Court on its own merits.

SUPREME COURT OF INDIA
JUDGMENT

<u>Civil Appeal No. 6541 of 2010</u>

The appellants herein are carrying on the business, *inter alia*, of manufacturing, sale and distribution of Indian Made Foreign Liquor (IMFL). They are the successor in interest of Shaw Wallace Distilleries. It so happened that in same proceedings which were initiated against one M/s. S. R. Nagpal and company and M/s. Finacord Chemicals Private Limited, who had imported certain goods from England and had sold to the appellant herein, the said goods which

were in custody of the appellant were seized by the Customs Department in those proceedings. The appellant felt aggrieved by the said seizure and approached the High Court of Bombay for release of the goods. In the said Writ Petition No. 3220 of 1991 filed by the appellant, interim order dated 25.10.1991 was passed which reads as under: -

> "Rules returnable forthwith Respondents waive service. Order as per minutes. Petition disposed of accordingly adjudication proceedings to proceed.
>
> Upon the petitioner no. 1 depositing the amount of Rs.1,56,64,500/- with the Additional Collector of Customs, Bombay the Petitioners are allowed to utilize 15664,50 bulk liters of Ethyl Alcohol which are the subject matter of the Supurthnama dated 7.10.1991."

Pursuant to the aforesaid order, the appellant deposited a sum of Rs. 1,56,64,500/- and got the siezed goods released. The appellant, thereafter, moved another application in the said writ petition praying that the money deposited by it be kept with the Nationalised Bank in a Fixed Deposit. On the said application, order dated 30.10.1991 was passed. Though the aforesaid request of the appellant was rejected, but at the same time, the Court gave the direction that in the event it is ultimately held that the appellant is entitled to get back the amount deposited by it, the same shall be refunded to the appellant with interest at the rate of 13 per cent per annum which was the rate of interest payable by the Nationalised Bank on Fixed Deposits at the relevant time.

The matter was proceeded against M/s. S. R. Nagpal and company and M/s. Finacord Chemicals Private Limited. The Order-in-Original was passed by the Commissioner against those firms. However ultimately the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to 'CESTAT') in the appeals filed by them, gave them substantial relief by allowing the appeals partly. The issue as to whether there was an under-invoicing in the import of the goods was decided in favour of the said parties and on that ground, the additional demand of duty was struck down. Even the redemption fine was reduced to Rs. 10 lakhs and as far as penalty is concerned, it was completely knocked off and set aside. We may mention here that against that order passed by the CESTAT, the Department had filed appeal and this court has affirmed that part of the order of the CESTAT dismissing the appeal of the Department. The effect thereof is that even qua M/s. S. R. Nagpal and company and M/s. Finacord Chemicals Private Limited, no additional duty or the penalty is payable and the only redemption fine to the extent of Rs. 10 lakhs is payable.

In the aforesaid background, the appellant herein, which was not even the importer of the goods but had purchased the goods from M/s. Finacord Chemicals Private Limited, made an application for refund of the amount of

Rs.1,56,64,500 which was deposited pursuant to the order dated 25.10.1991 passed by the High Court of Bombay in Writ Petition No. 3220 of 1991. The Commissioner while dealing with the case of M/s. S. R. Nagpal and company and M/s. Finacord Chemicals Private Limited had recorded certain findings in respect of the appellant herein as well. Insofar as the appellant is concerned, it is categorically held that no role could be attributed to the appellant in the import of goods in question and the appellant was the *bona fide* purchaser of the goods from the said two importers. The Commissioner also referred to the interim orders passed by the High Court of Bombay in the Writ Petition filed by the appellant, which are taken note of above. However, in his order, he ultimately recorded that the question of refund would arise only if the adjudication order holds the appellant to be entitled to this amount or part thereof. At the same time, it is significant to note some pertinent observations made by him in the order to the effect that the amount in question was in the nature of deposit by the appellant in lieu of permission to take back the goods and to utilise those goods pending adjudication and if adjudication orders so warrants, this amount could be appropriated towards dues as adjudicated, according to law.

After the order of the CESTAT holding that no additional duty was payable, the appellant made an

application for refund of the amount deposited by it stating that even the importers were held not liable to pay any duty. This application was, however, rejected invoking the doctrine of 'unjust enrichment'. Challenging the order, the appellant preferred Customs Appeal No. 56 of 2008 before the High Court of Bombay. Vide the impugned judgment dated 25.06.2009 rendered by the High Court of Bombay in the aforesaid appeal, the High Court has confirmed the applicability of the doctrine of unjust enrichment insofar as the demand of duty is concerned. However, insofar as the demand of fine is concerned, the High Court has held that the principle of unjust enrichment would not be attracted. It is this judgment which is under challenge in the present proceedings.

From the aforesaid narration of facts, it is clear that insofar as the appellant is concerned, it had not imported the goods in question. The importers were M/s.S.R.Nagpal and company and M/s. Finacord Chemicals Private Limited. The dispute of under-invoicing was also qua the said two importers on the basis of which custom was claiming lesser payment of duty by the said importers. In the adjudication proceedings, while imposing the duty against the said importers, a categorical finding was also recorded at the same time that the appellant had no role to play therein and was a *bona fide* purchaser of the goods from

the said importer which were imported by them. It is also manifest that the appellant came into picture only when the goods purchased by the appellant were seized by the custom department and he had to approach the High Court of Bombay for the release of those goods. What is significant is that as a condition for the release of the said goods, interim order directing the appellant to deposit the amount in the sum of Rs.1,56,64,500 was passed. It was not towards any custom duty. In this scenario, it is difficult to hold that the principle of unjust enrichment can at all be applied.

As far as the deposit of the aforesaid amount by the appellant and seeking refund thereof is concerned, we need not discuss the law on this aspect in detail as the position would become completely transparent on taking note of some of the circulars issued by the Central Board of Excise and Customs, New Delhi, itself. Further, these circulars are issued to give effect to certain judicial pronouncements.

JUDGMENT

First circular to which we would like to refer is Circular dated 02.01.2002 issued by the Board, wherein the Board clarified that in the matter of refund of pre-deposit, refunds would not be covered under the provisions of Section 11B of the Customs Act or Section 35F of the Central Excise Act, meaning thereby, the aforesaid provisions which pertain to aforesaid unjust enrichment would not be applicable. It

is also specifically pointed out in the said circular that these deposits are other than duty. The circular was issued keeping in view of the orders of this Court in few cases including in *Union of India* v. *Suvidhe Ltd.* It is clear from the following portion of this circular:

> **"The issue relating to refund of pre-deposit made during the pendency of appeal was discussed in the Board Meeting. It was decided that since the practice in the Department had all along been to consider such deposits as other than duty, such deposits should be returned in the event the appellant succeeds in appeal or the matter is remanded for fresh adjudication.**
> **2. It would be pertinent to mention that the Revenue had recently filed a Special Leave Petition against Mumbai High Court's order in the matter of NELCO LTD, challenging the grant of interest on delayed refund of pre-deposit as to whether:**
> **(i) the High Court is right in granting interest to the depositor since the law contained in Section 35F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and,**
> **(ii) the refunds so claimed are covered under the provisions of Section 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F of the Central Excise Act, 1944.**
>
> **The Hon'ble Supreme Court *vide* its order dated 26-11-2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for dismissal, it can well be construed in the light of its earlier judgment in the case of *Suvidhe Ltd.* and *Mahavir Aluminium* that the law relating to refund of pre-deposit has become final."**

It is the order dated 07.08.1996 which was passed by this Court in *Union of India* v. *Suvidhe Ltd.* dismissing the special leave petition which was filed by the Union of India against the judgment of the High Court of Bombay in *Suvidhe Ltd.* v. *Union of India* [1996 (82) ELT 177]. Since the

special leave petition was dismissed *in limine,* we would like to reproduce para 2 of the judgment of the High Court wherein the High Court had observed that in case of such deposits, provisions of Section 11B of the Customs Act will have no application. This para reads as under: -

> "2. Show cause notice issued by the Superintendent (Tech.) Central Excise to the petitioner to show cause why the refund claim for Excise Duty and Redemption fine paid in a sum of Rs.14,07,410/- should be denied under Section 11B of the Central Excise Rules and Act, 1944 (sic) is impugned in the present petition. The aforesaid amount is deposited by the Petitioners not towards Excise Duty buy by way of deposit under Section 35F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its Judgment and order passed on 30th of November, 1993 with consequential relief. Petitioners' prayer for refund of the amount deposited under Section 35F has not received a favourable response. On the contrary the impugned show cause notice is issued why the amount deposited should not be forfeited. In our judgment, the claim raised by the Department in the show cause notice is thoroughly *dishonest* and *baseless.* In respect of a deposit made under Section 35F, provisions of Section 11B can never be applicable. A deposit under Section 35F is not a payment of Duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief."

By another Circular No.802/35/2004-CX., dated 08.12.2004 issued by the Board, the Board emphasised that such amounts should be refunded immediately as non-returning of the deposits attracts interest that has been granted by the courts in number of cases.

It is stated at the cost of repetition that since the

amount in question was deposited in compliance with the interim order passed by the High Court of Bombay, which was not towards duty, the question of unjust enrichment would not arise at all.

This appeal is, accordingly, allowed. That part of the order of the High Court of Bombay which dis-entitles refund of duty amount is set aside. The entire amount shall be refunded along with interest calculated at the rate of 13 per cent per annum, as order to this effect was specifically passed on 30.10.1991 in Writ Petition No. 3220 of 1991 by the High Court of Bombay.

Civil Appeal No. 3410 of 2006

In view of the orders passed above, this appeal preferred by the Commissioner of Customs is dismissed.

....., J.
[A.K. SIKRI]

....., J.
[ROHINTON FALI NARIMAN]

New Delhi;
April 08, 2015

2023INSC881

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 4735-4736 OF 2009

COMMISSIONER OF CUSTOMS
(IMPORTS), MUMBAI APPELLANT(S)

VERSUS

M/S GANPATI OVERSEAS THROUGH ITS
PROPRIETOR SHRI YASHPAL SHARMA & ANR. RESPONDENT(S)

J U D G M E N T

UJJAL BHUYAN, J.

Since both the appeals arise out of the common judgment and final order dated 27.06.2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai with parties also being the same, the two appeals were heard together and are being disposed of by this common judgment and order.

2. The appeals have been filed by the Commissioner of Customs (Imports), Mumbai under Section 130-E of the Customs Act, 1962 against the common judgment and final order dated 27.06.2008 passed by the Customs, Excise and Service Tax

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Date: 2023.10.06
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Reason:

Appellate Tribunal, West Zonal Bench at Mumbai (briefly the 'CESTAT' or 'the Tribunal' hereinafter) in Appeal Nos. C/1347 and 1374 of 2002.

3. The issue that arises in the two appeals is whether the CESTAT was justified in holding that enhancement of value of the imported goods and the penalties imposed by the Commissioner of Customs (Adjudication-1), Mumbai on the respondents could not be sustained and consequently in setting aside the same?

4. A brief recital of facts would be in order.

4.1. Show cause notice dated 17.12.1999 was issued to the respondents by the Additional Director General, Directorate of Revenue Intelligence, New Delhi. It was mentioned therein that secret information was received by the Directorate of Revenue Intelligence that M/s Ganpati Overseas had imported tuners from Hong Kong at grossly under invoiced prices, thereby evading huge customs duty. The information revealed that the firm M/s Ganpati Overseas was owned by one Mr. Yashpal Sharma; the Hong Kong based supplier M/s Arise Enterprises was owned by his relative Mr. Suresh Chandra Sharma; the imported goods were cleared from Air Cargo Complex, Sahar, Mumbai and that M/s National Shipping Agency, Mumbai had acted as the Customs House Agent.

4.2. Upon receipt of such information, Directorate of Revenue Intelligence carried out investigation wherefrom it could be gathered that M/s Ganpati Overseas had imported twenty consignments during the years 1997-98 and 1998-99. It was found that M/s Ganpati Overseas had imported mainly tuners from M/s Arise Enterprises, Hong Kong and had also imported about three-four consignments of saw filters alongwith the tuners. Directorate of Revenue Intelligence obtained information from the Consulate General of India at Hong Kong that M/s Arise Enterprises, Hong Kong belonged to one Mr. Suresh Chandra Sharma who alongwith his wife Mrs. Kusum Sharma were the directors. When Mr. Suresh Chandra Sharma visited India in March, 1999, his statement was recorded on 08.03.1999 under Section 108 of the Customs Act, 1962 (referred to as the 'Customs Act' hereinafter). In his statement, Mr. Suresh Chandra Sharma stated that M/s Ganpati Overseas belonged to Mr. Yashpal Sharma who was his co-brother. He stated that M/s Ganpati Overseas was in the business of importing electronic goods since 1997-98. He had supplied tuners and saw filters to M/s Ganpati Overseas through his firm M/s Arise Enterprises from Hong Kong.

4.3. Mr. Suresh Chandra Sharma admitted that the rate of tuners per piece as shown in the invoices by M/s Arise Enterprises

did not reflect the actual price. He had deliberately mentioned lower price with the intention of saving customs duty in respect of the goods imported by his co-brother, Mr. Yashpal Sharma. The actual price of the tuners was quite high. The differential amount i.e. the difference between the actual price and the declared price was retained in India which he used to collect from Mr. Yashpal Sharma.

4.4. Mr. Yashpal Sharma was also summoned whereafter his statement was recorded under Section 108 of the Customs Act on 15.03.1999. Apart from narrating the factum of importing the goods by showing prices much lesser than the actual price meant to evade customs duty, he stated that the amount of payment disclosed in the import documents were sent by him to Mr. Suresh Chandra Sharma through the banking channel, whereas, the balance differential amount used to be handed over to Mr. Suresh Chandra Sharma on his visits to India.

4.5. It was mentioned that price of tuners so imported as per the sales vouchers was in the range of Rs. 40-60 per piece but the actual market value of these tuners was in the range of Rs. 200-325 per piece. In this manner, the respondents had evaded customs duty amounting to a total of around rupees twenty five to thirty lakhs approximately.

4.6. Mr. Yashpal Sharma was arrested on 15.03.1999 under Section 135 of the Customs Act. He was enlarged on bail on 30.03.1999 by the Additional Sessions Judge, Patiala House, New Delhi subject to the condition that a sum of rupees ten lakhs should be deposited in the office of the Directorate of Revenue Intelligence on 30.03.1999 and a further sum of rupees twenty lakhs should be so deposited within a period of forty-five days. Both the amounts were accordingly deposited.

4.7. From a scrutiny of the relevant materials including export declarations, it was found that the price of tuner as per the export declarations filed by the exporter before the Hong Kong Customs and Excise Department was Hong Kong $67.67 per piece which was much higher as compared to the price declared in the invoice by M/s Ganpati Overseas before the Indian customs authority at the time of importation of the goods. In this connection, the Directorate of Revenue Intelligence prepared two charts; as per chart-I, M/s Ganpati Overseas had evaded customs duty to the extent of Rs. 1,07,41,419.00 on import of nineteen consignments. Likewise, Directorate of Revenue Intelligence prepared chart-II which dealt with importation of 3200 pieces of tuners which were made in Taiwan. It was noted that the value of the goods declared before the customs authority was Hong Kong $19200 whereas the actual value

was Hong Kong $211468.07 as per export declaration before the Hong Kong Customs and Excise Department. Thus, according to the Directorate of Revenue Intelligence, M/s Ganpati Overseas had evaded customs duty to the tune of Rs. 8,67,762.00. The price of goods as shown in the import documents by M/s Ganpati Overseas was found to be much less than the real price of the goods, i.e., at the price at which those were supplied from Hong Kong. Therefore, the import valuation was rejected in terms of Section 14 of the Customs Act and the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (briefly, the 'Customs Valuation Rules' hereinafter).

4.8. The show cause notice proposed that the value of imported goods should be determined under Rule 8 of the Customs Valuation Rules on the basis of the value given in the export declarations obtained from the Hong Kong Customs and Excise Department. Alleging that respondents had wilfully misdeclared and suppressed the correct value of the imported goods with an intent to evade duties of customs, Directorate of Revenue Intelligence invoked the extended period of limitation as per the proviso to Section 28(1) of the Customs Act. It was mentioned that M/s Ganpati Overseas was liable to pay the differential customs duty of Rs. 1,07,41,419.00 leviable on the import of tuners, saw filters etc. as per chart-I and

Rs. 8,67,762.00 as per chart-II, the total amount being Rs. 1,16,09,181.00. Respondents were therefore called upon to show cause as to why the aforesaid amount of customs duty should not be demanded and recovered from them and also as to why the imported goods should not be confiscated under Sections 111(d) and 111(m) of the Customs Act, besides appropriation of the amount of Rs. 30 lakhs already deposited. Respondents were further called upon to show cause as to why penalty under Section 112(a) of the Customs Act should not be imposed upon them and as to why interest should not be levied on the evaded customs duty.

4.9. The noticees were directed to submit their reply to the Commissioner of Customs, Air Cargo Complex, Sahar Airport, Mumbai within the stipulated time. It was mentioned that the show cause notice was issued under Section 124 of the Customs Act read with the proviso to Section 28(1) of the aforesaid Act.

5. M/s Ganpati Overseas through its lawyer replied to the aforesaid show cause notice on 20.05.2000. While denying all the allegations in totality, it was mentioned that the Commissioner of Customs *vide* his letter dated 07.04.2000 had rejected the request of M/s Ganpati Overseas for supply of certain documents sought for, on the ground that those documents were not relied upon. It was submitted that those documents might have relevance while

preparing the defence and that absence of those documents would handicap the noticees in putting forth a proper defence. While reiterating the request for such documents, the noticees submitted what they called an interim reply.

5.1. It was mentioned that Mr. Yashpal Sharma was the proprietor of the noticee firm which was engaged in the business of import of tuners etc. during the years 1997-98 and 1998-99. The imports were made from M/s. Arise Enterprises, Hong Kong. At the time of clearance, the bills of entry were filed through the Customs House Agent and the imported goods were cleared after proper assessment by the customs authority on payment of due customs duty. Those goods were subsequently sold in the local market. In all, twenty consignments were imported. The noticees thereafter described and furnished the details of two types of tuners which were imported over a period of about nine months consisting of twenty consignments.

5.2. The noticees adverted to the allegations made in the show cause notice that the price declared by the noticees was not correct and was on the lower side, as proved by the statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma recorded under Section 108 of the Customs Act as well as by the export declarations filed by M/s Arise Enterprises before the Hong Kong Customs and Excise

Department. It was pointed out that the two statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma could not be termed as voluntary under any circumstances. Those inculpatory statements were obtained through coercion and under duress. It was pointed out that the statement of Mr. Yashpal Sharma was structured in such a manner as to tally entirely with the statement of Mr. Suresh Chandra Sharma. That apart, statement of Mr. Yashpal Sharma was contradictory to his own statement made before the Additional Sessions Judge where he had stated that there was no under valuation or under invoicing of the goods imported. Therefore, it was contended that both the statements were not at all reliable. Further, Mr. Yashpal Sharma *vide* letter dated 25.08.1999 had retracted the statement made by him under Section 108 of the Customs Act.

5.3. Regarding the export declarations filed by M/s Arise Enterprises before the Hong Kong customs authority, it was submitted that it was not known as to when these declarations were forwarded by the Consulate General of India, Hong Kong to the Directorate of Revenue Intelligence, New Delhi. The copies relied upon by the department were unattested and photocopies, thus unreliable. That apart, when the noticees contacted M/s Arise Enterprises, Hong Kong, it was acknowledged that due to error on

the part of the staff, value of the goods was incorrectly shown in the export declarations. The mistake was subsequently rectified whereafter M/s Arise Enterprises lodged a second set of declarations before the Hong Kong customs authority and paid the penalty which was levied.

5.4. It was stated that the noticees were informed by the Hong Kong supplier that the tuners, saw filters etc. were being offered to them on stock clearance basis at lower prices. It was for this reason that the goods were sold to the noticees at lower prices, details of which were mentioned in paragraph 11 of the reply.

5.5. After saying so, it was pointed out that different prices in export declarations and in import invoices did not necessarily mean that the price shown in the export declarations was correct and that the one declared in the import invoices was incorrect.

5.6. The reply also touched upon the method of valuation as well as the valuation of the goods by the customs authority in India. After adverting to various provisions of the Customs Valuation Rules, it was asserted that the price at which the goods of the respondents were assessed and cleared was more or less correct. It was pointed out that the department could not adduce any single piece of evidence to arrive at the so called correct value of the goods. No value

of identical or similar goods could be produced. No evidence of market value was adduced. No attempt to find out the price per unit was made for a comparison. That apart, no incriminating document or material was produced to establish under valuation. There was no evidence as to how remittances over and above the invoice price were made. One and only 'evidence' relied upon by the department was the initial value shown in the export declarations which was declared to be incorrect by the supplier itself and later on rectified. Thus, there was no mis-declaration either in respect of description of the goods or value of the goods. No question of confiscation under Sections 111(d) and 111(m) of the Customs Act was made out. That apart, the goods were not prohibited ones, the import of which would warrant confiscation. In any view of the matter, the goods on being cleared by the customs authority were sold by the noticees much before the issuance of the show cause notice. Therefore, there cannot be any confiscation of such goods. In so far deposit of Rs. 30 lakhs by Mr. Yashpal Sharma is concerned, the same was to fulfil the bail condition imposed by the Additional Sessions Judge. Since there was no short payment of customs duty, question of appropriation of the aforesaid amount did not arise; neither any penalty was imposable nor interest leviable. M/s Ganpati Overseas, therefore, requested the Commissioner to drop the proceedings.

6. Reply of the respondents was found to be not acceptable. Therefore, the case was taken up for adjudication. Accordingly, the case was transferred to Commissioner of Customs (Adjudication-1), New Customs House, Mumbai for the purpose of adjudication. During the adjudication process, personal hearing was afforded to the respondents.

6.1. Adjudicating authority noted that the customs department had alleged under valuation of the goods in question resulting in evasion of customs duty to the tune of Rs. 1,16,09,181.00. To prove under valuation, the department had relied upon the price mentioned in the export declarations filed by the supplier before the Hong Kong customs authority in respect of nineteen consignments. The price so declared was considered as the correct transaction value. In respect of one more consignment where export declaration was not available, department had proposed enhancement of the price of the goods on the basis of the other export declarations. Adjudicating authority did not accept the contention of the respondents that the price mentioned in the export declarations filed before the Hong Kong customs authority could not be accepted. Distinguishing the facts of the two cases relied upon by the respondents, the adjudicating authority took the view that even if the copies of the export declarations available with the Directorate of

Revenue Intelligence were not attested or were xerox copies, it would not make those copies unreliable or unauthentic. Therefore, taking into account the fact that the supplier M/s Arise Enterprises had acknowledged that those declarations were filed by them, which was not denied by the respondents, the adjudicating authority held that there was no reason to doubt the veracity of the export declarations even if those were unattested and were mainly xerox copies. Accordingly, the adjudicating authority held that the information obtained was correct and genuine.

6.2. On the contention that statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma were not voluntary and therefore could not be relied upon, adjudicating authority held that both of them in their statements recorded under Section 108 of the Customs Act had admitted to having under-invoiced the price of the goods and had voluntarily paid Rs. 30 lakhs towards payment of evaded customs duty during the investigation. They had also explained in their statements the *modus operandi* adopted by them and the manner of transfer of the differential amount. Therefore, the adjudicating authority opined that he had no reason to accept the plea of the respondents that the statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma were not voluntary and should not be relied upon. This plea was taken only as an afterthought.

6.3. Contention of the respondents that the declared price was correct when compared with contemporaneous imports was also not accepted by the adjudicating authority as the invoices of the contemporaneous imports did not reveal the specification, quality etc., of the products.

6.4. Adjudicating authority also rejected the contention of the respondents that the supplier M/s Arise Enterprises had purchased the goods in question on stock clearance basis at a lower price and for this reason it could sell the goods to M/s Ganpati Overseas at a lower price. According to the adjudicating authority, this was again an afterthought and an invented argument as the noticees had not declared that the goods were purchased in stock lot. Neither invoices nor export declarations as well as the bills of entry or any other document on record suggested that the subject goods were purchased in stock lot at a price lower than the normal one. Rather, such a plea would support the allegation of the department that the invoice price was not a normal price and coupled with the fact that the parties were relatives, had rendered the invoice price unacceptable for assessment in terms of Section 14(1) of the Customs Act read with Rule 2(2) of the Customs Valuation Rules. Since neither the transaction value of similar goods nor contemporary prices etc. were available, resort to Rules 5, 6 and 7

for determining the assessable value of the goods was not possible. Therefore, Rule 8 of the Customs Valuation Rules was correctly applied.

6.5. Holding that the export declarations reflected the true transaction value which was misdeclared by the importer to evade customs duty, the adjudicating authority *vide* the order-in-original dated 17.06.2002 held that the proviso to Section 28(1) of the Customs Act was applicable. Consequently, M/s Ganpati Overseas was held liable to pay the differential customs duty of Rs. 1,16,09,181.00 alongwith interest forthwith. For misdeclaration and under valuation, the goods in question were held liable for confiscation under Sections 111(d) and 111(m) of the Customs Act. However, as the said goods were not available having been cleared no order for confiscation was passed. Further, equivalent amount of differential customs duty was imposed on M/s Ganpati Overseas as a penalty under Section 114A of the Customs Act and in addition, penalty of rupees five lakhs was imposed on Mr. Yashpal Sharma under Section 112(a) of the Customs Act.

7. Aggrieved by the aforesaid order-in-original of the adjudicating authority, respondents preferred appeals before the CESTAT which were registered as Appeal Nos. C/1347 and 1374 of 2002.

