CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 60758 of 2019

[Arising out of Order-in-Original No. COMMR/ASR/LDH/CUSTM/05/2019 dated 28.05.2019 passed by the Commissioner of Customs, Ludhiana]

Rajvinder Singh Bath **……Appellant**
Manager M/s Gursam International
B-29/1839/122, Street No. 8, Suraj Nagar,
New Shimlapuri, Ludhiana - 141203

VERSUS

Commissioner of Customs, Ludhiana **……Respondent**
ICD GRFL, G.T. Road
Sahnewal, Ludhiana - 141001

with

Customs Appeal No. 60759 of 2019

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M/s Gursam International **……Appellant**
B-29/1839/122, Street No. 8, Suraj Nagar,
New Shimlapuri, Ludhiana - 141203

VERSUS

Commissioner of Customs, Ludhiana **……Respondent**
ICD GRFL, G.T. Road
Sahnewal, Ludhiana - 141001

APPEARANCE:

Present for the Appellants: Mr. Jagmohan Bansal & Mr. Naveen Bindal, Advocates

Present for the Respondent: Mr. Rajiv Gupta & Mr. M.S. Dhindsa, Authorised Representatives

CORAM: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

INTERIM ORDER NO. 1-2/2021 dated 03.02.2021

FINAL ORDER NO. 60070-60071/2026

DATE OF HEARING: 27.11.2020
DATE OF DECISION : 20.01.2026

PER: ASHOK JINDAL

These appeals have been filed against the impugned order dated 28.05.2019, in which the show cause notices have been issued on 07.10.2016.

2. The facts of the case are that the appellants are importers of bicycle parts. An intelligence was gathered that the appellants were engaged in evasion of customs duty by loading bicycles parts from China routing the same through Malaysia and availing wrongly benefit of Notification No. 46/2011-Cus dt. 01.06.2011 issued under Preferential Trade Agreement between the Governments of Member States of the ASEAN and the Republic of India by way of mis-declaring the country of origin, therefore, the investigation was conducted. On the basis of the investigation, it was revealed the modus operandi of the appellants, whereby, it was found that the bicycles parts of China origin were routed through Malaysia port to avail wrongly the benefit of exemption notification issued under Preferential Trade Agreement which was admitted by the appellants; therefore, the show cause notices were issued and adjudicated on the basis of documents recovered and statements recorded during the course of investigation. The impugned demand were confirmed along with interest. A redemption fine was also imposed on provisionally released goods. In view of confiscation, penalties were imposed on both the appellants. Against the said order, the appellants are before us.

3.1 The ld. Counsel for the appellants submitted that the impugned order is not sustainable in the eyes of law as in this case, the show

cause notices were issued on 07.10.2016, whereas adjudication has taken place on 28.05.2019 as per amended explanation 4 to Section 28 of the Customs Act, 1962 and as held by Hon'ble Punjab & Haryana High Court in the case of *M/s Prabhat Fertilizers & Chemical Works vs. CC (Import)* in *C.W.P. No. 23433 of 2019* and *M/s Harkaran Dass Vedpal vs. U.O.I.* in *C.W.P. No. 10889 of 2015 dt. 22.07.2019.*

3.2 He further submitted that Section 28 deals with demand of duty not levied or short levied or not paid or short paid. It is a case of entitlement of exemption notification which can be denied only after re-assessment of bill of entry. Section 28 does not deal with determination of entitlement of exemption. In civil law, it may be called as execution of decree and it is well known fact that execution is meaningless without decree. There is no Section or Rule under Customs Act which prescribes mode, manner or method of re-determination of exemption notification. In the absence of power prescribed under the Act/Rule itself, the Department has no authority to issue show cause notice under Section 28 to re-determine or hold any claim of exemption as duty not levied or short levied or not paid or short paid. It is a settled law that no demand can be made in the absence of power/mechanism prescribed under the Act or Rule made thereon. To support, he relied on the decision of Hon'ble Apex Court in the case of *CCE vs Larsen & Toubro – 2015 (39) STR 913 (SC).* He also relied on the decision of Hon'ble Apex Court in the case of *ITC Ltd vs. CCE, Kolkata-IV – 2019-TIOL-418-SC-CUS-LB* to say that without challenging the assessment made under Section 17 of the Customs Act, 1962, the refund claim cannot be entertained under

Section 27 of the Customs Act, 1962. It is his submission that Section 27 and Section 28 are the machinery provisions which provide the procedure to be adopted in case of refund or demand of duty. In the absence of amendments/modifications have been made in the bill of entry on the basis of which assessment has been made, the proceedings under Section 28 of the Act cannot be initiated. He also submitted that the said view of the Hon'ble Apex Court has been followed by the Hon'ble Punjab & Haryana High Court in the case of *M/s Jairath International And Another vs. U.O.I. – 2019-TIOL-2459-HC-P&H-CUS*.

3.3 It is further submission that at the time of clearance of imported goods, the Revenue examined the declared value, duty and claim of exemption under Notification No. 46/2011-Cus dt. 01.06.2011. From the conspectus of examination order of each and every bill of entry, it would be gleaned that claim of exemption notification was duly examined prior to clearance of goods. The goods allowed to be cleared without disturbing the self assessment made by the appellants which otherwise is re-assessment of the self assessment made by the appellants. Therefore, the question arises that whether the Revenue at this stage can re-assess exemption claim when goods are no more imported goods. There is no provision permitting re-assessment of claim of exemption and there is only remedy of appeal with both the parties. The assessing authority cannot re-assess claim of exemption and in case of any grievance, he has right to file appeal which the Revenue failed to do so. Therefore, on this ground itself, the appeals are to be allowed and the impugned order is to be set aside.