7.1. CESTAT opined that export declarations filed by the foreign supplier before the Hong Kong customs authority could not be relied upon for the purpose of enhancement of value. This was for more than one reason. Firstly, those declarations were unattested photocopies. Secondly, the supplier had filed another set of declarations indicating the price as shown in the invoices of the imports. Thirdly, for filing incorrect declarations which had to be subsequently replaced by another set of declarations, the foreign supplier had paid penalty before the Hong Kong customs authority. Fourthly, no investigation was carried out by the customs authority with the Hong Kong customs authority revealing anything to the contrary. On that basis, CESTAT held that the price shown in the initial export declarations could not form the basis for enhancing the value of the goods.

7.2. CESTAT noted that nothing incriminating was recovered from the importers in the form of text messages etc. CESTAT also recorded that there was no evidence of contemporary imports which had higher value. The foreign supplier had given explanation in respect of the price initially declared in the export declarations, which explanation was not discarded.

7.3. According to CESTAT, value in the export declaration may be relied upon for ascertainment of assessable value under the

Customs Valuation Rules and not for determining the price at which the goods are ordinarily sold at the time and place of importation. CESTAT referred to and relied upon the decision of this Court in *Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd.,* (2007) 6 SCC 373 wherein this court held that the burden lies upon the department to prove under valuation by evidence or information about comparable imports and if the charge of under valuation is not supported by such evidence or information, the benefit of doubt has to be given to the importer. On the basis of the aforesaid decision, CESTAT recorded that there was not only no contrary evidence of contemporaneous import but even the foreign supplier had satisfactorily explained that the price initially shown in the export declarations was incorrect which was subsequently amended and accepted by the Hong Kong customs authority.

7.4. As regards the statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma, the Tribunal observed that these statements were retracted at the earliest available opportunity. Decisions relied upon by the appellant, viz., *Surjit Singh Chhabra Vs. Union of India,* 1997 (89) ELT-646 and in *K.I. Pavunny Vs. Assistant Collector*, (1997) 3 SCC 721 did not advance the case of the department. Tribunal observed that in the said decisions, this court has held that the inculpatory portion of confessional statement of

accused, even if retracted, could be relied upon to base conviction if it is found to be voluntary and truthful; however, this Court sounded a note of caution that prudence and practice would require that such confessional statement should be corroborated by other evidence adduced by the prosecution. Statement of Mr. Yashpal Sharma that the actual market value of the tuners was in the range of Rs.200.00 and Rs.325.00 per piece which would make the market price thereof in excess of Rs.700.00 after adding normal profit could not be taken to be voluntary and true for the reason that tuners were supplied to the respondents at negotiated price of four different rates i.e. HK$ 4.00, 4.50, 5.50 and 6.00. In that view of the matter, Tribunal was of the view that the loaded value proposed by the department would not be correct since the proposed Free on Board (FoB) price would be about Rs.372.00 per piece and CIF (Cost, Insurance and Freight) value would be Rs. 454.00 per piece and the landing cost would be Rs.660.00 per piece after adding customs duty.

7.5. CESTAT also noted that the importers i.e. respondents had produced invoices of contemporaneous imports by M/s Bharat Electronics and M/s K.S. International to show price comparable with the price declared by them in respect of the goods in question.

7.6. In the above backdrop, CESTAT *vide* the judgment and order dated 27.06.2008 held that enhancement of the value of the imported goods as well as the penalties imposed could not be sustained. Accordingly, those were set aside and appeals filed by the respondents were allowed.

8. It is this order of CESTAT which has been impugned in the two appeals before us.

9. This court *vide* the order dated 24.07.2009 had issued notice. Thereafter, the appeals were admitted on 10.12.2010.

10. Respondents have filed counter affidavit through Mr. Yashpal Sharma. After narrating the facts, respondents have supported the judgment and order passed by the CESTAT while controverting all the contentions raised by the appellant. Respondents have, therefore, sought for dismissal of the appeals.

11. Mr. Rupesh Kumar, learned counsel for the appellant has assailed the judgment and order of CESTAT. He has asserted that the appellant was justified in determining the value of the imported goods under Rule 8 of the Customs Valuation Rules on the basis of the declared value of the goods mentioned in the export declarations filed by the supplier which were obtained from the Hong Kong customs authority. The invoices presented by the respondents before

the customs authority did not represent genuine and actual transaction.

11.1. The price declared in the invoice was much lower than the value declared in the export declarations filed in Hong Kong. Since it did not reflect the correct transaction value, the value appearing in the import invoices did not fulfil the criteria of Section 14(1) of the Customs Act and Rule 4 of the Customs Valuation Rules as per which the transaction value of the imported goods is the price actually paid or payable when sold for export to India.

11.2. He submits that the export declarations filed by the foreign supplier before the Hong Kong customs authority was not the sole basis for increasing the value of the subject goods. There were sufficient materials on record to prove under valuation. Both Mr. Suresh Chandra Sharma, director of the supplier firm and Mr. Yashpal Sharma, proprietor of the importer, in their statements under Section 108 of the Customs Act had admitted under valuation. In his statement, Mr. Yashpal Sharma had stated that the supplier M/s Arise Enterprises, Hong Kong belonged to his co-brother Mr. Suresh Chandra Sharma. Mr. Suresh Chandra Sharma used to send the goods on his own and that he had never sent any written or oral order for supply. As and when M/s Arise Enterprises would dispatch

the goods, Mr. Suresh Chandra Sharma would inform Mr. Yashpal Sharma over telephone to whom the goods were to be sold, in what quantity and at what price. Thereafter, he used to sell the goods at the settled price and receive the payments. He had stated that he was not aware of the actual price of the goods imported from Hong Kong. The amount of payment as per the import documents were sent by him to Mr. Suresh Chandra Sharma through banking channel and the balance amount he used to handover to Mr. Suresh Chandra Sharma whenever he visited India.

11.3. Learned counsel has highlighted the fact that the supplier in Hong Kong and the importer in India were related parties. Therefore, the contention that the foreign supplier had filed another set of export declarations wherein the price shown in the invoices matched with that shown in the import documents in India was an afterthought to frustrate the proceedings initiated by the customs authority.

11.4. He further submits that where the importer like the respondents had not laid any basis for acceptance of the invoice price as transaction value, then the authorities would be legally justified to initiate fixation of price under Rule 5 onwards under the Customs Valuation Rules. According to him, the department had to take

recourse to Rule 8 of the aforesaid Rules straightaway instead of proceeding through Rules 5, 6 and 7 as neither transaction value of similar goods nor contemporary prices were available. Therefore, the adjudicating authority had rightly invoked Rule 8 while assessing the transaction value to determine the short levy of customs duty and for imposing penalty. CESTAT was not at all justified in interfering with such a reasoned order of the adjudicating authority. In these circumstances, he seeks setting aside of the order of the CESTAT dated 27.06.2008.

12. *Per contra*, Mr. V. Lakshmikumaran, learned counsel for the respondents has supported the order of CESTAT and submits that the appeals of the department wholly lacks merit and therefore should be dismissed.

12.1. He submits that the Tribunal was fully justified in holding that the price declared in the import invoice was correct. The foreign supplier had withdrawn the original export declarations earlier submitted before the Hong Kong customs authority and thereafter had filed another set of declarations where the declared price matched the price shown by the respondents in the import invoices. The subsequent declarations were accepted by the Hong

Kong customs authority following which penalty was levied which was paid by the supplier.

12.2. Mr. Lakshmikumaran, learned counsel submits that the export declarations relied upon by the appellant were only photocopies which were neither signed nor attested. As such, those export declarations did not have any evidentiary value. He has asserted that the price reflected in the import invoices was the sole consideration for sale which satisfied the definition of transaction value as per Rule 4 of the Customs Valuation Rules.

12.3. According to Mr. V. Lakshmikumaran, there were no evidence before the customs authority to prove under valuation. Statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma could not be relied upon to prove under valuation for more than one reason. Firstly, when the two statements were recorded there was no evidence available with the customs department to prove under valuation. Secondly, both the statements were almost identical and matched each other which would indicate that those were dictated ones. Therefore, it is clearly evident that those were obtained under coercion and undue pressure. Thirdly, the two statements were retracted at the first available opportunity. Fourthly, the Additional Sessions Judge, New Delhi while granting bail to Mr. Yashpal

Sharma had recorded in his order dated 26.05.1999 that the statement made was under coercion and pressure and therefore, the same could not be termed as a voluntary statement. In the circumstances, Tribunal was fully justified in not giving any credence to the above two statements.

12.4. He further submits that though the appellant had placed much emphasis on the fact that the parties are related and that filing of the second set of export declarations was an afterthought, the same is totally irrelevant. On the contrary, it is on record that the second set of export declarations were accepted by the Hong Kong customs authority by imposing penalty which was paid by the Hong Kong supplier.

12.5. Asserting that there was no under valuation of the imported goods, learned counsel submits that valuation of imported goods is governed by the Customs Valuation Rules and not by price declaration made by the supplier in another country. Appellant was not justified in by-passing Rules 5, 6 and 7 of the Customs Valuation Rules while determining the transaction value and straightaway invoking Rule 8. Customs department had not made any effort to gather evidence to determine transaction value of identical or similar goods imported contemporaneously. In this connection, learned

counsel has relied upon the decision of this court in *Rabindra Chandra Paul Vs. Commissioner of Customs*, (2007) 3 SCC 93 and in the case of *South India Television (P) Ltd.* (supra). He, therefore, submits that there was no error or infirmity in the view taken by CESTAT. Consequently, the appeals are liable to the dismissed.

13. Submissions made by learned counsel for the parties have received the due consideration of the court.

14. Before we deal with the rival contentions, it would be relevant to have a brief recap of the factual narrative. Based on an intelligence input received by the Directorate of Revenue Intelligence that M/s Ganpati Overseas had imported tuners etc. from Hong Kong at grossly under invoiced prices thereby evading huge customs duty, a show cause notice dated 17.12.1999 was issued to the respondents. As per the show cause notice, M/s Ganpati Overseas had imported twenty consignments of tuners and saw filters from M/s Arise Enterprises, Hong Kong during the years 1997-1998 and 1998-1999. Mr. Suresh Chandra Sharma and his wife Mrs. Kusum Sharma were the directors of M/s Arise Enterprises, whereas, Mr. Yashpal Sharma was the proprietor of M/s Ganpati Overseas. Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma were co-brothers.

14.1. Statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma were recorded under Section 108 of the Customs

Act. In their respective statements which virtually complimented each other, they admitted that the price of goods as per the export declarations filed by the foreign supplier before the Hong Kong customs authority reflected the actual price. On import, the price was kept intentionally low to avoid paying due customs duty. Actual price of the goods was quite high. The difference between the actual price and the declared price was retained in India, which Mr. Suresh Chandra Sharma used to collect from Mr. Yashpal Sharma whenever he visited India. However, the two statements were subsequently retracted on the ground that those were obtained under coercion and duress.

14.2. Mr. Yashpal Sharma was arrested on 15.03.1999 under Section 135 of the Customs Act. He was enlarged on bail on 30.03.1999 by the Additional Sessions Judge, Patiala House, New Delhi conditional upon depositing Rs.30 lakhs, which he deposited. In his bail order, the Additional Sessions Judge recorded that the statement made by Mr. Yashpal Sharma under Section 108 of the Customs Act was forcibly taken, and, therefore, could not be relied upon.

14.3. It has come on record that the foreign supplier had admitted before the Hong Kong customs authority that price of the

goods declared in the initial export declarations was not correct because of mistake committed by the staff. It thereafter submitted a second set of export declarations where the price of the goods declared matched the price of the goods at the time of import in India. This was accepted by the Hong Kong customs authority but on payment of penalty which was paid by the supplier.

14.4. Be that as it may, the show cause notice proposed levy of higher customs duty with interest; confiscation of the imported goods; and imposition of penalty.

14.5. Respondents submitted their reply denying all the allegations. The show cause notice was adjudicated upon by the Commissioner of Customs (Adjudication-1), Mumbai. In his order-in-original dated 17.06.2002 the adjudicating authority accepted the price mentioned in the initial export declarations filed by the supplier before the Hong Kong customs authority in respect of nineteen consignments. In respect of one consignment where export declaration was not available, adjudicating authority accepted the price mentioned in respect of the nineteen consignments. Adjudicating authority brushed aside the objection raised by the respondents that copies of the export declarations available with the Directorate of Revenue Intelligence were not attested and were

simply xerox copies. Adjudicating authority took the view that merely because the copies of the export declarations were not attested or were xerox copies, those would not become unreliable or unauthentic. According to the adjudicating authority, the supplier had acknowledged those export declarations. Therefore, he held that information obtained by the Directorate of Revenue Intelligence based on the export declarations was correct and genuine.

14.6. He also rejected the objection of the respondents that statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma were not voluntary and therefore could not be relied upon. According to the adjudicating authority, both the two persons had admitted to under invoicing of the price and this was buttressed by the fact that Mr. Yashpal Sharma had voluntarily paid Rs.30 lakhs towards the evaded customs duty during the investigation stage. Such objection was therefore held to be only an afterthought.

14.7. Further contention of the respondents that the declared price is correct when compared with the contemporaneous imports was not accepted by the adjudicating authority on the ground that invoices of contemporaneous imports did not reveal the specification, quality, etc. of the products.

14.8. Adjudicating authority also rejected the contention of the respondents that the supplier had purchased the goods on stock

clearance basis at a lower price for which reason it could sell the goods to M/s Ganpati Overseas at lower price. Such a contention was held to be an afterthought as M/s Ganpati Overseas did not produce any invoice etc. of purchase of goods on stock clearance basis. Since neither transaction value of similar goods nor price of contemporaneous imports etc. were available, adjudicating authority held that the department had rightly invoked Rule 8 of the Customs Valuation Rules instead of going through Rules 5, 6 and 7 sequentially.

14.9. The order-in-original was assailed by the respondents in appeals before the CESTAT. *Vide* the judgment and order dated 27.06.2008, CESTAT set aside the order-in-original passed by the adjudicating authority. CESTAT recorded that the initial export declarations filed by the foreign supplier before the Hong Kong customs authority could not be relied upon for enhancing the declared value of the imported goods. Copies of those export declarations available with the department were unattested photocopies. That apart, the foreign supplier had filed a second set of export declarations before the Hong Kong customs authority declaring the price as shown in the invoices of the imports. This was accepted by the Hong Kong customs authority but on imposition of penalty on the supplier which was paid by the supplier. CESTAT

noted that no investigation was carried out by the customs authority with the Hong Kong customs authority to support their allegation. Therefore, CESTAT held that the value of the goods shown in the initial export declarations could not form the basis for enhancing the value. Nothing incriminating was recovered from the importers. There was no evidence before the customs department of any contemporaneous import having higher value. Thus, the department could not prove under-valuation by adducing evidence.

14.10. As regards statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma, CESTAT observed that those statements were retracted at the earliest available opportunity. In the absence of any corroborative material or evidence, CESTAT declined to give much credence to the two statements.

14.11. Further, it was observed that while respondents had produced invoices of contemporaneous imports by M/s Bharat Electronics and M/s K.S. International at price comparable with the price declared by the respondents, those were summarily rejected by the adjudicating authority without the department discharging the burden to prove the contrary.

14.12. In such circumstances, CESTAT *vide* the judgment and order dated 27.06.2008 set aside the order-in-original and allowed the appeals of the respondents.

15. As we have seen, both the department and the adjudicating authority had relied upon the initial export declarations filed by the foreign supplier before the Hong Kong customs authority for the purpose of enhancing the value of the goods. CESTAT had interfered with the same. We believe, CESTAT was justified in doing so.

16. Proceeding alleging under-invoicing of price and thereby evading customs duty by the respondents was initiated by the Directorate of Revenue Intelligence and carried forward by the customs department primarily on the basis of the price declared by the foreign supplier in the first set of export declarations filed before the Hong Kong customs authority. It was noticed that there was great discrepancy in the price mentioned in the export declarations and the price of the goods as per the import invoices. To support the above allegations, the department relied upon copies of those export declarations. Adjudicating authority brushed aside the objections raised by the respondents that the copies of the export declarations relied upon by the Directorate of Revenue Intelligence and the department were not attested and were just xerox copies. Adjudicating authority took the view that merely because the copies of the export declarations were just xerox copies and were not attested, the said fact did not make those documents unreliable or

unauthentic. It was held that the foreign supplier had accepted the factum of filing those declarations which the noticees did not deny. This finding of the adjudicating authority was negatived by the CESTAT. The Tribunal, while accepting the objections of the respondents that those declarations could not be relied upon for the purpose of enhancement of value not only because those were unattested photocopies but also for the reason that the foreign supplier had explained that incorrect price was erroneously mentioned in the first set of export declarations for which it filed a second set of export declarations showing the price of goods in question matching with the price as declared in the import invoices. The second set of export declarations was accepted by the Hong Kong customs authority but for showing incorrect price initially, imposed penalty which was paid by the foreign supplier. CESTAT also noted that no investigation was carried out by the customs authority with the Hong Kong customs authority indicating anything incriminating against the respondents. Therefore, CESTAT held that the value shown in the first set of export declarations could not form any reliable basis for enhancement of the value.

17. We concur with the view taken by CESTAT. First and foremost, the export declarations relied upon by the appellant and earlier by the Directorate of Revenue Intelligence were unattested

photocopies. Since those documents were used as a piece of evidence against the respondents, it was necessary that those documents were required to have been proved as is understood in law. Unattested photocopies of the relied upon documents without anyone proving or owning up the veracity of the same would not have any evidentiary value. It is another matter that the very substratum of these documents was subsequently removed when the foreign supplier filed a second set of export declarations before the Hong Kong customs authority showing lower price matching the price of the goods declared in the import invoices. We need not go into the reasons necessitating filing of the second set of export declarations simply because, the Hong Kong customs authority had accepted the second set of export declarations *albeit* imposition of penalty for mis-declaration of price at the initial stage. It has also come on record that the foreign supplier had paid the penalty. If this be the position, there can be no justifiable reason for the appellant to harp upon the price of the goods as per the initial export declarations by placing reliance on the unattested photocopies of the first set of export declarations to prove under-invoicing for the purpose of evading customs duty.

18. This brings us to the statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma recorded under Section 108 of the

Customs Act. Statement of Mr. Suresh Chandra Sharma was recorded on 08.03.1999 whereas the statement of Mr. Yashpal Sharma was recorded on 15.03.1999. Reference to the full details of the two statements so made may not be relevant. Suffice it to say, according to Mr. Suresh Chandra Sharma, Mr. Yashpal Sharma, who was his co-brother, was the proprietor of the importer M/s Ganpati Overseas. He had supplied tuners and saw filters to M/s Ganpati Overseas through his firm M/s Arise Enterprises, Hong Kong. He stated that the price of the goods shown in the import invoices did not reflect the actual price. Price of the goods in the import invoices was deliberately declared low with the intention of saving customs duty. Actual price of the goods was quite high. While the invoice amount after sale upon import used to be sent to him by Mr. Yashpal Sharma through the banking channel, the differential amount was retained in India by Mr. Yashpal Sharma who paid the same to Mr. Suresh Chandra Sharma whenever he visited India.

18.1. Mr. Yashpal Sharma in his statement also stated more or less the same thing as stated by Mr. Suresh Chandra Sharma. He was arrested on 15.03.1999 itself under Section 135 of the Customs Act. However, he was enlarged on bail on 30.03.1999 by the Additional Sessions Judge, Delhi subject to deposit of Rs. 30 lakhs within a specified period, which he paid. It has come on record that

the Additional Sessions Judge in his bail order dated 26.05.1999 had mentioned that the statement of Mr. Yashpal Sharma recorded under Section 108 of the Customs Act may not have been a voluntary one. It may be mentioned that Mr. Yashpal Sharma *vide* his letter dated 25.08.1999 had retracted the statement made by him under Section 108 of the Customs Act. CESTAT noted the factum of retraction of the statement and therefore, refused to give credence to such confessional statement. In our view, no fault can be found with the approach of the CESTAT.

19. Section 108 of the Customs Act deals with the power to summon persons to give evidence and produce documents. Section 108 of the Customs Act as it stood at the relevant time is extracted as under:-

> **108. Power to summon persons to give evidence and produce documents.-**
> (1) Any gazetted officer of customs duly empowered by the Central Government in this behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods.
>
> (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under control of the person summoned.
>
> (3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound

> to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required:
>
> Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.
>
> (4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).

20. From a reading of the provisions of Section 108 of the Customs Act, as it stood at the relevant point of time, we find that any gazetted officer of customs duly empowered by the Central Government had the authority to summon a person whose attendance be considered necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer was making with respect to the smuggling of any goods. A person so summoned was bound to make a statement as regards the subject which was being examined. Such an enquiry by the customs officer would be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code.

21. While we are on Section 108 of the Customs Act, we may also advert to Section 24 of the Evidence Act, 1882 which deals with admissibility of a confession. Section 24 of the Evidence Act reads as under:

> **24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.**—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

22. From a reading of Section 24 of the Evidence Act what is clear is that a confession made by an accused due to any inducement, threat or promise having reference to the charge against the accused person would be irrelevant in a criminal proceeding. This court held in *State of Punjab Vs. Barkat Ram* 1962 (3) SCR 338 that customs officers are not police officers for the purpose of Section 25 of the Evidence Act which says that no confession made before a police officer shall be proved as against a person accused of any offence. A constitution bench of this court in *Ramesh Chandra Mehta Vs. State of West Bengal,* AIR 1970 SC 940 held that customs officers are entrusted with the powers specifically relating to collection of customs duty and prevention of smuggling. For that purpose, they are invested with the power to search any person on reasonable suspicion, to summon a person to give evidence, to arrest such a

person if there is a reasonable suspicion that such a person is guilty of an offence under the Customs Act etc.

23. For collecting evidence, the customs officer is entitled to serve summons upon a person to produce a document or other thing or to give evidence etc. However, he has no power to investigate a customs infringement as an offence nor has he the power to submit a report under the Code of Criminal Procedure. A customs officer is not a police officer. Dealing with Sections 167(8) and 178(A) of the Sea Customs Act, 1878, this court in *Collector of Customs, Madras Vs. D. Bhoormall,* (1974) 2 SCC 544 held that provisions of the Evidence Act and the Code of Criminal Procedure did not govern the onus of proof under Section 167(8) of the Sea Customs Act. In such proceedings, the customs officer was guided by the basic principles of criminal jurisprudence and natural justice. The burden of proving that the goods were smuggled goods was on the department. The cardinal principle having an important bearing on the incidence of burden of proof was that sufficiency and weight of the evidence was to be considered according to the proof which it was in the power of one side to prove and in the power of the other side to have contradicted.

24. In *Ramesh Chandra Mehta* (supra), the objections as to admissibility of a confessional statement under Section 25 of the

Evidence Act were rejected, holding that such a statement was admissible in evidence in customs proceedings since customs officers are not police officers.

25. This court in *Naresh J. Sukhawani Vs. Union of India,* AIR 1996 SC 522 clarified that a statement made before the customs officer is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. It is material piece of evidence collected by the customs officer under Section 108 of the Customs Act.

26. A three-judge bench of this court in *K.I. Pavunny Vs. Assistant Collector, (*1997) 3 SCC 721 considered the question as to whether a retracted confessional statement would be inadmissible in evidence in the context of the Customs Act. After holding that a statement recorded under Section 108 of the Customs Act is admissible in evidence, this court considered the next question as to whether such a statement can form the sole basis for conviction. The further question was whether a retracted confessional statement requires corroboration from any other evidence. After referring to various judicial pronouncements this court observed that there is no prohibition under the Evidence Act to rely upon a retracted confession to prove the prosecution case or to make the same the basis for conviction of the accused. But practice and prudence would

require that the court would seek assurance by getting corroboration from other evidence adduced by the prosecution.

27. Again, in *Union of India Vs. Padam Narain Aggarwal,* AIR 2009 SC 254, this court considered the provision of Section 108 of the Customs Act in great detail and thereafter observed that the said section obliges the person summoned to state the truth upon any subject in respect of which he is being examined. He is not absolved from speaking the truth on the ground that such a statement is admissible in evidence and could be used against him. The provision thus enables the custom officer to elicit the truth from the person examined. The underlying object of Section 108 is to ensure that the officer questioning the person gets all the truth concerning the incident. However, a person called upon to make a statement before the customs authorities is not an accused. The entire idea behind Section 108 is that the customs officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue, its utility for the officer gets lost. Therefore, statements recorded under Section 108 of the Customs Act are distinct and different from statements recorded by a police officer during the course of investigation under the Criminal Procedure Code.

28. Thus, what is deducible from an analysis of the relevant legal provisions and the corresponding judicial pronouncements is that a customs officer is not a police officer. Further, the person summoned and who makes a statement under Section 108 is not an accused. However, a statement made by a person under Section 108 of the Customs Act before the concerned customs officer is admissible in evidence and can be used against such a person. Object underlying Section 108 is to elicit the truth from the person who is being examined regarding the incident of customs infringement. Since the objective is to ascertain the truth, the customs officer must ensure the truthfulness of the statement so recorded. If the statement recorded is not correct, then, the very utility of recording such a statement would get lost. It is in this context that the customs officer who is empowered under Section 108 to record statement etc. has the onerous responsibility to see to it that the statement is recorded in a fair and judicious manner providing for procedural safeguards to the concerned person to ensure that the statement so recorded, which is admissible in evidence, can meet the standard of basic judicial principles and natural justice. It is axiomatic that when a statement is admissible as a piece of evidence, the same has to conform to minimum judicial standards. Certainly a statement recorded under duress or coercion

cannot be used against the person making the statement. It is for the adjudicating authority to find out whether there was any duress or coercion in the recording of such a statement since the adjudicating authority exercises quasi-judicial powers.

29. Proceeding ahead, we find that the department, after rejecting the price declared as per the import invoices, had invoked Rule 8 of the Customs Violation Rules straightaway instead of going through Rules 5, 6 and 7 thereof sequentially. This was approved by the adjudicating authority after rejecting the submission of the respondents that contemporaneous imports of similar goods by M/s Bharat Electronics and M/s K.S. International had prices comparable with the prices declared by the respondents in the import invoices.

30. Before we deal with this aspect, we may advert to the relevant legal provisions. Section 2 (41) of the Customs Act defines the expression 'value'. It says 'value' in relation to any goods means the value thereof determined in accordance with the provisions of sub-Section (1) of Section 14 (w.e.f. 10.10.2007 this definition has been amended to include sub-Section (2) of Section 14 as well).

31. Section 14 of the Customs Act provides for valuation of goods. Before the amendment in 2007, Section 14 read as under:

14. Valuation of goods for purposes of assessment- (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be-
the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course or international trade, where-

(a) the seller and the buyer have no interest in the business of each other; or
(b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or offer for sale:

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

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

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

(3) For the purposes of this section-

(a) “rate of exchange” means the rate of exchange-

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct,

for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

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

32. Section 156 of the Customs Act confers general power upon the Central Government to make rules consistent with the Customs Act to carry out its purposes.

33. In exercise of the powers conferred by Section 156 of the Customs Act read with Section 22 of the General Clauses Act, 1897 and in supersession of the Customs Valuation Rules, 1963 except in respect of things done or omitted to be done before such supersession, the Central Government has made the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (already referred to as the 'Customs Valuation Rules').

33.1. Rule 2(1)(c) defines "identical goods". It means imported goods-

(i) which are same in all respects including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods;
(ii) produced in the country in which the goods being valued were produced; and

(iii) produced by the same person who produced the goods or where no such goods are available, goods produced by a different person.

However, such goods 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.

33.2. Likewise, Section 2(1)(e) defines "similar goods" to mean imported goods-

(i) which although not alike in all aspects, 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 trademark;

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

(iii) produced by the same person who produce the goods being valued, or where no such goods are available, goods produced by a different person;

But it 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 of 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.

33.3. Rule 2(1)(f) defines "transaction value" to mean the value determined in accordance with Rule 4 of the Customs Valuation Rules.

33.4. Rule 2(2) mentions the instances where persons shall be deemed to be "related". In the context of the facts of the present case, what may be of relevance is Rule 2(2)(viii) which says that persons shall be deemed to be "related" only if they are members of the same family. Therefore, the question is whether co-brothers can be construed to be members of the same family? However, this aspect may not require much deliberation in view of our discussions in respect of the other issues.

34. Rule 3 of the Customs Valuation Rules reads as under:

> **3. Determination of the method of valuation**—For the purpose of these rules, -
>
> (i) the value of imported goods shall be the transaction value;
>
> (ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules.

34.1. Thus, as per Rule 3, the valuation of imported goods shall be the transaction value. However, if that value cannot be determined, the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Customs Valuation Rules.

35. This brings us to transaction value dealt with in Rule 4 which is as under:

4. Transaction value. —(1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.

(2) The transaction value of imported goods under sub-rule (1) above 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 same 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 9 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 9 of these rules 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.

36. To complete the narrative, we may mention that while Rule 5 deals with transaction value of identical goods, Rule 6 deals with transaction value of similar goods. On the other hand, Rule 6A provides for determination of value when transaction value is not available. Rule 7 which comes after Rule 6A provides for determination of deductive value and Rule 7A provides for computed value.

37. Where the value of imported goods cannot be determined under the provisions of any of the aforesaid rules, the value shall be

determined using reasonable means as provided in Rule 8 i.e. the residual method.

38. In *Rabindra Chandra Paul* (supra), this court referred to its earlier decision in *Eicher Tractors Limited Vs. Commissioner of Customs,* (2001) 1 SCC 315, and held as follows-

> **6.** In *Eicher Tractors Ltd. Vs. Commr. Of Customs*, this Court held that the principle for valuation of imported goods is found in Section 14(1) of the Customs Act, 1962 which provides for the determination of the assessable value on the basis of the international sale price. Under the said Act, customs duty is chargeable on goods. According to Section 14(1), the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed it has to be decided under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale, for delivery at the time and place and importation in the course of international trade. The word "ordinarily" implies the exclusion of special circumstances. This position is clarified by the last sentence in Section 14(1) which describes an "ordinary" sale as one where the seller or the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale. Therefore, when the above conditions regarding time, place and absence of special circumstances stand fulfilled, the price of imported goods shall be decided under Section 14(1-A) read with the Rules framed thereunder. The said Rules are the Customs Valuation Rules, 1988. It was further held that in cases where the circumstances mentioned in Rules 4(2)(c) to (h) are not applicable, the Department is bound to assess the duty under transaction value. Therefore, unless the price actually paid for the particular transaction falls within the exceptions mentioned in Rules 4(2)(c) to (h), the Department is bound to assess the duty on the transaction value. It was further held that Rule 4 is

directly relatable to Section 14(1) of the Customs Act, 1962. Section 14(1) read with Rule 4 provides that the price paid by the importer in the ordinary course of commerce shall be taken to be the value in the absence of any special circumstances indicated in Section 14(1). Therefore, what should be accepted as the value for the purpose of assessment is the price actually paid for the particular transaction, unless the price is unacceptable for the reasons set out in Rule 4(2). It was further held that the word "payable" in Rule 4(1) must be read as referring to the "particular transaction" and payability in respect of the transaction contemplates as situation where payment of price stands deferred. Therefore, Rule 4 is limited to the transaction in question. It was further held that Rule 5 allows the transaction value to be determined on the basis of identical goods imported into India about the same time; Rule 6 allows fixation of transaction value on the basis of the value of similar goods imported into India about the same time. Where there are no contemporaneous imports into India, the value is to be decided under Rule 7 by a process of deduction in the manner provided therein. If this is not possible, then the value shall be computed under Rule 7-A. It was further held that it is only when the transaction value under Rule 4 is rejected, only then under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8. Conversely, if the transaction value can be decided under Rule 4(1) and does not fall under any of the circumstances given in Rule 4(2), there is no question of determining the value under the subsequent rules. It was further held that discount is a recognised feature of international trade and as long as those discounts are uniformly available and as long as they are based on commercial considerations, they cannot be denied under Section 14.

7. The primary base for customs valuation is the transaction value i.e. the price actually paid or payable for the goods when sold for export to the country of importation, subject to adjustment. The said price should not be subject to any condition or consideration that could prevent the value from being determined under Rule 4(1). Where the Department has reason to doubt the

> truth or accuracy of a declared value, it may ask the importer to provide further explanation to the effect that the declared value represents the total amount actually paid or payable for the imported goods. If the declared value is lower than the declared value of similar goods imported by other buyers at or about the same time, it can constitute "reason to doubt" the truth or accuracy of the declared value indicated in the commercial invoice (see Rule 10-A). Under Rule 8(2)(i) no value shall be determined based on the selling price of the goods produced in India. In cases where the Department fails to establish circumstances mentioned in Rule 4(2), the transaction value declared by the assessee cannot be rejected and the price mentioned in the invoice should be held to represent the transaction value.

39. The dispute involved in *South India Television (P) Ltd.* (supra), was as regards the assessable value of ceramic capacitors and diodes imported by the importer from the foreign supplier at Hongkong. The price declared by the importer was not accepted by the customs authority on the basis of overseas investigation report whereafter Rule 8 of the Customs Valuation Rules was invoked. This court examined and analysed Section 2(41) and Section 14(1) of the Customs Act in the following manner:

> **10**. We do not find any merit in this civil appeal for the following reasons. Value is derived from the price. Value is the function of the price. This is the conceptual meaning of value. Under Section 2(41), "value" is defined to mean value determined in accordance with Section 14(1) of the Act. Section 14 of the Customs Act, 1962 is the sole repository of law governing valuation of goods. The Customs Valuation Rules, 1988 have been framed only in respect of imported goods. There are no rules governing the valuation of export goods. That must be done based on Section 14 itself. In the present case, the

> Department has charged the respondent importer alleging misdeclaration regarding the price. There is no allegation of misdeclaration in the context of the description of the goods. In the present case, the allegation is of under invoicing. The charge of under invoicing has to be supported by evidence of prices of contemporaneous imports of like goods. It is for the Department to prove that the apparent is not the real. Under Section 2(41) of the Customs Act, the word "value" is defined in relation to any goods to mean the value determined in accordance with the provisions of Section 14(1). The value to be declared in the bill of entry is the value referred to above and not merely the invoice price.
>
> **11**. On a plain reading of Section 14(1) and Section 14(1-A), it envisages that the value of any goods chargeable to ad valorem duty has to be the deemed price as referred to in Section 14(1). Therefore, determination of such price has to be in accordance with the relevant rules and subject to the provisions of Section 14(1). It is made clear that Section 14(1) and Section 14(1-A) are not mutually exclusive. 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 reach the customs barrier. Therefore, the invoice price is not sacrosanct.

39.1. This court held that 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. In

this regard, this court held that under valuation has to be proved. If the department wants to allege under valuation, it must make detailed inquiries, collect material and also adequate evidence. 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. The charge of under invoicing has to be supported by evidence of prices of contemporaneous imports of like goods. It has been held as follows:

> **12**. 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(1-A) 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. Undervaluation has to be proved. If the charge of undervaluation 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 undervaluation, it must make detailed inquiries, collect material and also adequate evidence. When undervaluation is alleged, the Department has to prove it by evidence or information about comparable imports. For proving undervaluation, if the Department relies on declaration made in the exporting country, it has to show how such declaration was procured. We may clarify that strict rules of evidence do not apply to adjudication proceedings. They apply strictly to the courts'

> proceedings. However, even in adjudication proceedings, the AO has to examine the probative value of the documents on which reliance is placed by the Department in support of its allegation of undervaluation. Once the Department discharges the burden of proof to the above extent by producing evidence of contemporaneous imports at higher price, the onus shifts to the importer to establish that the invoice relied on by him is valid. Therefore, the charge of under invoicing has to be supported by evidence of prices of contemporaneous imports of like goods.

39.2. Reverting to Section 14(1) of the Customs Act, this court held that it is for the department to prove that the invoice price is incorrect. When there is no evidence of contemporaneous imports at a higher price, the invoice price is liable to be accepted. This is what this court has said:

> **13**. Section 14(1) speaks of "deemed value". Therefore, invoice price can be disputed. However, it is for the Department to prove that the invoice price is incorrect. When there is no evidence of contemporaneous imports at a higher price, the invoice price is liable to be accepted. The value in the export declaration may be relied upon for ascertainment of the assessable value under the Customs Valuation Rules and not for determining the price at which goods are ordinarily sold at the time and place of importation. This is where the conceptual difference between value and price comes into discussion.

40. Section 14 of the Customs Act and Rules 3 and 4 of the Customs Valuation Rules again came up for consideration before this court in *Varsha Plastics Private Limited* (supra). As regards

Section 14(1) of the Customs Act, this court analysed the said provision in the following manner:

> **19**. Section 14(1) of the Act prescribes a method for determination of the value of the goods. It is a deeming provision. By legal fiction incorporated in this section, the value of the imported goods is the deemed price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade.
>
> **20**. The word "ordinarily" in Section 14(1) is a word of significance. The ordinary meaning of the word "ordinarily" in Section 14(1) is "non-exceptional" or "usual". It does not mean "universally". In the context of Section 14(1) for the purpose of "valuation" of goods, however, by use of the word "ordinarily" the indication is that the ordinary value of the goods is what it would have been in the course of international trade at the time of import. Section 14(1), thus, provides that the value has to be assessed on the basis of price attached to such or like goods ordinarily sold or offered for sale in the ordinary course of events in international trade at the time and place of transportation.

40.1. After adverting to the procedural aspects provided in the Customs Valuation Rules, more particularly in Rules 3 and 4 thereof, this court referred to its earlier decision in *Eicher Tractors Limited* (supra) and held that the price paid by the importer to the vendor in the ordinary course of commerce shall be deemed to be the value in the absence of any special circumstances indicated in Section 14(1) and particularised in Rule 4(2). However, when the transaction value under Rule 4 is rejected, the value shall be determined by proceeding

sequentially through Rules 5 to 8 of the Customs Valuation Rules. This court held as follows:

> **23.** In *Eicher Tractors* this Court held that the value, according to Section 14, shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale, for delivery at the time and place of importation in the course of international trade. It was further held that by Rule 4(1) mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods under assessment as the transaction value but this mandate is subject to certain exceptions specified in Rule 4(2). It was also held by this Court in Eicher Tractors [(2001) 1 SCC 315] that both Section 14(1) of the Act and Rule 4 provide that the price paid by the importer to the vendor in the ordinary course of commerce shall be deemed to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularised in Rule 4(2). However, when the transaction value under Rule 4 is rejected, the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules.

40.2. This court also referred to the decisions in *Rabindra Chandra Paul* (supra) and *South India Television (P) Ltd.* (supra) to reiterate the recognised legal position that transaction value can be rejected if the invoice price is not found to be correct but it is for the department to prove that the invoice price is incorrect.

41. Thus, on a cumulative analysis of the facts and the legal position as alluded to hereinabove, we have no hesitation in coming to the conclusion that both the department as well as the adjudicating authority were not justified in rejecting the import

invoice price of the goods as not correct and enhancing the price by straightaway invoking Rule 8 of the Customs Valuation Rules when there was no evidence before them to do so. In these circumstances, CESTAT was justified in setting aside the order in original.

42. We, therefore, do not find any error or infirmity in the impugned judgment and order of CESTAT. The appeals filed by the department are devoid of merit and those are accordingly, dismissed. No costs.

.....J.
[B. V. NAGARATHNA]

.....J.
[UJJAL BHUYAN]

NEW DELHI;
06.10.2023

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 9766-9775 OF 2003

WIPRO LTD. .....APPELLANT(S)

VERSUS

ASSISTANT COLLECTOR OF CUSTOMS & ORS. .....RESPONDENT(S)

W I T H

CIVIL APPEAL NO(S). 1950-1951 OF 2004

J U D G M E N T

A.K. SIKRI, J.

These appeals are preferred by the appellant challenging the validity of judgment dated 11.10.2002 passed by the Division Bench of the High Court of Judicature at Madras. The High Court has, vide the said judgment, disposed of few writ petitions filed under Article 226 of the Constitution of India as well as certain writ appeals which were filed against the orders of the single Judge. All the aforesaid writ petitions and writ appeals were preferred by the appellants herein.

2) The subject matter of those writ petitions/writ appeals was the constitutional validity of proviso (II-i) of Rule 9(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (hereinafter referred to as the "Valuation Rules"). This proviso has been inserted by Notification No.39/90 dated 05.07.1990 issued by the Ministry of Finance, Department of Revenue, Union of India. As per the appellant, this proviso is not only ultravires Section 14(1) and Section 14(1-A) of the Customs Act, 1962 (hereinafter referred to as the 'Act') but is also violative of Article 14 and Article 19(1)(g) of the Constitution of India. The challenge, however, stands repelled by the High Court in the impugned judgment leading to dismissal of writ petitions and writ appeals. This is how these appeals have come up in this Court, via special leave petition route, in which leave was granted.

JUDGMENT

3) In order to understand the controversy, purpose would be served in taking note of the facts from the Writ Appeal No.1079/2000 which was filed by the appellant in the High Court. The appellant is engaged in the manufacture and marketing of Mini and Micro Computer Systems and peripheral devices like printer, drivers etc. It, *inter alia,* imported various components including software from time to time. The appellant presented a Bill of Entry No.15020

dated 15.04.1993. The chargeable weight of the consignment was 315 kgs and the actual loading, unloading and handling charges amounted to Rs.65.40 paisa as per the tariff of the International Airport Authority of India, Madras (now Chennai). However, the Customs Authorities, on the basis of the impugned notification added a sum of Rs.15,214.69 paisa to the value of the goods as handling charges as the impugned provision entitles the authorities to add 1% of the F.O.B. value of goods on account of loading, unloading and handling charges. The actual duty charged, as a consequence of addition of the notional handling charges, amounted to Rs.16,209.20 paisa instead of Rs.69.98 paisa.

4) At this juncture, instead of proceeding further with the factual narration, we would like to deviate a bit and take note of the relevant valuation rules and the amendments made therein from time to time. These rules are made in exercise of powers conferred under Section 156 of the Customs Act, 1962, read with Section 22 of the General Clauses Act, 1897. The purpose of these rules is to arrive at the valuation of the imported goods to enable the customs authorities to levy duty thereupon, on the basis of the value so arrived at. Rule 2 is the "definition" clause

whereunder certain terms are defined. Rule 2(f) defines "transaction value" to mean the value determined in accordance with Rule 4 of these Rules. This is to be read along with Rule 3. We, therefore, reproduce Rule 3 and relevant portion of Rule 4 hereunder:

> "3. **Determination of the method of valuation-**
> For the purpose of these rules, -
> (i) the value of imported goods shall be the transaction value;
> (ii) if the value cannot be determined under the provisions of Clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules.
>
> 4. **Transaction Value** – (1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.
>
> (2) The transaction value of imported goods under sub-rule (1) above shall be accepted.
> Provided that ….."

5) A conjoint reading of the aforesaid two provisions would make it clear that the value of the imported goods has to be the transaction value and in those cases where transaction value cannot be determined, such a value is to be determined by resorting to Rules 5 to 8 thereof in a sequential order. Therefore, first attempt has to ascertain the transaction value. As per the formula contained in sub-rule (1) of Rule 4, the authorities are to

find out the **price actually paid or payable** for the goods when sold for exports to India, to arrive at the value of the goods. Once this value is arrived at, it is to be adjusted in accordance with the provisions of Rule 9 of the said Rules. The final outcome, after such an adjustment made, is to be treated as transaction value to attract the import duty thereupon. As per sub-rule (2) of Rule 4, the transaction value of the imported goods under sub-rule (1) is to be accepted, except in certain circumstances mentioned in proviso to sub-rule (2). If any of those circumstances exists, then the value is to be determined as per sub-rule (3) of Rule 4. However, we are not concerned with such a situation in the present case.

6) Thus, normally, the value of imported goods has to be the transactional value which means the price "actually paid" or "payable" for the goods imported. Moreover, the value as specified in sub-rule (1) is to be generally accepted with the exception of certain contingencies stipulated in proviso to sub-rule (2) of Rule 4. Only when such a value cannot be determined, one has to resort to Rules 5 to 8, in a sequential manner which would mean that the authorities would first refer to Rule 5 and in case it is inapplicable, then Rule 6 and so on. As per Rule 5, in those

cases where the transaction value is indeterminable, transaction value of "identical goods" is to be taken into consideration. Rule 6 mentions about transaction value of "similar goods". If this also inapplicable then "deductive value" is to be arrived at in terms of formula contained in Rule 7. If that is also inapplicable, residual method is provided in Rule 8 which prescribes that the value shall be determined using "reasonable means" consistent with the principles of general provisions of these Rules and sub-section (1) of Section 14 of the Customs Act and on the basis of data available in India. At the same time, sub-rule (2) of Rule 8 excludes certain methods which are not to be applied to determine the value under these Rules. Precise language of sub-rule (2) of Rule 8 is reproduce as under:

> "2. No value shall be determined under the provisions of these rules on the basis of -
> (i) the selling price in India of the goods produced in India;
> (ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;
> (iii) the price of the goods on the domestic market of the country of exportation;
> (iv) the price of the goods for the export to a country other than India;
> (v) minimum customs values; or
> (vi) arbitrary or fictitious values."

7) Once the transaction value is arrived at by applying the formula applicable in a given case in terms of aforesaid provision,

exercise is still incomplete. Adjustments to this value are still to be made in accordance with the provision of Rule 9. Only thereafter, exact "transaction value" gets determined on which customs duty is to be paid. It is so stated in Rule 4 itself. So, at this stage, Rule 9 comes into play, with which we are concerned in the present case. It deals with "cost of services". It lays down that in determining the transactional value, cost of certain services is to be added to the price actually paid or payable for the imported goods, as mentioned in clauses (a) to (e) of sub-rule (1) of Rule 9. We would like to reproduce this Rule, as it originally stood, in its entirety:

> "9. **Cost of services** – (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -
> (a) **the following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods**, namely -
> (i) commissions and brokerage, except buying commissions;
> (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
> (iii) the cost of packing whether for labour or materials;
> (b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:-

(i) materials, components, parts and similar items incorporated in the imported goods;
(ii) tools, dies, moulds and similar items used in the production of the imported goods;
(iii) materials consumed in the production of the imported goods;
(iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;
(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.
(d) the value of any part of the proceeds of any subsequent resale, disposal, or use of the imported goods that accrues, directly or indirectly, to the seller;
(e) **all other payments actually made or to be made as a condition of sale of the imported goods**, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

2. For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include -
(a) the cost of transport of the imported goods to the place of importation;
(b) **loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation;** and
(c) the cost of insurance :

Provided that in the case of goods imported by air, the cost and charges referred to in clauses (a), (b) and (c) above,-
(i) where such cost and charges are ascertainable, shall not exceed twenty per cent of the free on board value of such goods,
(ii) where such cost and charges are not

ascertainable such cost and charges shall be twenty per cent of the free on board value of such goods;

Provided further that in the case of goods imported other than by air and the actual cost and charges referred to in clauses (a), (b) and (c) **above are not ascertainable, such cost and charges shall be twenty-five per cent of the free on board value of such goods.**

(3) Additions to the price actually paid or payable shall be made under this rule on the **basis of objective and quantifiable data.**

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule."

8) Rule 9 was amended in the year 1989 vide Notification dated 19.12.1989. With this amendment, the provisos appearing below sub-rule (2) of Rule 9 were substituted with the following proviso:

"Provided that -

(i) Where the cost mentioned in clause (a) are not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) Where the charges mentioned at clause (b) are not ascertainable, such charges shall be one per cent of the free on board value of the goods;

(iii) Where the cost mentioned at clause (c) are not ascertainable, such cost shall be 1.125% of free on board value of the goods.

Provided further that in the case of goods imported by air, where the cost mentioned in clause (a) are ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods."

9) In the year 1990 i.e. vide amendment Notification dated 05.07.1990, the said provisos underwent further modification with

the substitution of following provisos:

> "Provided that -
> (i) Where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;
> (ii) **the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport refered to in clause (a) plus the cost of insurance referred to in clause (c)**;
> (iii) Where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods;
> Provided further that in the case of goods imported by air, where th cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods;
> Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (I) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above."

10) Clause (ii) of first proviso, as is clear from reading thereof, mandated addition of one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c).

11) Reverting to the facts of the present case, it is on the strength of this proviso, even when the actual handling charges were shown as Rs.69.98 paisa, that too as fixed by the International Airport

Authority, the customs authorities added further sum of Rs.15,214.69 paisa to the value of goods of handling charges, being one per cent free on board value of the goods. Obviously, the appellant was aggrieved by this addition and handling charges on notional basis pursuant to the aforesaid proviso whereby the charges for loading, unloading and handling associated with the delivery of imported goods at the place of importation had been fixed at one per cent free on board value of the goods plus the cost of the transport of the imported goods to the place of importation plus cost of insurance.

12) This became the reason for filing the writ petition in the High Court to question the validity of the said proviso by way of impugned amendment. In brief, the case set up by the appellant was that such a notional fixation of the handling charges with the addition of one per cent of free on board value of the value of goods, irrespective of the nature of goods, size of the cargo, was in total disregard to the total handling charges, even when such actual handling charges could be ascertained. It was also the submission of the appellant that the said one per cent so fixed without reference to the nature of the goods, size of the cargo and value of the goods is irrational, in the sense, high value items like

SUPREME COURT OF INDIA
JUDGMENT

components of computer, involving little or no expenses by way of handling, whereas heavy weight items like machinery, hardware might involve substantial expenditure for loading, unloading and handling. It was submitted that the handling services are rendered by the sea port and airport authorities. The handling charges are levied on the basis of either the gross weight or chargeable weight, whichever is higher. Both these weights are incidentally available in the air bill accompanying the consignment. The international Airport Authorities and the port trust are having schedule of tariff and the appellant have from time to time been paying the handling charges to the authorities as per the tariff. On this basis, it was argued that such an addition was totally irrational and arbitrary, thus violative of Article 14 of the Constitution and was also ultravires Section 14(1) and Section 14(1)(A) of the Customs Act.

13) The respondents defended the aforesaid amendment by pointing out that over last number of years, it was found impossible to ascertain the actual amounts incurred towards loading, unloading and handling charges while making the assessment as they varied depending upon the quantities and place of import. Finding this difficulty in actual practice and in order to achieve

certainty, one per cent of the F.O.B. value was fixed to be included in the assessable value. It was argued that once this uniformity is achieved with the aforesaid provisions, merely because some would be getting the benefit while others would suffer certain detriment, is no reason for invalidating the provision when many others would be getting the benefit thereof as well. The percentage had been fixed by the rule making authority after taken into consideration the overall picture.

14) The High Court, in the impugned judgment, after referring to various decisions of this Court, accepted the plea of the Government holding that rule making authority had the requisite power to make a provision of this nature by including landing charges for the purpose of valuation as valuation on such a basis was held to be valid by this Court in ***Garden Silk Mills Ltd.*** v. ***Union of India***[1]. The justification for adding one per cent of F.O.B. value in determination handling charges can be discerned from paras 17 and 18 of the impugned judgment which read as under:

> "17. We are not able to uphold the contents of the learned counsel for the petitioner for the reason that prior to the impugned notification, the same one percent of F.O.B. value was taken by the authorities as loading, unloading and

1 (1998) 8 SCC 744

handling charges for determination of the assessable value of the goods, when the actuals are not assessable. Even prior to that, 3/4th of the F.O.B. value has been added to the value of the goods as loading, unloading and handling charges for the purpose of assessment pursuant to the GATT agreement. The one per cent **F.O.B. value would be very nominal to the importers and that the percentage has been fixed on the basis of objective and quantifiable data taking onto consideration of the experience gained by the authorities and the difficulties in ascertaining the actuals.**

18. The method of collection or the manner of collection may be prescribed either under the Act or under the rules framed by the delegated authority. In the case on hand, instead of actuals, rules have prescribed a fixed percentage which in some cases may be too harsh where the value of the goods imported is much more and the weight of the commodity is less. There may be number of other items where the value of the imported goods are less and weight of the commodity is very much. The machinery provision so provided for collection of duty, taking into consideration the administrative convenience cannot be considered beyond the scope of the rule making power and it cannot be said to be levying duty on amount which is not within the purview of the Customs Act or Section 14(1) simply because the rule making authority have prescribed a fixed percentage based on experience instead of actual.

Section 14 of the Customs Act itself made it clear the value of such imported goods shall be 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 or exportation in the course of international trade and the price referred to shall be determined in accordance with the rule made in this behalf. For the purpose of determination of the value, rules have been made and taking into consideration the difficulties experienced in the past in fixing the handling charges on the actuals, it is fixed at one percent of the CIF value of the goods. When the statute confers the power to make rules for

> determination of the value, such determination of the value by imposition of the same as a percentage cannot at any stretch of imagination be considered as repugant to Section 14(1) or discriminatory."

15) The High Court in support of the aforesaid view, referred to certain judgments of this Court touching upon the principle that when a power is conferred on the Legislature to levy a tax, that power itself must be widely construed. Reliance upon the judgment in *Garden Silk Mills* is placed by the High Court in the following manner:

> "19. The Supreme Court in Garden Silk Mills Ltd. v. Union of India reported in AIR 2000 Supreme Court 33 has observed that Section 14 is a deeming provision. The legislative intent is clear that the actual price of imported goods viz., the landing costs cannot alone be regarded as the value for the purpose of calculating the duty. The language of Section 14 clearly indicates that though the transaction value may be relevant consideration, the value for the purpose of custom duty will have to be determined by the customs authority, which value can be more and at times even less than what is indicated in the document of purchase or sale."

16) Questioning the correctness of the aforesaid view taken by the High Court, Mr. Dushyant Dave, learned senior counsel appearing for the appellant in all these appeals, submitted that prior to the impugned notification dated 05.07.1990, the Rule in this regard was to the effect that the handling charges were reckoned on the

actuals and only where the actual cost could not be ascertained, one per cent of the F.O.B. of the goods was to be added as charges on this account. However, with the impugned amendment in the Rules, the actual cost incurred and or ascertainable is totally ignored in the matter of "handling charges" and is to be arrived at fictionally by adding one per cent of the F.O.B. value of the imported goods and its transportation and insurance charges. It was pointed out that the appellant is engaged in the manufacture and marketing of computer systems and peripherals, and in the course of its business, imports various components worth crores of rupees, which are of high value but of low weight and dimensions. Further, the actual cost incurred towards the handling charges in accordance with the prescribed charges by the international Airport Authority of India was not even a fraction of the "notional handling charges" arrived at by applying the formula contained in the amended Rule. In nutshell, it was pointed out that in the present case, where actual cost could be ascertained, the same had to be taken into consideration to determine the valuation of the goods for the purpose of custom duty and it is only in those cases where actual cost could not be arrived at the fictional formula should be made applicable. Making such a provision, it was argued, even where the actual

cost was known was clearly ultravires Section 14(1) and Section 14(1A) of the Customs Act. It was also argued that there was no rationale in adding one per cent of the F.O.B. value in such cases and this smacked of arbitrariness making it violative of Article 14 of the Constitution as well. Mr. Dave also referred and relied upon the judgment of this Court in ***Indian Acrylics*** v. ***Union of India and Anr.***[2] in support of his aforesaid submissions. He also referred to the provisions of the General Agreement on Tariffs and Trade (GATT) which *inter alia* laid down the yardsticks/methodology for arriving at cost of transport and the prescription therein is the actual cost of transport of the imported goods to the port or place of importation plus the handling charges and cost of insurance.

17) Mr. Radhakrishnan, learned senior counsel appearing for the respondents, on the other hand, defended the judgment by adopting the reasoning given by the High Court sustaining the validity of the impugned provision.

18) We have given our due consideration to the submissions of the learned counsel for the parties with reference to the material on record as well as various statutory and other provisions, placed at

2 (2000) 2 SCC 678

our disposal.

19) In order to arrive at the answer to the issue raised, we shall have to go through the scheme of customs duties as payable under the Act. Chapter V is the relevant chapter which deals with "Levy of, and Exemption from, Customs Duties". It contains the provisions from Section 12 to Section 28BA. Section 12 which talks of "dutiable goods", provides that duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975, or any other law for the time being in force, on goods imported into, or exported from, India. Thus, the rates at which the customs duties is to be imposed are specified in the Customs Tariff Act, 1975. That rate is on the value of goods imported or exported, as the case may be. Therefore, there is a need to determine the value of the goods imported and exported. The yardsticks for arriving at this value are contained in Section 14 of the Act. This provision as originally stood and was prevalent at the relevant time with which we are concerned, reads as under:

> "14. Valuation of goods for purposes of assessment.- (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be-
> the price at which such or like goods are

ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where-

(a) the seller and the buyer have no interest in the business of each other; or

(b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or ofer for sale:

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

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

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

(3) For the purposes of this section-

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

(i) determined by the Board, or

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

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

20) This provision was amended in the year 2007. Though, we are

not concerned with this amended provision, we are taking note of the same in order to examine as to whether any change, in principle, is brought about or not. The amended provision reads as follows:

> "14. Valuation of goods.- (1) For the purposes of the the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:
>
> Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:
>
> Provided further that the rules made in this behalf may provide for,-
>
> (i) the circumstances in which the buyer and the seller shall be deemed to be related;
>
> (ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

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

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

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

21) A reading of the unamended provision would show that the earlier/old principle was to find the valuation of goods "by reference to their value". It introduced a deeming/fictional provision by stipulating that the value of the goods would be the price at which such or like goods are "ordinarily sold, or offered for sale". Under the new provision, however, the valuation is based on the transaction price namely, the price "actually paid or payable for the goods". Even when the old provision provided the formula of the price at which the goods are ordinarily sold or offered for sale, at that time also if the goods in question were

sold for a particular price, that could be taken into consideration for arriving at the valuation of goods. The very expression "ordinarily sold, or offered for sale" would indicate that the price at which these goods are actually sold would be the price at which they are ordinarily sold or offered for sale. Of course, under the old provision, under certain circumstances, the authorities could discard the price mentioned in the invoice. However, that is only when it is found that the price mentioned in the invoice is not the reflection of the price at which these are ordinarily sold or offered for sale. To put it otherwise, the reason for discarding the price mentioned in the invoice could be only when the said price appeared to be suppressed one. In such a case, the authorities could say that generally such goods are ordinarily sold or offered for sale at a different price and take that price into consideration for the purpose of levying the duty. It could, however, be done only if there was evidence to show that ordinarily the price at which these goods are ordinarily sold or offered for sale is higher than the price mentioned in the invoice. In fact, this fundamental concept is retained even now while introducing the concept of "transaction value" under the amended provision. More importantly, the rules viz. Valuation Rules, 1988 had incorporated this very principle of "transaction value" even under the old

provision. No doubt, as per this provision existing today generally the price mentioned is to be accepted as it is the transaction value. However, this very provision stipulates the circumstances under which that price can be discarded. In any case, having regard to the question with which we are concerned in the present appeals, such a change in the provision may not have much effect.

22) The underlying principle contained in amended sub-section (1) of Section 14 is to consider transaction value of the goods imported or exported for the purpose of customs duty. Transaction value is stated to be a price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Therefore, it is the price which is actually paid or payable for delivery at the time and place of importation, which is to be treated as transaction value. However, this sub-section (1) further makes it clear that the price actually paid or payable for the goods will not be treated as transaction value where the buyer and the seller are related with each other. In such cases, there can be a presumption that the actual price which is paid or payable for such goods is not the true reflection of the value of the goods. This Section also provides that normal price would be the

sole consideration for the sale. However, this may be subject to such other conditions which can be specified in the form of Rules made in this behalf.

23) As per the first proviso of the amended Section 14(1), in the transaction value of the imported goods, certain charges are to be added which are in the form of 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 which can be prescribed in the rules. Sub-section (2) of Section 14, which remains the same, is an over-riding provision which empowers the Board to fix tariff values for any class of imported goods or export goods under certain circumstances. We are not concerned with this aspect in the instant case.

24) In contrast, in the unamended Section 14, we had provision like sub-section (1A) which stipulated that the price referred to in sub-section (1) in respect of imported goods shall be determined in accordance with rules made in this behalf. Therefore, rules can be made in determining the price. However, these rules have to

be subject to the provisions of sub-section (1), the underline principle whereof, as stated above, is to taken into consideration actual price of the goods unless it is impermissible because of certain circumstances stipulated therein. Keeping in mind this fundamental aspect, we have to examine the scheme of the Valuation Rules, 1988.

25) It can very well be seen from the Valuation Rules, 1988 that these Rules are made to facilitate arriving at the valuation of goods in all the contingencies provided in sub-section (1) of Section 14. We have already reproduced the relevant Rules and indicated the scheme thereof. To recapitulate in brief, Rule 3 echoes the principle enshrined in sub-section (1) of Section 14 by mentioning that value of the imported goods would be the transaction value[3]. Likewise, Rule 4 again reproduces the concept behind sub-section (1) of Section 14 by stipulating in no uncertain terms, that the transaction value shall be the price actually paid or payable for the goods when sold for exports to India. The adjustments which are made in accordance with the provisions of Rule 9 are nothing but the costs and services, as specified in first proviso to

3 It is interesting to note, which is somewhat strange, that though concept of transaction value was introduced in sub-section (1) of Section 14 by amendment in the year 2007, which before that in the Valuation Rules, 1988, the expression "transaction value" is incorporated. This also lends credence to our observations that the concept of unamended provision was also to arrive at to take into consideration the actual value wherever it was available and was not excluded by any of the circumstances mentioned therein.

Section 14(1) of the Act. It is only in those cases where value of the imported goods i.e. transaction value cannot be determined, that we have to resort to Rules 5 to 8 of the said Rules. The purpose of these Rules is to fix the transaction value of the goods notionally. However, even when the fiction is applied, the scheme and spirit behind Rules 5 to 8 would amply demonstrate that the endeavour is to have closest proximity with the actual price. That is why Rules 5 to 8 are to be applied in a sequential manner, meaning thereby we have to first resort to Rule 5 and if that is not applicable only then we have to go to Rule 6 and in the case of inapplicability of Rule 6, we have to resort to Rule 7 and even if that is not applicable, then Rule 8 comes into play. In order to find out as to what would be the closest real value of the goods, Rule 5 mentions that transaction value of "identical goods" is to be taken into consideration. Thus, wherever the value of identical goods is available, one can safely rely upon the said value in the event transaction value of the goods in question is indeterminable. Value of the identical goods is most proximate. If that is also not available, next proximate value is provided in Rule 6 which talks of value of "similar goods". In the absence thereof, we come to the formula of applying the "deductive value" as contained in Rule 7. In those cases, where even deductive value

cannot be arrived at, one has to resort to residual method provided in Rule 8 which prescribes that the value shall be determined using "reasonable means". This would indicate adopting "Best Judgment Assessment" principle. However, even while having best judgment assessments, Rule 8 reminds the authorities that such reasonable means or best judgment assessments has to be in consonance with the principles of general provisions contained in the Rules as well as sub-section (1) of Section 14 of the Act and also on the basis of data available in India.

26) On the aforesaid examination of the scheme contained in the Act as well as in the Rules to arrive at the valuation of the goods, it becomes clear that wherever actual cost of the goods or the services is available, that would be the determinative factor. Only in the absence of actual cost, fictionalised cost is to be adopted. Here again, the scheme gives an ample message that an attempt is to arrive at value of goods or services as well as costs and services which bear almost near resemblance to the actual price of the goods or actual price of costs and services. That is why the sequence goes from the price of identical goods to similar goods and then to deductive value and the best judgment assessment,

as a last resort.

27) In the present case, we are concerned with the amount payable for costs and services. Rule 9 which is incorporated in the Valuation Rules and pertains to costs and services also contains the underlying principle which runs though in the length and breadth of the scheme so eloquently. It categorically mentions the exact nature of those costs and services which have to be included like commission and brokerage, costs of containers, cost of packing for labour or material etc. Significantly, Clause (a) of sub-rule (1) of Rule 9 which specifies the aforesaid heads, cost whereof is to be added to the price, again mandates that it is to be "to the extent they are incurred by the buyer". That would clearly mean the actual cost incurred. Likewise, Clause (e) of sub-rule (1) of Rule 9 which deals with other payments again uses the expression "all other payments **actually made or to be made** as the condition of the sale of imported goods".

28) Keeping in mind this perspective, we need to look into clause (b) of sub-rule (2) of Rule 9 which deals with loading, unloading and handling charges associated with the delivery of imported goods at the place of importation, which are to be included to arrive at

the value of such imported goods. It is these charges with which we are directly concerned with in the instant case.

29) The provision of sub-rule (2) of Rule 9, as originally stood, made it clear that wherever loading, unloading and handling charges are ascertainable i.e. actually paid or payable, it is those charges that would be added. Proviso to the said Rule contained the provision that only in the event the same are not ascertainable, it shall be 25% of the free on board value of such goods. In fact, sub-rule (3) of Rule 9 leave no manner of doubt when it mentions that additions are to be made on the basis of objective and quantifiable data.

30) It would be pertinent to mention here that sub-rule (2) talks of three kinds of charges. Apart from loading, unloading and handling charges which are mentioned in Clause (b), Clause (a) deal with cost of transport of imported goods to the place of importation and Clause (c) dealt with cost of insurance. All these costs were to be included on actual basis. Only when such costs were not ascertainable, proviso got attracted which stipulated that such costs and charges shall be 25% of the free on board value of such goods. Even when the aforesaid proviso was amended

SUPREME COURT OF INDIA
JUDGMENT

vide notification dated 19.12.1989, the spirit behind the unamended proviso was maintained and kept intact. Only difference was that instead of addition of 25% of free on board value of goods in respect of all the three kinds of charges, under the amended proviso, this percentage fixed was different in respect of each of the aforesaid charges. As far as cost of transport is concerned, it was changed at 20% of the free on board value of goods. Insofar as loading, unloading and handling charges are concerned, it was reduced to 1% of the free on board value of goods and in case of insurance charges, the amended provision provided for such cost at 1.125% free on board value of goods. However, as mentioned above, the spirit behind this proviso continued to be the same viz. the proviso was to made applicable only when the actual cost was indeterminable.

JUDGMENT

31) In contrast, however, the impugned amendment dated 05.07.1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of

these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned. The proviso now stipulates 1% of the free on board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultravires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the

Constitution.

32) We find that the High Court, instead of examining the matter from the aforesaid angle, has simply gone by the powers of the rule making authority to make Rules. No doubt, rule making authority has the power to make Rules but such power has to be exercised by making the rules which are consistent with the scheme of the Act and not repugnant to the main provisions of the statute itself. Such a provision would be valid and 1% F.O.B. value in determining handling charges etc. could be justified only in those cases where actual cost is not ascertainable. The High Court missed the point that *Garden Silk Mills Ltd.* case was decided by this Court in the scenario where actual cost was not ascertainable. That is why we remark that first amendment to the proviso to sub-rule (2) of Rule 9 which was incorporated vide notification dated 19.12.1989 would meet be justified. However, the impugned provision clearly fails the test.

33) We would like to refer to the judgment of this Court in ***Indian Acrylics*** (supra) at this juncture. Though, the issue in that case related to the rate of exchange touching upon the provision in respect whereof contained in sub-section (3) of Section 14

(unamended provision), the question of law decided therein would support the view we are taking in the instant case. A reading of sub-section (3) of Section 14 would make it clear that such rate of exchange can be determined by the Board or can be ascertained in such manner as the Board may direct, for the conversion of Indian currency into Foreign currency or Foreign currency into Indian currency. Thus, Board had been given power to determine the rate of exchange or stipulate the manner in which such rate of exchange is to be determined. Armed with this power, the customs authorities notified the rate of exchange for the purposes of Section 14 at one US dollar equal to Rs.31.44. Notification in this behalf was issued by the Board on 27.03.1992. On 29.04.1992, the Reserve Bank of India had notified the exchange rate of one US dollar equal to Rs.25.95. On the basis of this fixation by the Reserve Bank of India, the notification dated 27.03.1992 stipulating exchange rate of one US dollar equal to Rs.31.44 was challenged as arbitrary fixation of the exchange rate. This Court sustained the challenge in the following words:

> "5. The counter filed by the respondent before the High Court, as also before this Court, does not indicate why the rate was fixed at Rs.31.44. The affidavits do not indicate that the prevalent Reserve Bank of India rate had been taken into consideration. Strangely, the High Court, adverting to this contention, stated that "... In the absence of any other material brought on

> record, it cannot be held that the rate of exchange by the Central Government under Section 14(3)(i) is arbitrary" and it said this after noting the contention on behalf of the appellant that the Central Government rate was arbitrary being different from that fixed by Reserve Bank of India.
>
> 6. The exchange rate fixed by Reserve Bank of India is the accepted and determinative rate of exchange for foreign exchange transactions. If it is to be deviated from to the extent that the notification dated 27.03.1992 does, it must be shown that the Central Government had good reasons for doing so. Reserve Bank of India's rate, as we have pointed out, was Rs.25.95, the rate fixed by the notification dated 27.03.1992 was Rs.31.44, so that there was a difference of as much as Rs.5.51. In the absence of any material placed on record by the respondents and in the absence of so much as a reason stated on affidavit in this behalf, the rate fixed by the notification dated 27.03.1992 must be held to be arbitrary."

34) In the present case before us, the only justification for stipulating 1% of the F.O.B. value as the cost of loading, unloading and handling charges is that it would help customs authorities to apply the aforesaid rate uniformly. This can be a justification only if the loading, unloading and handling charges are not ascertainable. Where such charges are known and determinable, there is no reason to have such a yardstick. We, therefore, are not impressed with the reason given by the authorities to have such a provision and are of the opinion that the authorities have not been able to satisfy as to how such a provision helps in achieving the

object of Section 14 of the Act. It cannot be ignored that this provision as well as Valuation Rules are enacted on the lines of GATT guidelines and the golden thread which runs through is the actual cost principle. Further, the loading, unloading and handling charges are fixed by International Airport Authority.

35) In ***Kunj Behari Lal Butail*** v. ***State of H.P.***[4] this Court made following pertinent observation which are apt and contextual and, therefore, we are reproducing the same:

> "13. It is very common for the legislature to provide for a general rule-making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule-making power is not expressed in such a usual general form then it shall have to be seen if the rules made are protected by the limits prescribed by the parent act. (See: Sant Saran Lal v. Parsuram Sahu, AIR 1966 SC 1852). From the provisions of the Act we cannot spell out any legislative intent delegating expressly, or by necessary implication, the power to enact any prohibition on transfer of land. We are also in agreement with the submission of Shri Anil Divan that by placing complete prohibition on transfer of land subservient to tea estates no purpose sought to be achieved by the Act is advanced and so also such prohibition cannot be sustained. Land forming part of a tea estate including land subservient to a tea plantation have been placed beyond the ken of the Act. Such land is not to be taken in account either for calculating area of surplus land or for calculating the area of land

4 (2000) 3 SCC 40

which a person may retain as falling within the ceiling limit. We fail to understand how a restriction on transfer of such land is going to carry out any purpose of the Act. We are fortified in taking such view by the Constitution Bench decision of this Court in Bhim Singhji v. Union of India, (1981) 1 SCC 166 whereby sub-section (1) of Section 27 of the Urban Land (Ceiling and Regulation) Act, 1976 was struck down as invalid insofar as it imposed a restriction on transfer of any urban of urbanisable land with a building or a portion only of such building which was within the ceiling area. The provision impugned therein imposed a restriction on transactions by way of sale, mortgage, gift or lease of vacant land or buildings for a period exceeding ten years, or otherwise for a period of ten years from the date of the commencement of the Act even though such vacant land, with or without a building thereon, fell within the ceiling limits. The Constitution Bench held (by majority) that such property will be transferable without the constraints mentioned in sub-section (1) of Section 27 of the said Act. Their Lordships opined that the light to carry on a business guaranteed under Article 19(1)(g) of the Constitution carried with it the right not to carry on business. It logically followed, as a necessary corollary, that the right to acquire, hold and dispose of property guaranteed to citizen under Article 19(1)(f) carried with it the right not to hold any property. It is difficult to appreciate how a citizen could be compelled to own property against his will though he wanted to alienate it and the land being within the ceiling limits was outside the purview of Section 3 of the Act and that being so the person owning the land was not governed by any of the provisions of the Act. Reverting back to the case at hand, the learned counsel for the State of Himachal Pradesh has not been able to satisfy us as to how such a prohibition as is imposed by the impugned amendment in the Rules helps in achieving the object of the Act.

14. We are also of the opinion that a delegated

> power to legislate by making rules "for carrying out the purposes of the Act" is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself."

36) We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 05.07.1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable.

37) As a result, judgment of the High Court is set aside and the appeals are allowed in the aforesaid terms with no order as to cost.

JUDGMENT

.....J.
(A.K. SIKRI)

.....J.
(ROHINTON FALI NARIMAN)

NEW DELHI;
APRIL 16, 2015.

In the High Court of Judicature at Madras

Dated : 08-10-2014

Coram:

The Honourable Mr.Justice V.RAMASUBRAMANIAN

Writ Petition No.16288 of 2014 and MP.No.1 of 2014

M/s.City Office Equipments, rep.by its
Proprietor Mr.Pawan Kumar JhunJhunwala ...Petitioner

Vs

1.The Commissioner of Customs (Seaport-Import), Customs House, Chennai-1.

2.The Joint Commissioner of Customs (Gr.5)
Customs House, Chennai-1. …Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Mandamus directing the respondents herein to assess and permit clearance of 129 units of second hand Digital Multifunction Print and Copying Machines forming the subject matter, vide Bill of Entry No.5602113 dated 26.5.2014 upon the payment of applicable duties of customs on the assessable value as determined by the Chartered Engineer.

For Petitioner : Mr.N.Viswanathan

For Respondents : Mr.V.Sundareswaran,
Senior Panel Counsel

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ORDER

Under an invoice dated 03.3.2014, the petitioner imported a consignment of 129 packages of old and used Digital Multifunction Print and Copying Machines of various models for a declared value of USD 8201.6375 (CIF). They also filed a Bill of Entry dated 26.5.2014.

2. The Customs Approved Chartered Engineers examined the goods on arrival, in the presence of the Customs

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Officers and submitted an examination report on 4.6.2014. However, the appraised value was USD 24,932.77 (CIF).

3. The respondents did not permit the clearance, even after the report of the Chartered Engineers. Therefore, the petitioner made a representation on 16.6.2014 to the second respondent, informing him that he is prepared to accept the enhancement of value. But, the petitioner did not receive any response. Therefore, the petitioner has come up with the above writ petition seeking the issue of a Writ of Mandamus to direct the respondents to assess and permit the clearance of 129 packages of the so called second hand Digital Multifunction Print and Copying Machines, forming the subject matter of the Bill of Entry dated 26.5.2014, upon payment of applicable duties of customs.

3. I have heard Mr.N.Viswanathan, learned counsel for the petitioner and Mr.V.Sundareswaran, learned Senior Panel Counsel appearing for the respondents.

4. The Department of Commerce, Ministry of Commerce and Industry, Government of India, issued a Foreign Trade Policy with effect from 05.6.2012. Under Chapter II of the said Policy, it was stated that exports and imports shall be free, except when regulated and that such regulation would be as per the Foreign Trade Policy. Paragraph 2.7 of the said Policy stipulated that any goods/service, the export or import of which is 'restricted', may be exported or imported only in accordance with an authorisation/permission/licence or in accordance with the procedure prescribed in a Notification/public notice issued in this regard.

5. Insofar as the second hand goods are concerned, Paragraph 2.17 of the Foreign Trade Policy, prior to its amendment, stipulated that Digital Multifunction Print and Copying Machines are restricted items and that they will be allowed to be imported only as per the provisions of the Foreign Trade Policy.

6. With effect from 28.02.2013, the Central Government issued an amendment to Paragraph 2.17, vide Notification No.35 (RE-2012)/2009-2014. Insofar as the second hand Digital Multifunction Print and Copying Machines are concerned, the amended Notification made them restricted goods importable only as against authorisation.

7. It appears that the petitioner made an application on 27.8.2013 seeking permission for the import of used Digital Multifunction Print and Copying Machines. The request of the petitioner was placed before the Export Facilitation Committee, in a meeting held on 19.12.2013 and the Committee decided to reject the case as per the recommendation of the Department of Industrial Policy and Promotion under the Office Memorandum

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dated 03.10.2013. The decision of the Export Facilitation Committee was communicated to the petitioner by a letter dated 03.01.2014. The only reason stated in the said communication for the rejection of the request of the petitioner was that the second hand equipment would become obsolete/junk very fast and that the disposal of such junk equipment would pollute the environment.

8. But, despite such a rejection order communicated on 03.01.2014, the petitioner appears to have raised an invoice on 03.3.2014 and filed a Bill of Entry on 26.5.2014. According to the petitioner, they had placed orders much before the rejection of their request and that those items were kept for the raising of invoice and for transhipment at the Foreign Port before the rejection order. Hence, it is claimed that the petitioner should be allowed to clear the goods.

9. Before proceeding to consider the rival contentions, I should take note of one subsequent development namely that the Joint Commissioner of Customs - the second respondent herein has now issued a show cause notice dated 27.6.2014 under Section 124 of the Customs Act, 1962, calling upon the petitioner to show cause as to why the value declared should not be rejected and as to why the imported items should not be held as prohibited, liable for confiscation. The proposals made in the show cause notice can be best understood only if the operative portion of the show cause notice in paragraph 9 is extracted. Hence, it is extracted as follows :

> "In view of the above, the importer M/s.City Office Equipment, Chennai is hereby called upon to show cause to the Joint Commissioner of Customs, Group 5, Customs House, Chennai-600001 as to why :
>
> (a) the declared value of the goods namely 102 units of used Digital Multifunction Print and Copying Machine imported under the Bill of Entry No.5602113 dated 26.5.2014 should not be rejected under Rule 12 of the Customs (Determination of Value of Imported Goods) Rules, 2007 and re-determined as USD 24932.77 (CIF) equivalent to Rs.14,98,459/- (CIF) under Rule 9 of the said Rules.
>
> (b) the goods namely 102 units of used Digital Multifunction Print and Copying Machines imported under the Bill of Entry No.5602113 dated 26.5.2014 should not be held as prohibited under Sub-Section (u) of Section 11 of the Customs Act read with Sub-Section (3) of Section 3 and 11 of Foreign

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Trade (Development and Regulation) Act, 1992 and Rules and Orders issued thereunder read with Para 2.17 of Foreign Trade Policy 2009-14 as amended vide DGFT Notification No.35/(RE-2012)/2009-14 dated 28.2.2013.

(c) the goods namely 102 units of used Digital Multifunction Print and Copying Machine imported under the Bill of Entry No.5602113 dated 26.5.2014 should not be held as prohibited under Sub-Section (u) of Section 11 of the Customs Act read with Rule 16 of the Hazardous Waste (Management, Handling and Transboundary) Rules, 2008.

(d) the goods namely 102 units of used Digital Multifunction Print and Copying Machine imported under the Bill of Entry No.5602113 dated 26.5.2014 valued at Rs.14,98,459/- (CIF) should not be confiscated under Section 111(d) and (m) of the Customs Act, 1962 read with Sub-Section (3) of Section 3 and 11 of Foreign Trade (Development and Regulation) Act, 1992 and Rules and Orders issued thereunder read with Paragraph 2.17 of Foreign Trade Policy 2009-14 as amended vide DGFT Notification No.35/(RE-2012)/2009-14 dated 28.2.2013 read with Rule 16 of the Hazardous Waste (Management, Handling and Transboundary) Rules, 2008.

(e) Penalty should not be levied under Section 112(a) of the Customs Act, 1962."

Since the writ petition was filed on 23.6.2014 and the show cause notice is dated 27.6.2014, the petitioner has not dealt with the same in this writ petition.

10. The Respondents have filed a counter affidavit contending inter alia (1) that in terms of Board Circular No.27/2011, dated 04.07.2011, the import of goods covered under Entry B 1110 of Part B of Schedule III of the Hazardous Material (Management, Handling and Transboundary) Rules, 2007, such as second hand computers/electronic assemblies require the permission of the Ministry of Environment and Forests; (2) that as per para 4 of the clarification issued on 30.11.2011 to the Tamil Nadu Pollution Control Board, the Director, Ministry of Environment and Forests, Government of India indicated that used photocopiers/multifunction devices covered under electric and electronic assemblies meant for direct use require prior permission of the Ministry of Environment and Forests; (3)

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that the import of goods "restricted" under the Foreign Trade Policy, makes those goods liable for confiscation under Section 111(d) of the Customs Act, 1962;

(4) that as per the law declared by the Supreme Court in Sheik Mohd. Omer vs. Collector of Customs (1983 (13) E.L.T. 1439(SC), restriction is also one form of prohibition; (5) that despite the denial of permission to the petitioner way back in December 2013, the petitioner had the audacity to import the goods; and (6) that in the light of a show cause notice already issued to the petitioner, proposing to confiscate the goods, the goods cannot be released.

11. In order to test the correctness of the contentions raised on both sides, it is necessary to have a look at the provisions of the Customs Act, 1962, The Foreign Trade (Development and Regulation) Act, 1992, The Foreign Trade (Regulation) Rules, 1993 and the Hazardous Material (Management, Handling and Transboundary) Rules, 2007.

THE CUSTOMS ACT, 1962:

12. The expression " Prohibited Goods" is defined in Section 2(33) of the Customs Act, 1962 to mean "any goods, the import or export of which is subject to any prohibition under the Customs Act or any other law for the time being in force, but it 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."

13. Unfortunately, the Act does not define the expression "Restricted Goods". But the definition of the expression "Prohibited Goods" itself contains an indication as to how the expression "Restricted Goods" has to be understood.

14. A careful look at Section 2(33) would show that even prohibited goods could be permitted to be imported or exported subject to some terms and conditions. The moment those conditions are complied with, those goods would cease to be prohibited goods. This is why the exclusion clause contained in the second part of Section 2(33) uses the expression "any such goods". Therefore, it appears that the Customs Act recognizes only two types of goods namely: (1) those that are prohibited; and (2) those that are not prohibited. The Act also recognizes the fact that even prohibited goods could be imported or exported subject to certain conditions. If those conditions are fulfilled, prohibited goods would automatically become non-prohibited goods.

15. Section 11 of the Act empowers the Central Government, by Notification in the official gazette, to prohibit either absolutely or subject to such conditions to be fulfilled before or after clearance of the import or export of goods of any specified description. The expression "illegal import" is

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defined in Section 11A(a) of the Customs Act, 1962 to mean the import of any goods in contravention of the provisions of the Customs Act or any other law for the time being in force.

16. What is to be done if goods are improperly imported into or exported outside India, is spelt out in Chapter XIV. Section 111, which makes certain goods liable for confiscation, states that any prohibited goods brought into any bay or any goods which are imported contrary to any prohibition imposed or under the Customs Act, 1962 or any other law for the time being in force, are liable for confiscation. Under Section 112, the person guilty of improper importation of goods is also made liable for a penalty. But before confiscation, an adjudication is to take place in terms of the procedure prescribed under Section 122A. Section 125(1) of the Customs Act 1962, obliges the adjudicating authority to give to the owner of the goods, an option to pay fine in lieu of confiscation. 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, 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."

17. Section 110A enables the provisional release of goods, pending adjudication. From the language of Section 110A read with Section 125, it is clear that both these provisions do not distinguish between goods which are prohibited from being

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imported into or exported out of India and goods in respect of which there is no such prohibition.

18. In case, the imported goods are confiscated to Government, the property in those goods vests in the Central Government in terms of Section 126(1) of the Customs Act, 1962. Consequently, the officer adjudging confiscation, should take and hold possession of the confiscated goods under Section 126 (2) of the Act. There appears to be no provision in the Customs Act, 1962 for directing the re-export of the goods that are confiscated under Section 122 of the Act. The only manner in which confiscated goods could be dealt with, is perhaps by the sale of those goods by the Central Government, after taking possession under Section 126 of the Act. Interestingly, even the procedure for sale of goods prescribed in Section 150(1) seems to apply only to goods which are not confiscated. Therefore, the answer to the question as to what happens to the confiscated goods whose possession is taken by the adjudging officer is not found in Customs Act, 1962.

THE FOREIGN TRADE (DEVELOPMENT AND REGULATION) ACT, 1992:

19. After the economy of the country underwent a transition in the year 1991, the Parliament enacted the Foreign Trade (Development and Regulation) Act, 1992. The object of the Act was to provide for the development and regulation of Foreign Trade by facilitating imports into and augmenting exports from India. Under Section 3 of the said Act, the Central Government was empowered to pass two types of orders namely: (1) orders making provision for the development and regulation of Foreign Trade by facilitating imports and increasing exports; and (2) orders making provision for prohibiting, restricting or otherwise regulating the import or export of the goods. Any order passed under Section 3(2) of the said Act prohibiting, restricting or otherwise regulating the import or export of goods, would make those goods, by virtue of Section 3(3) Foreign Trade (Development and Regulation) Act, 1992 to be the goods the import or export of which is prohibited under Section 11 of the Customs Act, 1962. In other words, once an order is passed under Section 3(2) of the Foreign Trade (Development and Regulation) Act, 1992 prohibiting or restricting or regulating the import of certain goods, those goods would automatically be deemed to be prohibited goods under Section 11 of the Customs Act, 1962. Consequently, all the provisions of the Customs Act, 1962 would automatically come into play. Therefore, the provisions relating to adjudication, confiscation etc., would also become applicable in such cases.

20. Section 11(1) of the Foreign Trade (Development and Regulation) Act, 1992, prohibits the import or export of goods except in accordance with the provisions of the Act, the Rules and orders made thereunder and the Foreign Trade Policy for the

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time being in force. The consequences of contravention of the provisions of the Foreign Trade (Development and Regulation) Act, 1992, the Rules and orders issued under the Act and the Foreign Trade Policy are spelt out in sub-sections (2) to (9) of Section 11. Section 11(8) makes the goods imported in contravention of any provision of the Foreign Trade (Development and Regulation) Act, liable for confiscation. Sub-sections (8) and (9) of Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 are to be noted and hence they are reproduced as follows:

> "(8) Where any contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy has been, is being, or is attempted to be made, the goods (including the goods connected with services or technology) together with any package, covering or receptacle and any conveyances shall, subject to such conditions and requirements as may be prescribed, be liable to confiscation by the Adjudicating Authority.
>
> (9) The goods (including the goods connected with services or technology) or the conveyance confiscated under sub-section (8) may be released by the Adjudicating Authority, in such manner and subject to such conditions as may be prescribed, on payment by the person concerned of the redemption charges equivalent to the market value of the goods or conveyance, as the case may be."

21. Therefore, it is clear that even the goods which are liable for confiscation can be released upon payment of redemption charges under Section 11(9) of the Act. This provision appears to be in tune with Section 125(1) of the Customs Act, 1962.

FOREIGN TRADE (REGULATION) RULES, 1993:

22. Rule 17 of the Foreign Trade (Regulation) Rules, 1993, deals with confiscation and redemption. It reads as follows:

> RULE 17. Confiscation and redemption:- (1) Any imported goods or materials in respect of which --
>
> (a) any condition of the licence, or letter of authority under which they were imported relating to their utilisation or distribution; or
>
> (b) any condition relating to their utilisation

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or distribution, subject to which they were received from or through, an agency recognised by the Central Government; or

(c) any condition imposed under the Policy with regard to the sale or disposal of such goods or materials,

has been, is being, or is attempted to be, contravened, shall together with any package, coverage or receptacle in which such goods are found, be liable to be confiscated by the Adjudicating Authority, and where such goods or materials are so mixed with any other goods or materials that they cannot be readily separated, such other goods or materials shall be liable to be confiscated:

Provided that where it is established to the satisfaction of the Adjudicating Authority that any goods or materials which are liable to confiscation under this rule, had been imported for personal use, and not for any trade or industry, such goods or materials shall not be ordered to be confiscated.

(2) The Adjudicating Authority may permit the redemption of the confiscated goods or materials upon payment of redemption charges equivalent to the market value of such goods or materials."

23. Therefore, despite the fact that the goods, whose import is restricted in terms of the Foreign Trade Policy, should be construed to be prohibited goods, there is no bar for the release of the goods: (1) either under Section 125(1) of the Customs Act, 1962 upon payment of fine in lieu of confiscation; or (2) in terms of Section 11(9) of the Foreign Trade (Development and Regulation) Act, 1992 upon payment of redemption charges.

IV. HAZARDOUS WASTES RULES :

24. In exercise of the powers conferred under Sections 6, 8, and 25 of the Environment (Protection) Act, 1986, the Central Government issued Hazardous Material (Management, Handling and Transboundary Movement) Rules, 2007. As per Rule 2 of these Rules, they would apply to the handling of hazardous wastes as specified in the Schedules, but not to (i) waste water and exhaust gases; (ii) wastes arising out of the operation from ships; (iii) radioactive wastes; (iv) biomedical wastes; and (v) municipal wastes. There are seven Schedules to these Rules. Schedule I contains a list of processes generating hazardous wastes. Schedule II contains a list of waste constituents with

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concentration limits. Schedule III is divided into two parts, namely Part A and Part B. Part A contains a list of hazardous wastes applicable for import with Prior Informed Consent, with reference to Annexure VIII of the Basel Convention. Part B of Schedule III contains a list of hazardous wastes applicable for import and export not requiring Prior Informed Consent, with reference to Annexure IX of the Basel Convention. Entry B 1110 in Part B of Schedule III to the Rules relates to 'Electrical and Electronic Assemblies'. The description of items under Entry B 1110 is as follows :

B 1110	- Electrical and electronic assemblies
	- Electronic Assemblies consisting only of metals or alloys****
	- Waste Electrical and Electronic Assemblies scrap (including printed circuit boards) not containing components such as accumulators and other batteries included in list A, mercury - switches, glass from cathode-ray tubes and other activated glass and PCB - capacitors, or not contaminated with constituents such as cadmium, mercury, lead, polychlorinated biphenyl or from which these have been removed, to an extent that they do not possess any of the constituents mentioned in Schedule 2 to the extent of concentration limits specified therein.****
	Electrical and Electronic Assemblies (including printed circuit boards, electronic components and wires) destined for direct re-use and not for re-cycling or final disposal.

25. It is pertinent to note that there are stars (single, double, triple or four) assigned to some of the items in the Table below Schedule III. The significance of these stars is indicated at the bottom. If an item is assigned four stars, it means that the import of the said item is permitted in the country by the actual users with the permission of the Ministry of Environment and Forests and a licence from the Director General of Foreign Trade. It is also indicated in the Table below Schedule III to these Rules that those wastes, which do not carry any star, can be imported only with the permission of the Ministry of Environment and Forests.

26. Schedule IV to these Rules contains a list of hazardous wastes requiring registration for re-cycling and re-processing. Schedule V contains specifications for used oil suitable for re-processing/re-cycling. Schedule VI contains hazardous wastes prohibited for import and export. Schedule VII contains a list of authorities and corresponding duties.

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27. The expression 'hazardous waste' is defined in Rule 3 (l) of the Rules as follows :

> 'Hazardous waste means any waste, which by reason of any of its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics causes danger or is like to cause danger to health or environment, whether alone or when in contact with other wastes or substances, and shall include -
>
> (i) waste specified under column (3) of Schedule-I;
>
> (ii) waste having constituents specified in Schedule - II, if the concentration is equal to or more than the limit indicated in the said schedule; and
>
> (iii) waste specified in Part A or Part B of Schedule III in respect of import or export of such wastes in accordance with Rules 12, 13 and 14 or the wastes other than those specified in Part A or Part B if they possess any of the hazardous characteristics specified in Part C of that Schedule."

28. Therefore, if the item imported into India is one that falls under Part A or Part B of Schedule III, it would be deemed to be an hazardous waste within the definition of the expression under Rule 3(l), only in accordance with Rules 12 to 14. Rule 12 makes the Ministry of Environment and Forests as the Nodal Ministry to deal with transboundary movement of hazardous wastes and to grant permission for transit of the hazardous waste through any part of India. Rule 13 prohibits the import of hazardous wastes into India for disposal, though it permits the import of such wastes for re-cycling or recovery or re-use. Rule 14(1) stipulates that the import and export of hazardous wastes specified in Schedule III shall be regulated in accordance with the conditions laid down in the Schedule. Rule 14(2)(ii) stipulates that the import of hazardous wastes specified in Part B of Schedule III shall not require Prior Informed Consent of the country from where it is imported. Rule 16 provides the procedure for import of hazardous wastes. Rule 17(1) makes the import of hazardous wastes into India illegal, if it was made without the permission of the Central Government in accordance with these Rules. Under Sub-Rule (2), the importer is obliged to re-export the waste in question at his cost within 90 days from the date of its arrival, in the case of an illegal import of hazardous wastes. The Authorities competent to do the same are specified in Schedule VII. Therefore, the obligation to re-export an imported item arises only out of Rule 17(2) of the Hazardous Material (Management, Handling and Transboundary Movement) Rules and not out of the Customs Act or the Foreign Trade (Development and Regulation) Act. Consequently, if the petitioner had to be directed to re-export what was imported by

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him, it could be done only by the Authorities specified in Schedule VII. Till date, no action under these Rules has been initiated by any of the Authorities listed in Schedule VII to the Hazardous Waste Rules.

29. The Ministry of Environment and Forests, which is named as the Nodal Ministry under Rule 12 of the Hazardous Wastes Rules, have not initiated any action against the petitioner. As pointed out earlier, the import of hazardous wastes is prohibited by Rule 13(1) only if the import of such wastes is for disposal in India. But, if the import is for re-cycling or recovery or for re-use, it is permitted under Rule 13(2), subject however perhaps to the permission of the Ministry of Environment and Forests.

30. The procedure for import of hazardous wastes is stipulated in Rule 16. As per Rule 16(1), a person who intends to import hazardous wastes specified in Schedule III, should apply in Form 7 or Form 8 to the Central Government, together with Prior Informed Consent, wherever applicable and should send a copy of such application to the concerned State Pollution Control Board. The application so submitted has to be examined by the Ministry of Environment and Forests under Sub-rule (2) of Rule 16, with reference to the observations made by the State Pollution Control Board. Once permission is granted, the same has to be communicated by the Ministry of Environment and Forests to the Central Pollution Control Board, the State Pollution Control Board as well as the concerned Port and Customs Authorities.

31. What a Customs Authority is obliged to do, is also indicated in Rule 16(6). As per this rule, the Customs Authority should collect three randomly drawn samples of the consignment, before clearing it as per the Customs Act, 1962, for analysis and retain the report for two years. The importer is also obliged to maintain a record of the hazardous wastes imported by him.

32. The consequences of importing hazardous wastes into India are spelt out in Rule 17. If an import of hazardous wastes is made into India without the permission of the Central Government, it is deemed to be an illegal import under Rule 17 (1). In such cases, the importer is obliged to re-export the waste in question within 90 days, at his cost. The implementation of this is to be ensured by the State Pollution Control Board. Even Schedule VII to these Rules, which contains the list of authorities under the Act and their corresponding duties, does not name the Commissioner of Customs as one of the authorities who is entitled to take action under Rule 17 for illegal traffic in hazardous wastes. Therefore, the action now taken cannot be construed as one for re-export under Rule 17(2) of the Hazardous Wastes Rules.

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33. In such circumstances, I do not think that any of the respondents herein is competent, to order the re-export, even though they are competent to order confiscation. As a matter of fact, no samples have been drawn as per Rule 16 of the Hazardous Wastes Rules, to decide whether the item imported into India by the petitioner, falls within Entry B 1110 under Part B of Schedule III to the Hazardous Wastes Rules. Hence, the refusal of the respondents to permit the provisional release of the goods does not appear to be in accordance with law.

34. As I have stated earlier, the Customs Act, 1962, provides for provisional release. Even the Foreign Trade (Regulation) Rules, 1993 allows redemption of confiscated goods under Rule 17(2). No proceedings have been initiated by an authority competent in terms of the Hazardous Wastes Rules for directing the petitioner to re-export the goods. Therefore, the petitioner, in my considered view, is entitled to the release of the goods provisionally.

35. In view of the above, the writ petition is allowed, directing the respondents to assess and permit the provisional release of 129 units of second hand Digital Multifunction Print and Copying Machines, which form the subject matter of Bill of Entry No.5602113 dated 26.5.2014, upon payment of applicable duties of customs, subject however to the eventual adjudication. The respondents shall release the goods, after assessing and collecting the customs duty and other charges, provisionally, within a period of four weeks from the date of receipt of a copy of this order. However, the proceedings in pursuance of the show cause notice can go on. No costs. Consequently, connected M.P. is closed.

-s/d-
Assistant Registrar(CS-III)
Dt:8/10/2014

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Sub-Assitant Registrar

To

1.The Commissioner of Customs (Seaport-Import), Customs House, Chennai-1.

2.The Joint Commissioner of Customs (Gr.5), Customs House, Chennai-1.

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+ 1 CC TO MR.V.SUNDARESWARAN ADVOCAT SR 47805

+ 2 CC TO MR.N.VISWANTHAN ADVOCATE SR.7721

RSY(CO)

PRKS 8/10

WP.NO.16288 OF 2014

AND MP.NO.1 OF 2014

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 25.08.2020

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P (MD)Nos.1242, 1295, 2355,2377, 3042, 4040, 4076, 4080, 6348, 7841 & 7843 of 2020 and
W.M.P.(MD)Nos.1006, 1048, 2014, 2037, 2592, 3423, 3445& 3447 of 2020

in W.P.(MD)NO.1242 of 2020 :

M/s.Black Gold Technologies,
Rep. by its Proprietor Anuj Bansal
UP-58, Maurya Enclave, Pitarn Pura,
Delhi – 110 034. ... Petitioner

Vs.

1.Union of India, Rep. by its Secretary,
Ministry of Finance,
Department of Revenue, New Delhi.

2.The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin – 628 004.

3.The Assistant Commissioner of
Customs (SIIB),
Custom House, New Harbour Estate,
Tuticorin – 628 004. ... Respondents

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Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, directing the respondents herein to release the goods 824.900 MT viz., 33 x 40 Containers of “Used Rubber Tyre Cut in Two Pieces” (used Rubber Tyre with one cut in bead wire)

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imported vide Bill of Entry No.6099943, dated 16.12.2019 totally valued at USD 24747.

For Petitioner in WP(MD)Nos. 1242, 1295, 2355, 2377, 3042, 4040, 4076, 4080 of 2020	Mr.A.K.Jayaraj
For Petitioner in WP(MD)Nos. 6348 & 7841 & 7843 of 2020	Mr.Hari Radhakrishnan
For Respondents No.1 in all Wps	Mr.P.Subbiah Central Government Standing Counsel
For Respondents Nos.2 & 3	Mr.B.Vijaya Karthikeyan

COMMON ORDER

The petitioners had imported consignments of "Used Rubber Tyre Cut in Two Pieces". According to the petitioners, the said goods are freely importable and they are meant for manufacturing "rubber crumbs" to be eventually used for road laying.

2.The customs authorities were called upon to clear the goods in question on the ground that they have been classified under CTH 40040000. The respondents after examination came to the conclusion that the goods have been misdeclared. Though they had been declared as used tyre

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with one cut in bead wire, a random examination of the goods revealed that there was no cut in the bead wires. Therefore, it was referred to SIIB for detailed examination for import assessment. As per the examination report of the said officers, the cargo was found to be used rubber tyres in pressed bales. But there was no cut in the bead wires. Though import of used tyres with one cut in the bead wire is free, import of used rubber tyres is restricted. Hence, on the reasonable belief that the importer has mis-declared the cargo in order to circumvent the import restriction imposed by the extant Foreign Trade Policy, the entire cargo was seized for further investigation under the Customs Act, 1962. Following such seizure, the petitioners made a request for provisional release in terms of Section 110A of the Customs Act, 1962. Since the request was not complied with, these writ petitions came to be filed.

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3.The petitioners' request is opposed by the respondents. The respondents challenge the claim of Black Gold Technologies, that the imported goods were meant for manufacturing rubber crumbs at their unit said to be located

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in Alwar, Rajasthan. In Paragraph Nos.7 and 8 of the counter affidavits, the respondents have taken a stand that the seized goods have been restricted for import as per the Foreign Trade Policy and that they could have been imported only under due authorisation. Since the importer did not obtain valid licenses from DGFT, the goods were rightly seized. It is further contended that since the goods also constitute a hazardous waste, prayer for provisional release is also not maintainable. It is finally contended that the writ petitions have to be dismissed for non exhaustion of the alternative remedy available under the statute.

4.The counsel on either side filed their written arguments and reiterated the contentions set out therein. They also relied on a host of case laws. The learned standing counsel placed heavy reliance on the provisions of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016. Some of the provisions relied on by the learned standing counsel are as under :

> "3.(17).-"hazardous waste" means any waste which by reason of characteristics such as

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physical, chemical, biological, reactive, toxic, flammable, explosive or corrosive, causes danger or is likely to cause danger to health or environment, whether alone or in contact with other wastes or substances, and shall include -

(i)waste specified under column (3) of Schedule I;

(ii)waste having equal to or more than the concentration limits specified for the constituents in class A and class B of Schedule II or any of the characteristics as specified in class C of Schedule II; and

(iii)wastes specified in Part A of Schedule III in respect of import or export of such wastes or the wastes not specified in Part A but exhibit hazardous characteristics specified in Part C of Schedule III;"

"3.(23).-"other wastes" means wastes specified in Part B and Part D of Schedule III for import or export and includes all such waste generated indigenously within the country;"

"**13.Procedure for import of hazardous and other wastes.-** (1) Actual users intending to import or transit for transboundary movement of hazardous and other wastes specified in Part A and Part B of Schedule III shall apply in Form 5

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along with the documents listed therein, to the Ministry of Environment, Forest and Climate Change for the proposed import together with the prior informed consent of the exporting country in respect of Part A of Schedule III waste, and shall send a copy of the application, simultaneously, to the concerned State Pollution Control Board for information and the acknowledgement in this respect from the concerned State Pollution Control Board shall be submitted to the Ministry of Environment, Forest and Climate Change along with the application.

(2)For the import of other wastes listed in Part D of Schedule III, the importer shall not require the permission of the Ministry of Environment, Forest and Climate Change. However, the importer shall furnish the required information as per Form 6 to the Customs authorities, accompanied with the following documents in addition to those listed in Schedule VIII, wherever applicable. For used electrical and electronic assemblies listed at serial numbers 4 (e) to 4(i) of Schedule VIII (Basel No. B1110), there is no specific requirement of documentation under these rules:

(a) the import license from Directorate General of Foreign Trade, if applicable;

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(b) the valid consents under the Water (Prevention and Control of Pollution) Act, 1974 (25 of 1974) and the Air (Prevention and Control of Pollution) Act, 1981 (21 of 1981) and the authorisation under these rules as well as the authorisation under the E-Waste (Management and Handling) Rules, 2011, as amended from time to time, whichever applicable;

(c) importer who is a trader, importing waste on behalf of actual users, shall obtain one time authorisation in Form 7 and copy of this authorisation shall be appended to Form 6.

(3) For Part B of Schedule III, in case of import of any used electrical and electronic assemblies or spares or part or component or consumables as listed under Schedule I of the E-Waste (Management and Handling) Rules, 2011, as amended from time to time, the importer need to obtain extended producer responsibility-authorisation as producer under the said E-Waste (Management and Handling) Rules, 2011.

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(4)Prior to clearing of consignment of wastes listed in Part D of Schedule III, the Custom authorities shall verify the documents as given in column (3) of Schedule VIII.

(5)On receipt of the complete application with respect to Part A and Part B of Schedule III,

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the Ministry of Environment, Forest and Climate Change shall examine the application considering the comments and observations, if any, received from the State Pollution Control Boards, and may grant the permission for import within a period of sixty days subject to the condition that the importer has -

(i) the environmentally sound facilities;

(ii)adequate arrangements for treatment and disposal of wastes generated;

(iii)a valid authorisation and consents from the State Pollution Control Board;

(iv)prior informed consent from the exporting country in case of Part A of Schedule III wastes.

(6)The Ministry of Environment, Forest and Climate Change shall forward a copy of the permission to the concerned Port and Customs authorities, Central Pollution Control Board and the concerned State Pollution Control Board for ensuring compliance with respect to their respective functions given in Schedule VII.

(7)The importer of the hazardous and other wastes shall maintain records of the hazardous and other waste imported by him in Form 3 and the record so maintained shall be made available for inspection.

(8)The importer of the hazardous and other wastes shall file an annual return in Form 4 to the

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State Pollution Control Board on or before the 30th day of June following the financial year to which that return relates.

(9)Samples of hazardous and other wastes being imported for testing or research and development purposes up to 1000 gm or 1000 ml shall be exempted from need of taking permission for import under these rules.

(10)The Port and Customs authorities shall ensure that shipment is accompanied with the movement document as given in Form 6 and the test report of analysis of the waste, consignment, wherever applicable, from a laboratory accredited or recognised by the exporting country. In case of any doubt, the customs may verify the analysis."

"15.Illegal traffic.- (1)The export and import of hazardous or other wastes from and into India, respectively shall be deemed illegal, if,-

(i)it is without permission of the Central Government in accordance with these rules; or

(ii) the permission has been obtained through falsification, mis-representation or fraud; or

(iii)it does not conform to the shipping details provided in the movement documents; or

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(iv)it results in deliberate disposal (i.e., dumping) of hazardous or other waste in contravention of the Basel Convention and of general principles of international or domestic law.

(2)In case of illegal import of the hazardous or other waste, the importer shall re-export the waste in question at his cost within a period of ninety days from the date of its arrival into India and its implementation will be ensured by the concerned Port and the Custom authority. In case of disposal of such waste by the Port and Custom authorities, they shall do so in accordance with these rules with the permission of the Pollution Control Board of the State where the Port exists.

(3)In case of illegal import of hazardous or other waste, where the importer is not traceable then the waste either can be sold by the Customs authority to any user having authorisation under these rules from the concerned State Pollution Control Board or can be sent to authorised treatment, storage and disposal facility."

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5.The learned standing counsel would point out that even according to the petitioners, the imported goods would fall under the category B3140 which falls under Part B of Schedule 3 of the aforesaid rules. If that be so, the

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petitioners could have imported the same only with the permission of the Ministry of Environment, Forest and Climate Change. It is not the case of the petitioners that such permission was obtained. Therefore, the import has to be deemed illegal as per Rule 15. Rule 15(2) mandates that such illegally imported wastes shall be re-exported. The learned standing counsel points out that the rules have been made under the relevant provisions of Environment (Protection) Act, 1986. The said Act has a overriding effect on other laws. He therefore would contend that the question of provisionally releasing the goods cannot arise.

6.In support of this contention, the learned counsel relied on a decision of the Hon'ble Division Bench of the Madras High Court reported in 2013 (287) E.L.T 161 (Mad), (Commissioner of Customs (Imports) Chennai vs. V.S.Govindan. That was also a case of imported used tyres which were more than six years old. It was considered as hazardous waste and the Hon'ble Division Bench directed the importers to re-export the same. This decision was followed in Universal Trading Co. vs. The Commissioner of Customs,

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Kandla, 2014 (313) E.L.T 164 (Tri-Ahmd.,). The learned counsel drew my attention to the decision reported in 2015 (329) E.L.T 489 (Tri-Delhi), 2017 (347) E.L.T 4 (All.,), 2013 (297) E.L.T 184 (Mad.,) and 2012 (275) E.L.T 528 (Bom.,). Since the learned counsel for the petitioners placed heavy reliance on the decision of the Hon'ble Supreme Court reported in ***2019 (365) E.L.T 465 (S.C) (Commissioner of Customs vs. Atul Automations Pvt., Ltd***.), the learned standing counsel drew my attention to the decision of the Hon'ble Division Bench reported in ***2019 (367) E.L.T 920 (Mad) (Commissioner of Customs, Chennai – II vs. City Office Equipment)*** in which ***Atul Automations Pvt., Ltd,*** case has been distinguished. The learned standing counsel called upon this Court to dismiss the writ petitions.

7.I carefully considered the rival contentions and went through the materials on record. I must straight away observe that the respondents are not adopting a consistent stand. Their case is that the petitioners had misdeclared the imported goods. The relevant Chapter heading is as follows :

Exim Code	Item Description	Policy	Policy Condition

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40040000	Waste, paring and scrap of rubber (other than Hard rubber) and powders and granules obtained therefrom	Restricted	Import of used rubber tyres with one cut in bead wire and import of used rubbers tubes cut in two pieces however, is free.

While the petitioners would claim that the import is free, the original stand of the respondents was that it is restricted. In other words, when the seizure took place, the debate centered on the question whether the import is restricted or free and nothing else. A mere look at the seizure mahazar would indicate that it was not the stand of the respondents that the import of the goods in question is prohibited. In the written arguments filed by the learned standing counsel, it has been mentioned that though the petitioners claim that the imported used tyres are with two cuts in the bead wires, an inspection by the authorities, it was found that the said imported used tyres are without any cuts. The contention that the imports have been made without authorisation/license from DGFT has been reiterated in the written arguments. If that be so, the question is whether the request for provisional release of the goods can be opposed. The decision of the Hon'ble Supreme Court reported in ***2019 (365) E.L.T 465 (S.C)***

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(Commissioner of Customs vs. Atul Automations Pvt., Ltd.) is directly on the point. The Hon'ble Supreme Court held as follows :

> "8.Clause 2.01 of the Foreign Trade Policy provides for prohibition and restriction of imports and exports. The export or import of restricted goods can be made under Clause 2.08 only in accordance with an authorisation/permission to be obtained under Clause 2.11. Photocopier machines/Digital multifunction Print and Copying Machines are restricted items importable against authorisation under Clause 2.31. Indisputably, the Respondents did not possess the necessary authorisation for their import. The customs authorities therefore prima facie cannot be said to be unjustified in detaining the consignment. Merely because earlier on more than one occasion, similar consignments of the Respondent or others may have been cleared by the customs authorities at the Calcutta, Chennai or Cochin ports on payment of redemption fine cannot be a justification simpliciter to demand parity of treatment for the present consignment also. The defence that the DGFT had declined to issue such authorisation does not appeal to the Court.

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9.Unfortunately, both the Commissioner and the Tribunal did not advert to the provisions of the Foreign Trade Act. The High Court dealing with the same has aptly noticed that Section 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 provides for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. Section 3(3) of the Foreign Trade Act provides that any order of prohibition made under the Act shall apply mutatis mutandis as deemed to have been made Under Section 11 of the Customs Act also. Section 18A of the Foreign Trade Act reads that it is in addition to and not in derogation of other laws. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. The MFDs were not prohibited but restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value. There will exist a fundamental distinction between what is prohibited and what

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is restricted. We therefore find no error with the conclusion of the Tribunal affirmed by the High Court that the Respondent was entitled to redemption of the consignment on payment of the market price at the reassessed value by the customs authorities with fine Under Section 112(a) of the Customs Act, 1962.

10.The Central Government had permitted the import of used MFDs with utility for at least five years keeping in mind that they were not being manufactured in the country. The Chartered Engineer commissioned by the customs authorities had certified that the MFDs were capable of utility for the next 5 to 7 years without any major repairs. Considering that at import they had utility, the High Court rightly classified them as "other wastes" Under Rule 3(1)(23) of the Waste Management Rules, which reads as follows:

"Other wastes means wastes specified in Part B and Part D of Schedule III for import or export and includes all such waste generated indigenously within the country."

11.Rule 13(2) provides the procedure for import of other wastes listed in Part D Schedule

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III. Item B1110 of the Schedule mentions used Multifunction Print and Copying Machines (MFDs). Entry 4(j) lists out five documents required for import of used MFDs. The Respondents have been found to be substantially compliant in this regard and the requirement for the country of origin certificate has been found to be vague by the High Court. Form 6 has rightly been held to be not applicable to the subject goods.

12.Rule 15 of the Waste Management Rules dealing with illegal traffic, provides that import of "other wastes" shall be deemed illegal if it is without permission from the Central Government under the Rules and is required to be re-exported. Significantly the Customs Act does not provide for re-export. The Central Government under the Foreign Trade Policy has not prohibited but restricted the import subject to authorisation. The High Court therefore rightly held that the MFDs having a utility period, the Extended Producer Responsibility would arise only after the utility period was over. In any event, the E-waste Rules 2016 certificate had since been issued to the Respondents by the Central Pollution Control Board before the goods have been cleared."

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After such reasoning, the appeals filed by the Commissioner of Customs were dismissed by the Hon'ble Supreme Court.

8.It is true that this decision was distinguished by the Hon'ble Division Bench of the Madras High Court in the decision reported in ***2019 (367) E.L.T 920 (Mad) (Commissioner of Customs, Chennai – II vs. City Office Equipment).*** But, on a careful perusal of the factual matrix obtaining in the said case, I am of the view of that the Division Bench decision is clearly distinguishable. The Division Bench noted that the import of the second hand machines are allowed for clearance subject to fulfillment of certain conditions which included registration with BIS and that the said condition was not fulfilled. This is evident from the discussion found at Paragraph No.26 of the said order which reads as under :

> "26.Considering the factual position, the respondent would not be entitled to make a prayer for provisional clearance, as there is non compliance of the vital requirement regarding BIS certificate as required under Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order 2012 dated

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> 07.09.2012 and subsequent orders dated 25.06.2013 and 07.11.2014 issued by MeitY. We find that this issue did not arise in the case of Athul Automations Private Limited (supra) and the only common feature was non production of advance authorisation/import licence. Thus, in our considered view, the decision in the case of Athul Automations Private Limited (supra) is factually distinguishable apart from the fact that the said case arose out of an adjudicatory process in which the factual position was threadbare analysed by two fact finding authorities. That apart, the Hon'ble Supreme Court left the ultimate decision to be taken by DGFT."

As rightly pointed out by the learned counsel for the petitioner, both Atul Automations Pvt.Ltd., decision as well as the aforesaid decision of the Hon'ble Division Bench were considered by a subsequent Division Bench in the order dated 10.09.2019 in WP Nos.16126 of 2019 etc batch. That was also a case dealing with provisional release of the goods. When the said order was challenged before the Hon'ble Supreme Court in SLP (Civil) Diary No.3412 of 2020, the SLP was dismissed on 17.02.2020.

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9.The 2016 Rules contain as many as 8 schedules. Schedule 3 is in two parts. Part A contains a list of hazardous wastes applicable for import and export with prior informed consent. Part B contains the list of other wastes applicable for import and export and not requiring prior informed consent. Schedule VI sets out hazardous and other wastes prohibited for import. It is not the case of the respondents that the imported goods in the case on hand fall under Schedule VI. Once the application of the Schedule VI of the 2016 Rules is ruled out, the only question is whether the import of the goods is free or restricted. Under either case, in view of the decision of the Hon'ble Supreme Court in Atul Automations, provisional release is very much permissible. The respondents have seized the goods under Section 110 of the Customs Act, 1962. Therefore, Section 110A of the Customs Act, 1962 will automatically kick in. Section 110A of the Act reads as under :

> **"110A.Provisional release of goods, documents and things seized pending adjudication**
>
> Any goods, documents or things seized under Section 110, may, pending the order of the adjudicating authority be released to the

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owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require."

10.Of course, the contention urged by the learned standing counsel with reference to Rule 12 (4) r/w.Rule 15 has to be answered. Interestingly, this point has also been considered in ***Atul Automations*** decision. The Hon'ble Supreme Court after referring to Rule 15 points out that the Customs Act, 1962 does not provide for re-export. There is another decision reported in ***2015 (316) E.L.T 199 (Mad) (City Office Equipments vs. Commissioner of Customs***) in favour of the petitioners. The learned Judge after elaborate discussion of the statutory scheme obtaining in the Customs Act, 1962, the Foreign Trade Development and Regulation Act, 1992, Foreign Trade (Regulation) Rules, 1993 and the earlier Hazardous Wastes Rules concluded that despite the fact that the goods, whose import is restricted in terms of the Foreign Trade Policy, should be construed to be prohibited goods, there is no bar for the release of the goods. The learned Judge also noted that it is not open to the customs authorities to insist on re-export. This was to be done only by

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the authorities specified in Schedule VII of the Hazardous and Other Wastes (Management and Transboundary) Rules, 2016. As in that case, in the present case also, no proceedings have been initiated by the authorities in terms of the Hazardous Wastes Rules for directing the petitioners to re-export the goods. This decision of the learned single Judge was also confirmed by the Hon'ble Division Bench in the decision reported in ***2016 (336) E.L.T 199 (Mad) (Commissioner of Customs (Sea Port-Import), Chennai vs. City Office Equipments)***.

11.I am therefore of the view that the petitioners are entitled to provisional release of the goods under Section 110A of the Customs Act, 1962. Since several decisions have been cited on either side, I make it clear that I have chosen to follow the decision of the Madras High Court reported in ***2015 (316) E.L.T 199 (Mad) (City Office Equipments vs. Commissioner of Customs***) which was confirmed by the Hon'ble Division Bench in the decision reported in ***2016 (336) E.L.T 199 (Mad) (Commissioner of Customs (Sea Port-Import), Chennai vs. City Office Equipments)*** and

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the decision of the Hon'ble Supreme Court in ***Atul Automations*** case. Of course, the adjudication proceedings will go on. The respondents 2 and 3 are directed to provisionally release the goods of the petitioners by taking a bond from them in proper form with such security and conditions as the adjudicating authority may require. The petitioners' counsel also prayed that they should not be levied with any demurrage and container detention charges. The learned counsel for the petitioners pointed out that they are entitled to waiver in view of the Handling of Cargo in Customs Areas Regulations 2009. They would also point out that the Union Government has also instructed that in view of the lock down declared by the Government of India, demurrage and detention charges ought not to be levied.

12.The learned counsel for the petitioners placed reliance on the decision reported in 2018 (361) E.L.T 463 (Mad) (Giridhari Homes Pvt. ltd vs. Principal Commissioner of Customs, Chennai-III) and 2019 (367) E.L.T 972 (Mad.) (Agro 1 Stop vs. Commissioner of Customs, Chennai-II). The said decisions are squarely applicable to the case on hand.

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Therefore, the respondents are directed to assess and permit the provisional release of the goods in question upon payment of applicable duties of customs subject however to the eventual adjudication. The respondents shall release the goods after assessing and collecting the customs duty and other charges provisionally within a period of three weeks from the date of receipt of a copy of this order. The adjudication proceedings can go on. The respondents will bear in mind the usual approach adopted in the case of provisional release of goods in terms of 110A of the Customs Act. It is further declared that the petitioners are entitled to waiver in view of the handling of cargo in Customs Areas Regulations 2009. No demurrage and detention charges shall be levied on the petitioners herein.

13.These writ petitions stand allowed. No costs. Consequently, connected miscellaneous petitions are closed.

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25.08.2020

Index : Yes / No
Internet : Yes/ No
skm

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To:

1. The Secretary, Union of India,
   Ministry of Finance,
   Department of Revenue,
   New Delhi.

2. The Commissioner of Customs,
   Custom House, New Harbour Estate,
   Tuticorin.

3. The Assistant Commissioner of Customs(SIIB),
   Custom House, New Harbour Estate,
   Tuticorin – 628 004.

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G.R.SWAMINATHAN, J.

skm

W.P.(MD)No.1242 of 2020 & batch

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25.08.2020

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Reserved on : 24.10.2024
Date of Pronouncement : 14.11.2024

1. **CUSAP No. 4 of 2024 (O&M)**

Commissioner of Customs, Ludhiana … Appellant
Versus
M/s Star Spices …Respondent

2. **CUSAP No. 5 of 2024 (O&M)**

Commissioner of Customs, Ludhiana … Appellant
Versus
M/s Sherry Network Private Limited …Respondent

CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE SANJAY VASHISTH

Present: Mr. Sunish Bindlish, Senior Standing Counsel and
Mr. Viney Kumar, Advocate, for the appellant.

Ms. Radhika Suri, Senior Advocate with
Mr. Saurabh Kapoor, Advocate,
Mr. Abhinav Narang, Advocate and
Ms. Muskaan Gupta, Advocate, for the respondents.

***

SANJEEV PRAKASH SHARMA, J.

These are two Customs Appeals preferred by the Commissioner of Customs against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Chandigarh (for short, "the CESTAT") dated 07.06.2024 whereby the order of absolute confiscation of Areca Nuts imported by the two companies, namely, M/s Star Spice and M/s Sherry Network Private Limited, respondents in CUSAP No. 4 and 5 of 2024, respectively, by the order in original dated 14.12.2023, and the order which was further upheld by the order in Appeal dated 15.04.2024, have been set aside and the goods have been permitted to be re-exported on payment of fine of ₹ 25 lacs in lieu

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of confiscation and at the same time, the penalty imposed was reduced to ₹ 10 lacs.

2. The brief facts are being quoted from the case relating to CUSAP No.4 of 2024, wherein it has been stated that the respondents imported consignments of Areca Nuts claiming benefit of exemption from payment of customs duty in terms of Indo- Sri Lanka Free Trade Agreement notification dated 01.03.2023, which permits 100% exemption from levy of basic customs duty in respect of imports only from Sri Lanka. It is the case of the Revenue that as per the prior intelligence received by DRI, certain importers were engaged in malpractice of mixing consignments of Areca Nuts of Sri Lanka origin with that of shipments originating outside the SAARC territory and paying nil basic customs duty on the basis of notification dated 01.03.2000. It was suspected that the respondents were engaged in such exports and, therefore, the consignments imported by the respondents were put on hold and examined by the customs authority along with the officers of DRI in the presence of the authorized representatives of the respondent-importers. Samples were drawn from the said consignments and sent for testing to three different laboratories, namely, (i) Central Revenue Control Laboratory, New Delhi; (ii) Areca Nut Research and Development Foundation, Mangalore; and (iii) National Food Laboratory, Ghaziabad. It has been stated that as per the examination and testing of the representative samples, it was found that the Areca Nuts were not meeting the requirements as per FSSAI, 2011 and were found to be broken by moulds and insects. As per the report received from the Areca Nut Research and Development Foundation, the quality of samples of Areca Nuts was found to be very bad with infestation and visible moulds inside. The report

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further confirmed that the Areca Nuts were a mixture of Sri Lankan and Indonesian origin. The report received from National Food Laboratory, Ghaziabad reflected that the Areca Nuts were found with presence of visible fungal growth and musty, which did not confirm to the standards laid down under Regulation 2.3.55. of the Food Safety and Standards, Regulations, 2011. As per the report, the samples were, thus, found to be 'substandard' in terms of Section 3(1)(zx) and unsafe food as per Section 3(1)(zz)(x)(xi)(xii) of the Food Safety and Standards Act, 2006 (for short, 'the Food Act of 2006").

3. The adjudicating authority arrived at a conclusion that the imported consignment was contrary to the prohibition imposed under Section 25 of the Food Act of 2006. The respondents have fraudulently mis-declared the country of origin to avail the benefit of notification dated 01.03.2023 and that the imported consignment was not fit for human consumption. Apart from considering the reports of the concerned laboratories, it considered the evidence retrieved from the partner of the firm in the shape of phone records, chats, emails extracted by the forensic team on 05.10.2023, which reflected that the respondents had enquired about containers from Indonesia, which was to reach Colombo. There was conversation regarding hiding of low quality goods at the back of the container and the response of the partner of the respondents to the request by the exporter to make payment directly, thus, stating that he cannot show shipment through Indonesia. There were documents shared between the partner of the respondents and the exporter wherein payment from Sri Lanka to Indonesia were being shared. It was evident that the consignment from Indonesia was being re-routed through Sri Lanka in order to avail the undue

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benefit of the notification. The statement of the partner under Section 108 of the Customs Act, 1962 admitting of having such conversation was also noticed. It was contended by learned counsel for the appellant that the confiscation of goods under Section 111 (d) of the Customs Act, 1962 was rightly directed in terms of the provisions by the adjudicating authority. Therefore, the discretion exercised by it under Section 125 of the Customs Act, 1962 of absolute confiscation of goods was not liable to be interfered with.

4. Learned counsel for the appellant has taken pain to take this Court to the order dated 14.12.2023 passed by the adjudicating authority to submit that there was no occasion to interfere with the said order by the appellate authority. The request for re-export made by the respondent-importers was rejected. The respondents challenged the order in original by filing appeal before the appellate authority. In appeal the order dated 15.04.2024 passed by the adjudicating authority was upheld.

5. It was further submitted by learned counsel for the appellant that the respondents had not requested that the goods to be tested by any other 'A' credited laboratory to prove that the goods were of edible grade. The respondent-importers preferred appeal before the CSTAT, who vide its order dated 07.06.2024 partially allowed the appeal, reducing the penalty to ₹ 10 lacs and setting aside the order of absolute confiscation. It permitted the goods to be re-exported on payment of fine of ₹ 25 lacs in lieu of confiscation of goods.

6. Learned counsel for the appellant further submitted that the CSTAT has wrongly interfered with the discretion available to the Customs Authorities with regard to the imposition of fine and of absolute

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confiscation. There was no occasion to direct for re-exporting of the goods, which were prohibited to import in India. It was submitted that the evidence relating to the statements, the partner's conduct and the digital evidence of conversation with the supplier was collected in the year 2018 and can be considered while examining the goods, which were imported in 2023. Since the Areca nuts were found to be not consumable humanly, there was no occasion to direct the goods be re-exported. **It is further submitted that there is conscious mis-declaration.** He relies on the judgments of Supreme Court in ***U. P. State Road Transport Corporation and another vs Mohd. Ismail and others*** 1991 (3) SCC 239; ***Union of India vs Jain Shudh Vanaspati Limited*** 1996 (86) E.L.T. 460 (SC); ***Garg Woolen Mills (P) Limited vs Addl. Collr of Customs, New Delhi*** 1998 (104) E. L. T. 306 (SC); judgments of Bombay High Court in ***Commissioner of Customs (AP), Mumbai vs Alfred Menezes*** 2009 (242) E.L.T. 334 (Bom.); ***Jigesh Praveen Shah vs Union of India*** (2023) 8 Centax 3 (Bom.); and judgment of Madras High Court in ***Commissioner of Customs (AIR), Chennai-1 vs P. Sinnasamy*** 2016 (344) E. L.T. 1154 (Mad.).

7. It is further submitted that the observations of the Tribunal that the respondent-importer was not aware of the fact that the impugned goods are of substandard quality and not adhering to Indian standards, is a way of misleading the Court. It is further submitted that the guarantees sustained by the Tribunal is not in accordance with the provisions of the Customs Act and reduction of penalty cannot be sustained.

8. Per contra, the respondents have filed their written submissions. It is submitted that Section 25 of the Food Act of 2006 read with Food Safety Standard Authority of India Import (Regulations) 2017 requires that

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all imports of food items ought to be subject to the provisions of the Food Act of 2006. The respondent is a regular importer of food items and duly registered with the FSSAI and imported 6 consignments of Areca Nuts and filed Bills of Entries dated 17.09.2023, 01.10.2023, 08.10.2023, 08.10.2023, 08.10.2023 and 08.08.2023 at the Port of ICD CONCOR, Ludhiana. The consignments comprising of Sri Lankan origin Areca Nuts from M/s DLK Spice Export, 476/2, Kandy Road, Anwarama, Mawenella, Sri Lanka was done while various invoices which have been mentioned in the petition.

9. It is stated that in terms of the Customs Act, 1962 as well as Foreign Trade Policy, whenever any goods namely food items are being imported, the same are subject to Fumigation Certificate as well as Phytosanitary Certificate issued in terms of the requirements of FSSAI Department. The respondents on the basis of the aforesaid documents issued by the exporter filed bill of entries under Section 46 of the Customs Act for the purpose of clearance of goods. Since the imported Areca Nuts having originated from Sri Lanka, the same were subject to exemption from basic customs duty in terms of notification dated 01.03.2023. The respondents claimed the said exemption. It is submitted that the goods accompanied with the E.Country of origin certificate issued by the Sri Lankan Government duly affixed with bar code on the said certificates, which upon verification were linked to the Sri Lankan Website confirming the origin of goods from Sri Lanka. On 17.09.2023, the goods were imported vide bill of entry subject to examination and testing from Port Health Officer, Amritsar, who opined the samples were fit for human consumption. However, the officers of DRI and Custom Department examined the bill of entry and again drew samples on 09.10.2023.

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10. Learned counsel for the respondents further submitted that when the goods were not released, they requested for release of the goods but the same were retained for further testing, although there was no such requirement in law. It is submitted that as per FSSAI Import Regulations, 2017, procedure for testing has been prescribed and timelines for testing of samples have been laid down. But the appellant failed to follow the timelines and deliberately sent the same to three different laboratories. One consignment had already been tested and found to be fit for human consumption. The protest of the respondents was not taken into consideration and the samples were sent much after the goods had been imported to India. After sending the samples to the National Food Laboratory, Ghaziabad on 21.10.2023, the samples were again drawn on 26.10.2023 and forwarded to the Central Revenue Control Laboratory, New Delhi and it reported that the samples were found with visible fungal growth and musty in odour and do not confirm with the Food Safety and Standards Regulations 2011 and are unsafe for human consumption. The said report was not made available to the respondents and the Customs Department did not supply the test reports to the respondents although the same were required to be provided in terms of circular dated 18.07.2017.

11. It was further submitted by learned counsel for the respondents that the respondents vide their letter dated 19.10.2023 requested for re-testing of the samples. The writ petition was filed before this Court as the imported goods were subject to heavy demurrage and detention charges. The respondents were facing immense pressure from the supplier. The respondents vide letter dated 25.11.2023, 05.12.2023, 06.12.2023 and 12.12.2023 requested for re-export of the imported consignments. The re-

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testing was not acceded to and the Custom Department proceeded to reject the request for re-export. He submitted that the CESTAT ultimately accepted the request and the respondents did not want the concerned goods to be taken, having noticed the report of the laboratories, which they are not contesting. Further submitted that they should not be made to suffer on account of substandard material having been sent by the supplier to them. It is submitted that the order passed by the CESTAT does not warrant any interference.

12. We have carefully considered the written submissions as having been filed by both the parties and the judgments cited. We find that the only question which needs to be determined by this Court is whether the Tribunal has erred in setting aside the order in original and order in appeal whereby the absolute confiscation of the Areca Nuts imported by the respondents was ordered.

13. We find that the learned CESTAT while partly allowing the appeal, passed the following order:-

> *"19.1. Accordingly, the appeal No. C/60207/2024 is partially allowed modifying the impugned order in the following terms:*
>
> *i. Absolute confiscation is set aside and the appellants are allowed to re-export the impugned goods on payment of a fine, in lieu of confiscation, of Rs.25 Lakhs (Rupees Twenty-Five Lakhs only). Penalty imposed on the appellants under Section 112 of the Customs Act, 1962 is reduced to Rs.10 Lakhs.*
>
> *ii. The impugned goods are permitted to be re-exported subject to the compliance of the impugned order subject to the above modifications.*

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iii. The appellant shall submit an undertaking that the goods will not be routed back to the country.

iv. *An endorsement shall be made in the export documents to the extent that the goods are being re-exported for the reason that they are found to be unfit for human consumption as per Indian Standards."*

14. It has come on record that the respondents are regular importers having imported about 100 consignments of Areca Nuts. The goods were cleared after testing by the Public Health Officer at the custom stations. The Revenue Officers, however, in the present case seized the three consignments on the basis of messages exchanged between the partner of the firm and the foreign supplier in the year 2018 and proceeded to conclude that the Areca Nuts which have been imported in the year 2023 were wrongfully shown to be imported from Sri Lanka but the goods were actually brought from Indonesia.

15. Learned counsel for the respondents has candidly stated during the course of arguments that they have not challenged the reports of the Areca Nut Research and Development Foundation, Mangalore because they do not want to continue and keep the goods with them and want the same to be re-exported back to the concerned consigner. It has also been argued that the report from the Areca Nut Research and Development Foundation, Mangalore, has not been held to be reliable as the said institute is not credited by the Supreme Court while dismissing the SLP in the case of ***Commissioner of Customs (Preventive) vs Laltanpuh*** (2022) 1 Centax 4 (SC). We, therefore, accepted the contention raised by the Customs Department that the goods were found to be not fit for human consumption. The Areca Nuts were not fit or safe as per the National Food Laboratory,

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Ghaziabad. The question arises as to whether after such report is received, the authorities can be said to have correctly taken a decision to confiscate the substandard goods and not allow to be re-exported.

16. From the documents which have been noticed in the order in original dated 14.12.2023, it is apparent that the goods having been imported from Sri Lanka stands fully established. The report of Areca Nut Research and Development Foundation, Mangalore mentioned that the ceased Areca Nuts are mixture of Sri Lankan and Indonesian origin. The exemption from payment of custom duty is for imports only from Sri Lanka as per the notification No. 26/2000 dated 01.03.2023.

17. While the appellants have relied upon the said report to treat all the Areca Nuts to be of Sri Lankan origin, we find that the Supreme Court in **Laltanpuh**'s case (supra) has held that the report of the Areca Nut Research and Development Foundation, Mangalore, about foreign origin of ceased goods could not be relied upon. At the same time, there is a certificate of origin, duly signed by the Assistant Director of Commerce, Colombo, which has been placed on record as Annexure R-13, which has not been found to be forged by the authorities. The verification of the consignment by the Department of Commerce, Sri Lanka dated 09.10.2023 is also on record. Another certificate of origin of 18,000 kg of Areca Nuts containing Sri Lanka Areca Nuts is also on record. The respondents have also placed on record the gazette notification dated 26.03.2019 issued by the Democratic Socialist Republic of Sri Lanka whereby the import of Black Pepper, Areca nuts, Nutmeg/ Mace, Tamarind and Cinnamon is not permitted in Sri Lanka from any other country. Thus, it is apparent that the alleged allegation of Areca Nuts not being from Sri Lanka origin seems to be doubtful and on

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messages retrieved between the concerned partner of the respondents and the seller from Indonesia of the year of 2018, cannot be taken into consideration for the purpose of import of Areca Nuts done after 26.03.2019, when the aforesaid notification banning import of Areca Nuts, etc. from any other country in Sri Lanka was imposed.

18. A presumption against law cannot be allowed. Therefore, the basis of holding that there is an attempt to evade duty by the importers-respondents is found to be without basis.

19. It would be apposite to quote the findings of CESTAT, which are as under:-

> *"16. We find that the impugned goods have been tested to be unfit for human consumption as per FSSAI standards. Neither the Adjudicating Authority nor the Appellate Authority has given evidence vis-à-vis the Sri Lankan Standards. Moreover, it appears that the said conclusion has been arrived at with the presumption that there are no other uses of areca nuts other than for human consumption. We find that there are certain industrial uses of the areca nuts. On going through the technical sources, it is understood that areca nuts are used for the manufacture of paints; areca nut dust used for dyeing clothes and tanning leather, it can be used as an adhesive in ply board, areca nut husk is used to make many industrial products such as hardboard, insulation wool, cushions, paper, paper board and activated carbon. Thus, we find that it cannot be presumed that the impugned areca nut, if re-exported, would be used only for human consumption in Sri Lanka and elsewhere. It cannot also be presumed that the consignment will be routed back to India. We are of the considered opinion that while the appellants can be penalized for importing goods in violation of provision of*

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FSSAI and rules made there under, not permitting re-export would not serve any purpose. It has been more than 06 months since the import has taken place and it is likely that the goods will further deteriorate and would not have any commercial value and would be in the danger of losing industrial sage, if any. Allowing the same to further deteriorate would only cause unintended financial loss to the appellant end would cause wasteful outflow of foreign exchange from the Indian importer to the foreign buyer. The Department contends that no evidence of the foreign buyer accepting the consignment has been given. However, we find that wide letter dated 24.04.2024, M/s DLK Spice Export, Sri Lanka have requested the appellants to make the outstanding payment and to avoid financial strain, immediate action may be taken to re-export the goods. In view of the same, we are of the opinion that benefit of doubt can be given to the appellant as they are regular importer is not denied. Therefore, we find that ends of justice can be met if suitable redemption fine is imposed in lieu of confiscation and if the appellant is suitably penalized while permitting the re-export of the impugned goods. Indian Authorities should not have any objection if the impugned goods are re- exported. In case of such an apprehension, an endorsement can be made on the export documents that the goods are permitted to be re-exported as they were found to be unfit for human consumption as per Indian standards. We find that as the goods are of value of Rs.10 Crore Imposition of redemption fine of Rs 2 Cr is certainly harsh. We are of the considered opinion that a fine of Rs 25.00 Lakhs would be sufficient to meet the ends of justice and the goods can be permitted to be re-exported on payment of redemption fine."

21. The submission of learned counsel for the Revenue that once the authority has exercised its jurisdiction in terms of Regulation 10 (11) of

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the Food Safety & Standards (Import) Regulations 2017 and disallowed the re-export of food items, the CESTAT would not have taken another view, is found to be without any basis. The CESTAT hears an appeal, and therefore, all the arguments including the submissions relating to decision on Regulation 10 (11) of the Regulations 2017 can be examined by the Tribunal. Scope of Tribunal is wide enough to examine whether the discretion exercised by the authority was legal and proper. It can also take a different view after examining the reasons taken into consideration by the concerned authority. In the present case, the CESTAT found that the Areca Nuts may not be fit for human consumption, but the same are of such a nature which can be used for ancillary and industrial purposes by its original consignee or seller. Having reached to such a conclusion, it decided to direct the authority to allow the re-export of the food items which is provided as one of the option available under Regulation 10 (11) of the Regulations 2017. It, therefore, has interfered with the discretion exercised by the concerned authority and directed for re-export.

22. We also do not find force in the arguments raised by learned counsel for the appellant with regard to reducing of fine of ₹ 2 crores to ₹ 25 lacs and personal fine of ₹ 10 lacs, as no reason has come forward for imposing such a harsh fine. More so, when we find that the goods were sent by the seller to the importer without there being any participation of the importer in receiving substandard Areca Nuts. We, accordingly, reject the aforesaid submission of learned counsel for the appellant also.

23. We also find that the CESTAT has also examined the wasteful outflow of foreign exchange from Indian Importers for Foreign Buyers as one of the reasons for allowing the re-export. We find such reason to be

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sound and in accordance with public policy. We, therefore, do not find any ground to warrant interference. The appeals filed by the Revenue are found to be without merit and are accordingly dismissed.

If the goods have not been allowed to be re-exported, the authority shall now allow them to be re-exported forthwith.

24. All pending applications stand disposed of.

25. No costs.

(SANJEEV PRAKASH SHARMA)
JUDGE

14.11.2024 **(SANJAY VASHISTH)**
vs **JUDGE**

Whether speaking/reasoned Yes/No

Whether reportable Yes/No

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE EASWARAN S.

THURSDAY, THE 20TH DAY OF MARCH 2025 / 29TH PHALGUNA, 1946

WA NO. 2183 OF 2023

AGAINST THE ORDER/JUDGMENT DATED 10.11.2023 IN WP(C) NO.3124 OF 2023 OF HIGH COURT OF KERALA

APPELLANT/PETITIONER:

M/S. ITMA HOTELS INDIA PRIVATE LIMITED, ITMA HOTELS, PONNURUNNI NORTH, VYTILLA P.O, KOCHI, KERALA, REPRESENTED BY THE RESOLUTION PROFESSIONAL SHRI. KIZHAKKEKARAKURIAKOSE JOSE 682019, NEW ADDRESS ITMA HOTELS, PONNURUNNI NORTH, VYTILLA P.O., KOCHI, KERALA REPRESENTED BY ITS MANAGING DIRECTOR MR. TIJU VARGHEES CHAKO, PIN - 682019

BY ADVS.
SRI.K.SREEKUMAR (SR.)
M.BALAGOPAL
R.SREEJITH
AMMU CHARLES
THRESSY THOMAS
R.DEVIKA (ALAPPUZHA)
ANJALI MENON

RESPONDENTS/RESPONDENTS:

1 **THE ADDITIONAL COMMISSIONER OF CUSTOMS, CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS, OFFICE OF THE COMMISSIONER OF CUSTOMS, CUSTOM HOUSE, WILLINGTON ISLAND, COCHIN, PIN - 682009**

2 **THE DEPUTY/ASSISTANT COMMISSIONER OF CUSTOMS, CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS, OFFICE OF THE COMMISSIONER OF CUSTOMS, CUSTOM HOUSE, WILLINGTON ISLAND, COCHIN, PIN - 682009**

3 **STATE BANK OF INDIA, STRESSED ASSETS MANAGEMENT BRANCH (SAMB),1112, RAJA PLAZA, AVINASHI ROAD, COIMBATORE, REPRESENTED BY ITS ASSISTANT GENERAL MANAGER, PIN - 641037**

4 **STATE BANK OF INDIA, M.G. ROAD BRANCH, M.G. ROAD, ERNAKULAM, REPRESENTED BY ITS BRANCH MANAGER, PIN - 682016**

BY ADV SUVIN R MENON, CGC

OTHER PRESENT:

SRI. K. SREEKUMAR- SR. COUNSEL
SRI. P.V VINOD- SC FOR SBI

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20.03.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

Easwaran S., J.

This intra-court appeal is preferred by the writ petitioner aggrieved by the dismissal of WP(C) No.3124/2023 by the learned Single Judge by judgment dated 10.11.2023.

2. The short facts necessary for the disposal of the appeal are as follows:

The appellant/writ petitioner was under Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 initiated by the National Company Law Tribunal, Kochi. The petitioner had for the purpose of running a hotel, imported various capital goods from abroad under the Export Promotion Capital Goods Scheme announced by the Central Government, during the period between April, 2011 to March, 2014. At the time of the imports, the petitioner had furnished 45 Bank Guarantees for various amounts covering the amount of duty against the EPCG authorisations totalling to an amount of Rs.4,14,72,500/-. Since the petitioner was having financial constraints and in view of initiation of the insolvency proceedings, the project never took off and the imported goods were still available at the petitioner's premises in the packaged condition itself. While so, on 27.8.2022, 30.8.2022 and

31.8.2022, show cause notices under Sections 28(1) read with 124 of the Customs Act, 1962, were issued to the petitioner. According to the petitioner, since the amounts were due to the financial creditor, the 3rd respondent - State bank of India, an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 was moved before the Kochi Bench of the National Company Law Tribunal. While admitting the said application by order dated 31.12.2021, the NCLT, Kochi appointed an Interim Resolution Professional to carry out the resolution process of the petitioner as per the Code. In pursuance to the said order, a resolution plan was submitted, which was approved by the committee of creditors, and accordingly, the NCLT approved the same. The Customs Department, in the meantime, filed their claim before the resolution professional, who rejected the same. The dues of the Customs Department did not find a place in the resolution plan and finally the resolution plan was approved, and thereby the resolution applicant took charge of the affairs of the petitioner. After the rejection of the claim of the Customs Department by the resolution professional, the Customs Department issued a letter dated 11.1.2023 (Ext.P10) to the Bank to encash the Bank Guarantees which were given by State Bank of India on

account of the writ petitioner. Challenging Ext.P10, the petitioner approached this Court in the writ petition.

3. The learned Single Judge, who considered the writ petition, found that the challenge to the invocation of the Bank Guarantees cannot be made, except on fraud or irretrievable injury or loss caused to the person who has furnished the Bank Guarantee. Since none of the grounds were available in the writ petition, the challenge against Ext.P10 was repelled.

4. Heard Sri.K.Sreekumar, the learned Senior Counsel appearing for the appellant, and Sri.Suvin R.Menon, the learned Central Government Counsel appearing for respondents 1 and 2, and Sri.P.V.Vinod (Bengalam), the learned Standing Counsel appearing for respondents 3 and 4, State Bank of India.

5. The Senior Counsel raised twofold contentions; (a) the Bank Guarantees executed by the erstwhile State Bank of Travancore are no longer in force and have since expired and, therefore, the Customs Department cannot invoke expired Bank Guarantees; (b) The claim of the Customs Department was agitated before the resolution professional, who had rejected the claim. Against the dismissal of the claim by the resolution professional, the Customs Department, though had a remedy before the National

Company Law Tribunal, did not avail the same and, thereafter, the Department is not entitled to invoke the Bank Guarantee.

6. Per contra, Sri.Suvin R.Menon, the learned counsel appearing for the Customs Department with reference to the affidavit filed in the present appeal, contends that in the nature of the Bank Guarantees, it is not possible for the appellant to contend that they have expired. With reference to the clauses in the Bank Guarantees, a specimen of which is produced, the learned counsel contends that the Bank had agreed to make the Bank Guarantees alive until otherwise requested by the Customs Department.

7. Sri.P.V.Vinod (Bengalam), the learned counsel appearing for the Bank referring to the affidavit filed on their behalf sworn to by the Assistant General Manager, State Bank of India, Stressed Assets Management Branch (SAMB) asserts before this Court that the Bank Guarantees were alive only from 9.7.2011 to 8.7.2020. In fact, according to the learned Standing Counsel, the last date of lodgement of the claim was 8.7.2020. Under clause 7(2) of the Bank Guarantee, it is specifically agreed that the Bank Guarantee will be valid between 9.7.2011 and 8.7.2020, and any claim beyond the said period, the Bank is not obliged to honour. Thus, the Bank has

unequivocally stated before us that the Bank Guarantees in question are no longer valid and have since expired.

8. We have considered the rival submissions raised across the bar and are of the view that in the light of the unequivocal stand taken by the Bank in their affidavit dated 17.3.2025, Ext.P10 letter by which respondents 1 and 2 sought to invoke the Bank Guarantees cannot be sustained. Thus, we hold that invocation of the expired Bank Guarantees is not permissible under law and, therefore, Ext.P10 has no efficacy of law and is liable to be set aside.

9. At this point of time, the learned Central Government Counsel appearing for respondents 1 and 2 pointed out that the Bank cannot take a stand that the Bank Guarantees have expired, whereas going by the terms of the contract, they are obliged to keep the Bank Guarantees alive. We are afraid that in this proceedings we cannot adjudicate the disputed questions of fact touching upon the interpretation of the contract of the Bank Guarantees. Respondents 1 and 2 will have to take recourse to the appropriate proceedings under law.

Accordingly, we are of the view that the appellant is entitled to succeed. Hence, the writ appeal and the writ petition are allowed. Ext.P10 is set aside leaving open the rights of respondents 1 and 2

to take recourse to appropriate proceedings under law qua the Bank Guarantees issued by respondents 3 and 4, in accordance with law.

Ordered accordingly.

Sd/-
DR.A.K.JAYASANKARAN NAMBIAR,
JUDGE

Sd/-
EASWARAN S.,
JUDGE

jg

APPENDIX OF WA 2183/2023

PETITIONER ANNEXURES

Annexure A	**TRUE COPY OF THE ORDER DATED 29.03.2023 OF THE NCLT, KOCHI BENCH ALONG WITH THE APPROVED RESOLUTION PLAN**
Annexure B	**TRUE COPY OF THE EMAIL SENT BY THE APPELLANT TO THE 3RD RESPONDENT DATED 06.12.2023**
Annexure C	**TRUE COPY OF THE LETTER SENT BY THE APPELLANT TO THE 1ST AND 2ND RESPONDENTS DATED 15.12.2023**

RESPONDENT ANNEXURES

A true copy of acknowledgment of Google Pay receipt dated 07.03.2025

Annexure R1(a)	**A true copy of one of the Guarantee dated 14.01.2012 issued by the State Bank of Travancore in favour of the Hon'ble President of India, on the application of the Appellant**
Annexure R1(b)	**A true copy of the email dated 19.01.2023, issued by the Assistant General Manager of the State Bank of India, SME Branch to the 2nd Respondent**
Annexure R1(c)	**A true copy of the email dated 04.03.2023 issued by the Assistant General Manager of the State Bank of India, SME Branch**
Annexure R1(d)	**A true copy of the email dated 22.12.2023 issued by the Assistant General Manager of the State Bank of India, SME Branch to the License Section of Cochin Customs House**

Annexure R1(e)	**A true copy of the letter dated 06.10.2022 issued by the Assistant Commissioner of Customs, Customs House Cochin, to the Resolution Professional along with its Annexure**
Exhibit R/3-1	**A copy of the sanction letter dated 26.09.2013**
Exhibit R/3-2	**A copy of the one bank guarantee issued 9th July 2011**

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 26th March, 2025

\+ **W.P.(C) 3711/2025 & CM APPLs. 17331-32/2025**

BACKBONE OVERSEAS .....Petitioner

Through: Mr. Chinmaya Seth, Mr. A.K. Seth and Ms. Palak Mathur, Advocates.

versus

ASSISTANT COMMISSIONER OF CUSTOMS, FOREIGN POST OFFICE , NEW DELHI AND ANR. .....Respondents

Through: Mr. Jatin Singh, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE RAJNEESH KUMAR GUPTA

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

2. The present petition has been filed by the Petitioner- Backbone Overseas under Article 226 and 227 of the Constitution of India *inter alia* seeking issuance of an appropriate writ directing the Respondents to pass an order for unconditional and provisional release of the goods entered for export *vide* Postal Bill of Export No. 725259 dated 13th January 2025.

3. The case of the Petitioner is that it had filed a Postal Bill of Export (hereinafter, '*PBE*') for the purpose of export of ladies PVC slippers. The total value as per the PBE is Rs. 9,29,145.6/-. The said consignment was put on hold by the Customs Department on 13th January, 2025, however, no reasons were given and no seizure memo was even drawn until yesterday *i.e.* 25th

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March 2025.

4. The grievance of the Petitioner is that despite repeated letters to the Commissioner of Customs, requesting for release of the goods and seeking reasons for detention, no response has been received by the Petitioner.

5. The only response, which was received by the Petitioner was on 20th January, 2025. In the said response, the Office of the Assistant of Customs Commissioner Foreign Post Office, Kotla Road, New Delhi stated that the said matter has been referred to Special Intelligence and Investigation Branch (hereinafter, '*SIIB*'), ACC Export, New Customs House, Near IGI Airport, New Delhi.

6. It is the submission of ld. Counsel for the Petitioner that in terms of Circular No. 30/2013 dated 05th August, 2013, it has been repeatedly emphasised by the Central Board of Excise and Custom (hereinafter, '*CBIC*') that wrongful detention of export goods is not advisable and in fact continued detention of export goods in excess of three days must be brought to the notice of the Commissioner of Customs.

7. Ld. Counsel for the Petitioner further submits that in this matter, despite repeated letters to the office of the Commissioner of Customs, no response has been received, hence, he has filed the present writ petition seeking release of the goods.

8. Yesterday *i.e.* 25th March 2025, when the matter was listed, Mr. Jatin Singh had sought an adjournment to enable him to seek instructions. Today again it is submitted on behalf of Mr. Jatin Singh that three weeks may be granted as the SIIB, ACC Export, New Customs House, Near IGI Airport, New Delhi is looking into the matter.

9. This position is completely unacceptable to the Court, in as much as

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since 13th January, 2025, no seizure memo has been drawn as well as no *Panchama* has also been drawn by the authorities.

10. The Customs officer- Mr. Suryadeo Kumar, Inspector, SIIB, ACC Export, who is present in Court today, submits that the seizure memo was issued only yesterday *i.e.* 25th March 2025 in respect of the said goods detained by the Customs Department.

11. On behalf of the Department it is further submitted that there is an apprehension that the PVC slippers are grossly overvalued with an intention to claim duty drawbacks in an irregular and unlawful manner.

12. If the said apprehension exists on behalf of the Customs Department, then suitable steps would have to be taken by the Department in respect thereof but the consignment cannot be held up in this manner.

13. In fact the Circular No. 30/2013 dated 5th August 2013, itself recognises that there is a need for expedited clearing of goods unless they are prohibited goods. The said circular is set out below:

> *"**F.No. 401/179/2009-Cus.III***
>
> *Government of India*
> *Ministry of Finance*
> *Department of Revenue*
> *Central Board of Excise & Custom*
> *North Block, New Delhi,*
> *Dated the 5th August, 2013.*
>
> *To,*
> *All Chief Commissioner of Customs/Customs (Prev),*
> *All Chief Commissioner of Customs & Central Excise.*
> *All Directors General of CBEC.*
> *All Commissioners of Customs / Customs (Prev).*
> *All Commissioners of Customs (Appeals).*

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All Commissioners of Customs & Central Excise.
All Commissioners of Customs & Central Excise. (Appeals).

Subject : Provisional release of export - goods detained for investigation -reg.

Sir/Madam,

Attention is invited to the Board Circular No. 01/2011-Customs dated 04.01.2011 regarding provisional release of export goods that are detained or seized. The said Circular was issued with the objective of expediting the clearance of export goods and to ensure that where permissible by law, exports should not get unduly delayed, thereby causing congestion in ports as well as delays in fulfilment of export orders. Thus, it was instructed that provisional release of export goods that are suspected of being mis-declared or where declaration is to be confirmed by further enquiry / test or detained/seized for mis-declaration of quantity / value / description should be given on execution of Bond and suitable security to cover the redemption fine and penalty (Para 4 of Board Circular No. 01/2011-Customs dated 04.01.2011). Further, continued detention of export goods in excess of three days must be brought to the notice of the Commissioner of Customs.

2. It has been brought to the notice of the Board that the above instructions are not being implemented by certain field formations and exporting community is aggrieved by the long detention of exports goods. The matter has been raised in many forums and the issue of congestion in ports has also been highlighted by Inter- Ministerial Committee for boosting exports from Micro, Small & Medium Enterprises (MSMEs) sector, which pointed out that, besides the Boards aforementioned instructions, paragraph 2.42 of the Foreign Trade Policy also provides that export consignments shall not be withheld / delayed

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for any reason.

3. The Board has re-examined the subject matter. ***The view is that there can be no justification to hold up export consignments for long periods unless the export goods are prohibited under Customs Act, 1962 or ITC (HS) Policy. Essentially genuine exports must be facilitated and there should be no delays or hold ups of export goods.*** *Therefore, the Board strongly reiterates the instruction dated 04.01.2011 referred above. It shall be the responsibility of Commissioner of Customs concerned to ensure strict compliance of these instructions. Needless to state any deviation or lapse shall be proceeded against by the Board.*

3. A suitable Public Notice for information of trade and Standing Order for guidance of staff may be issued.

Yours faithfully,

(S.C.Ganger)

Under Secretary (Customs-III)

Fax: 011 23092173"

14. It is also submitted by ld. Counsel for the Petitioner that yesterday *i.e.* 25th March 2025, summons has been issued by the Customs Department seeking the following:

"1. to tender statement under Section 108 of the Customs At, 1962

2. Copy of purchase invoices against export goods under PBE No. 725259 dt. 13.01.2025 along with copy of purchase order placed to supplier, copy of ledger maintained with supplier along with statement of transactions.

3. copy of purchase order or agreement placed by the foreign buyer. The details of previous similar exported goods along with copy of invoices along with transaction

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details. Copy of GSTR-2A/2B and GSTR-3B returns for the period of January' 2025. Details of receipt of foreign remittances against previous exported goods, if any."

15. It becomes clear to the Court that the Customs Department is taking steps only after filing of the present writ petition. The delay in this manner would not be permissible as consignments of the Petitioner and other similarly placed persons are held up, when expedited steps are not taken for clearing of goods.

16. A perusal of the letters on record also show that on 20th January 2025 and 12th March 2025, repeated communications have been written by the Petitioner to the Commissioner of Customs *inter alia* requesting for release of the goods, but no response was elicited

17. Under these circumstances, it is directed that within a period of seven days, the Customs Department shall take a decision in this matter and provisionally release the goods, subject to any reasonable conditions that it deems appropriate on facts.

18. The Petitioner shall appear before the Customs Department on 27th March, 2025, *i.e.* tomorrow along with all the requisite documents as has been sought in the notice dated 25th March 2025.

19. The writ petition is disposed of in these terms. All the pending applications, if any, are also disposed of.

PRATHIBA M. SINGH, J.

RAJNEESH KUMAR GUPTA, J.

MARCH 26, 2025/*MR/ck*

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 26th March, 2025

\+ **W.P.(C) 3675/2025 & CM APPL. 17199/2025**

VEDANTA LIMITED .....Petitioner

Through: Mr. Aarohi Bhalla, Mr. Alok Agarwal, Mr. Prachit Mahajan, Mr. Shubham Singh and Mr. Mohit Kalra, Advs.

versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ORS. .....Respondents

Through: Mr. Aditya Singla, SSC, CBIC with Ms. Arya Suresh Nair, Adv.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE RAJNEESH KUMAR GUPTA

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

2. The present petition has been filed by the Petitioner- Vedanta Limited *inter alia* challenging the non-grant of relief in terms of drawback under Instruction No. 4/2019 issued by Central Board of Indirect Taxes and Customs (hereinafter, '*CBIC*') dated 11th October, 2019.

3. The case of the Petitioner is that it had sought duty drawback in respect of the amount it had deposited as clean energy cess, on utilisation of coal as a raw material, during the course of manufacturing of aluminium products. While calculating the brand rate for the purpose of duty drawbacks, the clean energy cess ought to be permitted to be added so that whenever the products are exported, exporters can get drawbacks inclusive of the amount of clean energy cess.

4. Between 2010-2017, various exports are stated to have been made by

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the Petitioner, however, at the relevant point in time there was no clarity as to whether clean energy cess which was charged on consumption of coal would be liable to be included in the calculation of the brand rate or not.

5. This position became clear after the clarification in Instruction No. 4/2019 dated 11th October, 2019, wherein the Central Board of Indirect Taxes and Customs clarified as under:

> *"Order-Instruction – Customs*
> *Instruction No. 04/2019- Customs*
> *F. No. 609/38/2019-DBK*
> *Government of India*
> *Ministry of Finance, Department of Revenue*
> *Central Board of Indirect Taxes & Customs*
> *New Delhi, dated 11th October, 2019*
>
> *XXXX*
>
> *Subject: Clarification regarding inclusion of cesses, surcharge, duties, etc. levied and collected under legislations other than Customs Act, 1962, Customs Tariff Act, 1975 or Central Excise Act, 1944 in Brand Rate of duty drawback.*
>
> *XXXX*
>
> *2.3 Regarding Clean Environment cess (erstwhile Clean Energy cess), Finance Act, 2010 vide Section 83(3) provided for levy and collection of Clean Energy cess as a duty of Excise and vide Section 83(7) empowered the Central Government to declare any of the provisions of Central Excise Act. 1944 applicable to the cess. Government vide notification No. 2/2010- Clean Energy Cess dated 22,06.2010 made, among others, the provisions related to refund under Section 11B of Central Excise Act, 1944 applicable to the cess. Vide instruction F, No. 354/72/2010-TRU dated 24,06.2010, the Board clarified that Clean Energy cess would also*

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> *be levied on import in the form of additional duty of Customs. Since the cess is collected as additional duty under Section 3 of Customs Tariff Act, the provisions of Customs Act, 1962 related to drawback, refund, etc. are applicable to it in terms of Section 3(12) of the Customs Tariff Act. 1975. Therefore, the incidence of Clean Environment cess (erstwhile Clean Energy cess) is required to be included in the calculation of Brand Rate. It may be mentioned that Clean Energy cess was renamed as Clean Environment cess in Finance Bill 2016 and the latter has been subsumed under GST w.e.f 01.07.2017."*

6. Pursuant to this clarification, the Petitioner moved before different Commissionerates seeking release of drawbacks, which were rejected by the respective Commissionerates as also by the CBIC Drawback Division on the ground that the same was barred by limitation.

7. According to Mr. Bhalla ld. Counsel for the Petitioner, until the instruction was issued on 11th October, 2019, the Petitioner was unaware that it could claim clean energy cess as part of the drawback and, therefore, it cannot be held that the application was barred by limitation.

8. In addition, Mr. Bhalla, ld. counsel for the Petitioner submits that the Customs and Central Excise Duties Drawback Rules, 1995 provide for power to relax the limitation period. Rule 17 of the said Rules reads as under:

> ***"17. Power to relax.***
> *- If the Central Government is satisfied that in relation to the export of any goods, the exporter or his authorised agent has, for reasons beyond his control, failed to comply with any of the provisions of these rules, and has thus been entitled to drawback it may, after considering the representation, if any, made by such exporter or agent, and for reasons to be recorded in writing, exempt*

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such exporter or agent from the provisions of such rule and allow drawback in respect of such goods."

9. Mr. Singla, ld. SSC for the CBIC, on the other hand, submits that since the exports relate to the period 2010-2017 and the maximum period to claim duty draw back is three months, which can be further extended for a period of another three months. Therefore, the applications seeking drawback are barred. It is submitted by the ld. SSC that the representations made by the Petitioner was after the said period and therefore, the rejection cannot be assailed and is perfectly valid.

10. The Court has considered the matter. A perusal of the letter dated 18th October, 2023 issued by the CBIC, Drawback Division shows that the rejection is completely cryptic and merely says that the "*request for relaxation is not considered favorably*". There are no other reasons which have been assigned for the rejection of the representation of the Petitioner.

11. In addition, even the impugned order dated 18th July, 2024 passed in reference to the representation dated 8th May, 2024 made by the Petitioner to the CBIC, Drawback Division reiterates the same position and does not assign any reasons.

12. The Instruction No. 4/2019 is clear to the effect that even pending applications were to be dealt with in terms of the said instruction. The relevant portion of the said instruction reads as under-

> *"3. Field formations are requested to deal with the pending applications for fixation of Brand Rate of duty drawback accordingly."*

13. Thus, the instructions were not merely prospective in nature. Benefit

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could be given even to pending applications.

14. Mr. Singla, ld. SCC further submits that since there was no pending application of the Petitioner on the said date, the rejection is completely valid.

15. On the other hand, the Petitioner's case is as soon as the Instruction No. 4/2019 was issued, within a period of three months, the representations have been made.

16. Under such circumstances, the reason for rejection, if any, ought to be spelt out and the order cannot be simply a cryptic order stating that the same has not been considered favourably.

17. Considering the same, this Court is of the opinion that the CBIC, Drawback Division ought to look into the matter and pass a reasoned order on the representations of the Petitioner while considering the purpose and the rationale behind issuance of the said Instruction No. 4/2019 dated 11th October 2019.

18. The present writ petition may be treated as a representation and a reasoned order may be passed by the CBIC, Drawback Division within three months.

19. All remedies of the Petitioner are left open in accordance with law.

20. The petition is disposed of in these terms. All pending applications, if any, are also disposed of.

PRATHIBA M. SINGH
JUDGE

RAJNEESH KUMAR GUPTA
JUDGE

MARCH 26, 2025
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CUSTOMS APPEAL (L) NO. 582 OF 2024

Commissioner of Customs NS-V … Petitioner

vs.

DOC Brown Industries LLP …Respondent

AND

CUSTOMS APPEAL (L) NO. 594 OF 2024
WITH
INTERIM APPLICATION (L) NO. 5902 OF 2024

Commissioner of Customs NS-V … Petitioner

vs.

Rahul Bajaj …Respondent

AND

CUSTOMS APPEAL (L) NO. 595 OF 2024

Commissioner of Customs NS-V … Petitioner

vs.

Seema Rubesh Shah …Respondent

Mr. Karan Adik with Ms. Sangeeta Yadav, for the Applicant/appellant.
Mr. Gopal Mundhra with Mr. Rajat Bharadwaj i/b. Economic Laws Practice, for the respondents.

CORAM: G. S. KULKARNI &
KISHORE C. SANT, JJ.
Reserved on: 19 March, 2024
Pronounced on: 20 March, 2024

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JUDGMENT (Per G. S. Kulkarni, J.)

CUSTOMS APPEAL (L) NO. 582 OF 2024

1. This appeal of the revenue is directed against the order dated 11 May 2023 passed by the Central Excise and Service Tax Appellate Tribunal whereby the respondent's appeal was allowed, by setting aside the order passed by the adjudicating officer (Commissioner of Customs), confiscating the goods and imposing penalties by an Order-in-Original dated 6 April 2022 passed on the show cause notice issued to the respondent.

2. The relevant facts are required to be noted: The respondent filed two bills of entries for clearance of goods described as "Caresmith Wave Body Massager". The concerned officer of the department, on examination of the goods, formed an opinion that the item, as imported by the respondent, is an "Adult Sex Toy", and therefore, was prohibited for import as per the Customs Notification No.01/1964- Customs dated 18 January 1964. On such premise, a show cause notice dated 6 January 2022 was issued to the respondent calling upon the respondent to show cause as to why such goods ought not to be confiscated and penalty imposed including on its partners.

3. The show cause notice was adjudicated by an Order-in-Original dated 6 April 2022 as passed by the Commissioner of Customs, who held that the

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import in question was of prohibited goods as per the Customs Notification dated 18 January 1964, hence, the goods were liable for confiscation under Section 111(d) of the Customs Act, 1962.

4. The findings as recorded by the Commissioner are peculiar and clearly appears to be quite astonishing and too far-fetched, when he reduces in writing his vivid imagination on what an equipment for a body massage would be and more particularly on his perception on the perceived uses, in the context of import in question. Apart from this, he also sought expert opinions from a physiotherapist and a gynecologist on the question as to whether the said product is a body massager or an adult sex toy. It appears that such experts clearly opined that although undoubtedly the item as imported was a body massager, however, it was also their opinion that the item could also be used for the purpose which the Commissioner contemplated.

5. Surprisingly, the Commissioner also referred to the provisions of Section 292 (2) of the Indian Penal Code, *inter alia* observing that such item of import would be hit by the said provision, which ordains that a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt

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the persons, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. The Commissioner, thereafter, considering the effect of Notification No.1/1964 dated 18 January 1964 issued under the provisions of Section 11 of the Customs Act, proceeded to hold that the import for such reasons would stand covered by Clause (ii) of the said notification, which prohibited import of any obscene book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object. The relevant observations made by the Commissioner in the Order-in-Original are required to be noted which read thus:-

> ""51.1 From the opinion of the experts both that of the department and importers. I find that it is accepted fact that the goods are in the natures of goods which act as body massagers and capable of and being used as devices as adult sex toys to satisfy basic instincts of people. The subject product is containing as article which falls under category of "Obscene Article" {Sex Toys) packaged in a cloth bag. The box is having a charging cable also. It is seen on Internet, that the item (identical) is being traded on amazon website-https:/ /www.amazon.in/Caresmith-Massager-Sports-Relidf- Entire/dp/B08 CZSD7KF. The reviews of customers and replies to customer queries by suppliers, like the Customers/users reviews on questions and answers on Caresmith Wave Body Massager are Question:- ls the massager safe to use for women? Also is it washable? Answer by one the customer : Yes safe and washable too. Question: - can this be used for masturbation? Answer by the customer: Yes it can be used just clean it before using confirms that the item is being used as Obscene Article (Sex Toys). Further contention of the importer that since the goods are sold through e-commerce websites like Amazon.in and Flipkart.com the items cannot be prohibited is not tenableas e-commerce companies like Amazon, Flipkart are not competent to decide whether the goods are prohibited or not.
>
> 51.2 In this context the provision of S. 292 of the Indian Penal Code reads as.
>
> Section 292 in The Indian Penal Code

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For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

51.3 Reference is drawn to Notification No. 1/ 1964 - Customs 18th January, 1964 which reads as :

GSR 87 - ln exercise of the powers conferred by section l1 of the Customs Act, 1962 (52 of 1962) and in suppression of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 41- Cus., dated the 1st February, 1963, the Central Government, being satisfied that it is necessary in the public interest so to do, for the purposes specified in sub-section (2) of that section, hereby prohibits the import of the following goods, namely:-

1. Counterfeit coin or coin made under the Native Coinage Act, 1876, or Indian Coin, which is not of the established standard in weight or fitness:

2. any obscene book, pamphlet, paper, drawing, painting, representation, figure or article:

… … … …

51.3 This leads me to conclude that the goods imported viz "Caresmith Wave Body Massager" are being marketed not primarily as a message device but as a sex toy. The purpose is not to be used as a device to provide relief to muscular stress but to provide stimulation and erotic pleasure. Accordingly, I hold that the impugned goods viz., "Caresrnith Wave Body Massager" are Adult Sex Toys and are therefore, prohibited goods which cannot be allowed to be released into the Country for consumption and therefore, are required to be absolutely confiscated."

6. The Commissioner, accordingly, passed the following order:

"55. I find that the importer had mis-declared the description of the goods. The invoice produced at the time of import did not show the correct description of the goods. It appeared that the importer is attempting to smuggle the prohibited goods Sex Toys in guise of "Caresmith Wave Body Massager". The impugned goods are not only visually but also intended to be used as obscene goods. Further, the medical opinion as brought out in foregoing paras also indicate that

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> these can be used as Sex articles thus, it appears that the goods i.e. "Caresmith Wave Body Massager" imported by importer, Doc Brown Industries LLP vide abovementioned 7 Bills of Entry as per table-1 total declared Assessable value of Rs. 1,74,87,298/- (Rs. One Crore Seventy Four Lakh Eighty Seven Thousands Two Hundred and Ninety Eight only) arc liable to confiscation under section 111(d) & section 111(m) of the Customs Act, 1962."

7. The respondent being aggrieved by the Order-in-Original, approached the tribunal in the appeal in question. The tribunal, considering the approach of the Commissioner and the contentions as urged on behalf of the department, severely criticized the findings as recorded by the Commissioner and held that the view taken by the Commissioner was purely the Commissioner's imagination, to categorise the item not as a body massager, but an Adult Sex Toy. It was observed that the sale of body massagers within the national boundaries was not subjected to any prohibition. In discarding the submission of the revenue to that effect, it was observed that the adjudicating authority had appeared to have found a cause to pause for ascertainment of his authority to determine goods as 'obscene' solely in international transactions, while no such restrictions were placed on domestic transactions, on such category of goods. It was observed that the adjudicating authority had made erroneous construction of the words as contained in Clause (ii) of the notification and the stand of the adjudicating officer based on the potential user of the impugned goods to regard the goods as obscene and prohibited, was patently illegal. The tribunal observed that the finding of the adjudicating

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authority that the impugned goods merit confiscation was “too wide off the mark”, considering as to what the law would mandate and accordingly allowed the appeal filed by the respondent, observing that the findings of the Commissioner to be totally untenable. It is on the above backdrop, the present appeal has been filed, proposing the question of law which we advert hereinbelow.

8. The revenue has urged the following substantial questions of law for our consideration in the present appeal:-

> “1. Whether the CESTAT erred in holding at paragraph 27 of the Impugned Order that "The finding of the adjudicating authority that the impugned goods merit confiscation is, thus, too wide off the mark, as Jar as the law invoked therein is concerned, on several counts. We note that the 'claim' of the importer has not been controverted and that the adjudicating authority has not placed any evidence on record in support of his conclusion on 'preference' in usage." when clearly the Customs had relied upon several reviews by customers on the website, and also a report by DR. GD POL foundation clearly stated that it can be used as a sex toy and head of NMMC hospital Vashi and also opinion of physiotherapy doctor Miss Prachi Shah who stated that the subject goods will not cause any trauma or harm if it is used as a device for pleasure?
>
> 2. Whether the CESTAT erred in holding at Para 28 of the impugned order that "No such judicial determination on 'body massagers' has been relied upon by the adjudicating authority'' when the law itself is clear under the Customs Notification 1 / 1964 as issued under Section 11 of the Customs Act 1962 wherein obscene articles are prohibited as p e r Sr. No. 2 of the notification no. 01/64-Cus dated 18.01.1964 read with section 292 of the Indian Penal Code 1860?
>
> 3. Whether the CESTAT erred in holding at Para 31 of the impugned order "That the impugned notification lacked definition of 'obscene' was not unknown to the adjudicating authority is not in doubt as seen from the attempt to fill that gap by reference to deeming provision in the Indian Penal

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> Code, 1860." when it is mandatory and infact necessary to read the general definition of obscene as laid under Section 292(b) of the IPC 1860 as it also deals with imports?
>
> 4. Whether the CESTAT erred in passing a complicated and a convoluted order riddled with complex jargon rather than simply the issue?"

9. We have heard learned Counsel for the parties. We have perused the record.

10. At the outset, we may observe that the entire basis for the Commissioner to regard the goods in question which are 'body massagers' to be adult sex toys appears to be his perception on a reading of the notification No.1/1964 dated 18 January 1964. As on date, such notification is stated to be valid, although it is almost 60 years old. It is quite possible that in regard to some of its contents, the notification may also have lost its efficacy in the contemporary times. Be that as it may, as the said notification was the very foundation to trigger the Commissioner's thoughts on the issue that the goods are prohibited goods in passing the Order-in-Original, we need to note the said notification, which reads thus:-

> "Notification-Customs - Customs - Non Tariff
> (Department of Revenue)
> Notification No. 1/1964-Customs
> (As amended by Notification No. 48/2007 dated 8/5/2007)
>
> New Delhi, the 18th January, 1964
>
> GSR 87- In exercise of the powers conferred by section 11 of the Customs Act, 1962 (52 of 1962) and in suppression of the notification of the

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Government of India in the Ministry of Finance (Department of Revenue) No. 41- Cus., dated the 1st February, 1963, the Central Government, being satisfied that it is necessary in the public interest so to do, for the purposes specified in sub-section (2) of that section, hereby prohibits the import of the following goods, namely:-

i. Counterfeit coin or coin made under the Native Coinage Act, 1876, or Indian Coin, which is not of the established standard in weight or fitness:

ii. any obscene book, pamphlet, paper, drawing, painting, representation, figure or article:

iii. Omitted

iv. Ormitted

v. goods made or produced beyond the limits of India and having applied thereto any name or trade mark being or purporting to be the name or trade mark of any person who is manufacturer, dealer or trader in India unless-

a. The name of trade mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place beyond the limits of India, and

b. The country in which that place is situated is in that indication indicated in letters as large and conspicuous as any letter in the name of trade mark and in the English language:

(vi) piece goods manufactured outside India, such as are ordinarily sold by length or by the piece, if each piece has not been conspicuously marked-

a. with the name of the manufacturer, exporter, or whole-sale purchaser in India, of the goods, and

b. with the real length of the piece in standard yards or standard meters inscribed in the international form of numerals;

(vii) Ormitted

(viii) goods which are required by a notification under section 139 of the Trade Marks Act, 1999, to have applied to them an indication of the country or place in which they were made or produced or the name and address of the manufacturer or the person for whom the goods were manufactured uniess such goods show such indication applied in the manner specified in the notification;

(ix) cotton yarn manufactured outside India, such as is ordinarily imported in bundles, if each bundle containing such yarn has not been

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conspicuously marked-

a. with the name of the manufacturer /exporter, or whole-sale purchaser in India, of the goods, and

b. with an indication of the weight and the count of the yam contained in it, accordance with the rules made under section 82 of the Trade Marks Act, 1999

(x) cotton sewing, darning crochet or handicraft thread manufactured outside India, if each of the units in which the thread is supplied has not been conspicuously marked-

a. with the name of the manufacturer, exporter, or whole-sale purchase in India, of the goods, and

b. with the length or weight of the thread contained in it and in such other manner as is required by the rules made under section 82 of the Trade Marks Act, 1999.

(No.1 Cus/F.No.4/10.63Cus.VIII)

S.VENKATESAN
Dy.Secretary

(Clauses (iii), (iv) and (vii) has been omitted; by Notification No. 48/2007 dated 8/5/2007)

(In clause (viii), for the words and figures" section 117 of the Trade and Merchandise Marks Act, 1958," the words and figures" section 139 of the Trade Marks Act, 1999" has been substituted; by Notification No. 48/2007 dated 8/5/2007)

(In sub-clause (b), for the words and figures" section 75 of the Trade and Merchandise Marks Act, 1958," the words and figures" section 82 of the Trade Marks Act, 1999" has been substituted, by Notification No. 48/2007 dated 8/5/2007)

(In sub-clause (b), for the words and figures" section 75 of the Trade and Merchandise Marks Act, 1958," the words and figures" section 82 of the Trade Marks Act, 1999" has been substituted; by Notification No. 48/2007 dated 8/5/2007)"

(emphasis supplied)

11. The only relevant portion of the aforesaid notification is the underscored portion being Clause (ii), as referred by the Commissioner to label

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the goods as prohibited. Such clause prohibits import of the goods, namely, any obscene book, pamphlet, paper, drawing, painting, representation, figure or article. Necessarily, in our opinion, the different items as set out in Clause (ii) are required to be read *ejusdem generis.* These machines like massagers certainly cannot be compared with the companion items in the said entries which are in the nature of book, pamphlet, paper, drawing, painting, representation, figure or article, etc.

12. This apart, we are in complete agreement with the findings as recorded by the tribunal that it was totally unwarranted and in our opinion, perverse for the Commissioner to take recourse to clause (ii) of the said Notification to regard the goods in question as prohibited goods, for more than one reason. Firstly, it was clearly the figment of the Commissioner's imagination and/or his personal perception that the goods are prohibited iteams. This was far from the legal consequence as brought about by the notification that the goods could be so categorized. We may add that such thinking of the Commissioner was beyond anybody's control. The notification also could not have supported such perception of the Commissioner when he regarded the goods as obscene. As rightly observed by the tribunal, and obviously as body massagers being traded in the domestic market, were not regarded as prohibited items, was certainly a relevant consideration.

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13. Further and most significantly the very foundation of the objection of the Commissioner being on the basis of an imaginary / probable use of the goods, for the purposes as opined by him, raises more complications. If the test of mere imagination or ingenuity is to be applied to prohibit clearance of any goods, this would cross all boundaries of the customs officials being governed by law and the rules. In the facts of the present case, the Commissioner (adjudicating officer) has failed to act as a prudent official who would be expected to act reasonably in deciding the issues of clearance of goods in question, which ought to have been strictly in accordance with law. Any perverse application of law would fall foul of the rules of legitimacy and fairness expected from a quasi judicial authority. Such approach of the Commissioner has been rightly criticized by the tribunal. If what was observed by the Commissioner in the order-in-original is accepted to be the only test, it would amount to accepting personal views of the officer which would be something unknown to law. Such approach is certainly not permissible. We also say this in the context of the opinions which were gathered by the Commissioner. These experts invited by the department clearly opined that the goods in question were body massagers which could be subjected to other uses. Thus, merely because the goods can be subjected to an alternative use, of the nature, as the Commissioner contemplated, this can never be the test to hold that the goods were prohibited, when they otherwise satisfied the test of

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goods, which could be imported and sold. Thus, there was no material before the adjudicating officer, to categorize the goods under clause (ii) to be any obscene book, pamphlet, paper, writing, drawing, painting, representation, figure or article, and of objectional description, falling under the notification. Such view of the Commissioner was patently perverse.

14. In the light of the aforesaid discussion, we are of the clear opinion that no substantial question of law would arise for our consideration as raised on behalf of the Revenue. The tribunal is correct in its view when it set aside the orders passed by the Commissioner. The appeal is without merit. It is accordingly rejected.

15. Dismissed. No costs.

Customs Appeal (L) No. 594 of 2024 & Customs Appeal (L) No. 595 of 2024

16. These companion appeals are of the partners of M/s. Doc Brown Industries LLP who were aggrieved by an order imposing penalties by the adjudicating officer. In view of our aforesaid judgment confirming the order passed by the tribunal in the revenue's appeal against the firm, the present appeals are also required to be rejected. They are rejected for the reasons we have set out in deciding the aforesaid appeal against the revenue and in favour of the firm.

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17. Dismissed. No costs.

18. In view dismissal of Customs appeal (l) No.594 of 2024, pending Interim Application (L) No.5902 of 2024 would not survive. It is accordingly disposed of.

(KISHORE C. SANT, J.) (G. S. KULKARNI , J.)

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