3.4 He further submitted that the whole case is based upon the documents/conversations recovered from emails which were taken during the investigation but the provisions of Section 138C of the Act has not been followed. The printouts as document are admissible only if accompanied by certificate in terms of Section 138C of the Act obtained at the time of taking printouts. Any documentary evidence by way of electronic record under the Act can be proved only in accordance with procedure prescribed under Section 138C of the Act which postulates admissibility of electronic record. The purpose of Section 138C of the Act is to sanctify evidence in electronic form, generated by a computer. The very admissibility of documents i.e. micro films, facsimile copies of documents and computer printouts as documents and as evidence depends on the satisfaction of four conditions prescribed under Section 138C(2) of the Act. There is nothing in the whole impugned order that DRI complied with Section 138C of the Act while placing reliance upon documents/conversation printouts from the computer or hard disks resumed during the course of investigation. Therefore, the documents relied upon by the Revenue are not admissible and the proceedings on the basis of inadmissible documents/conversation as evidence are not sustainable in the eyes of law. To support, he relied upon the decision of this Tribunal in the case of *CCE vs. Vishal Gupta & Others vide Final Order No. A/63225-63234/2018 – Tribunal Chandigarh*.

4.1 On the other hand, the ld. AR submitted that the decision in the case of *M/s Harkaran Dass Vedpal (supra)* relied upon by the appellants is not applicable to the facts of this case as in the said case, the show cause notice was issued on 19.03.2009 and in the

case in hand, the show cause notices have been issued on 07.10.2016 and the explanation 4 to Section 28 clearly states that the said explanation is not applicable to the show cause notices issued during the period between 14.05.2015 till 28.03.2018.

4.2 With regard to the issue that the show cause notice cannot be issued without filing appeal against the assessment of bill of entry following the decision in the case of *ITC Ltd (supra),* it is a submission that the Hon'ble Apex Court was dealing with the definition of export goods and application of valuation rule to the exported goods. In the present case, there is no issue of valuation of exported goods or imported goods rather it is a case where importer ahs violated Section 46 of the Customs Act by mis-declaration in the bill of entry regarding the country of origin of the goods as Malaysia whereas these were of China. The show cause notices have been issued under Section 28 read with Section 111 of the Customs Act only on duty short paid by wrongly availing the exemption under Notification No. 46/2011-Cus dt. 01.06.2011.

4.3 He relied on the decision of Hon'ble Apex Court in the case of *U.O.I. vs. Jain Shudh Vanaspati Ltd – 1996 (86) ELT 460 (SC)* and on the decision of Hon'ble Madras High Court in the case of *Venus Enterprises vs. C.C., Chennai – 2006 (199) ELT 405 (Mad.).* He also relied on the decision of Hon'ble Apex Court in the case of *C.C., Mumbai vs. Virgo Steels – 2002 (141) ELT 598 (SC)* to say that the power of recovery duty which have escaped collection is a concomitant power arising out of levy of customs duty under Section 12 of the Act and same does not emanate from Section 28 of the Act

and Section 28 only provided for procedure aspect for recovery of duty.

4.4 He further submitted that the well settled legal position is that demand of duty can be made under Section 28 without reviewing the assessment under Section 129(d) as has also been reiterated by this Tribunal in the case of *Mahindra & Mahindra Ltd – 2014 (312) ELT 545 (Tri. Mumbai)*.

4.5 He further submitted that the relied upon documents i.e. emails which have been retrieved from web-based email accounts i.e. gmail.com stored on servers maintained by Google and not from emails stored in computers installed in the factory and office premises of the appellants. The documents have been printed on different dates from two email accounts namely rajvinbath@gmail.com owned and operated by Sh. Rajvinder Singh Bath, Manager (Import/Export) of the appellants and gursaminternational@gmail.com owned and operated by Sh. Samarjeet Singh, proprietor of the appellants and any documents printed out from these email addresses are in fact documents produced by them or have been seized from their custody and as such are covered under Section 139 of the Act and it leaves no doubt that unless the contrary is proved that the signature and other part of documents are genuine. Moreover, all the printouts are taken from the email accounts were duly signed by the respective owners of the said email accounts in token of its correctness. This is not a sole evidence. There is a corroborative evidence bringing out one to one co-relation of the well organized fraud which also stands admitted in their statements recorded under Section 108 of the Act,

which is an admissible evidence. To support his contention, he relied on the following decisions and prayed that the appeals resulting to be dismissed.

(a) Copier Force India Ltd vs. CCE, Chennai – 2008 (231) ELT 224 (Tri. Chennai)

(b) Shri Ulanganayagi Ammal Steels vs. CCE, Trichy – 2008 (231) ELT 434 (Tri. Chennai)

(c) CCE, Trichy vs. Shri Ulanganayagi Ammal Steels – 2009 (241) ELT 537 (Tri. Chennai)

(d) K.I. Pavunny vs. Asst. Collec., Cochin – 1997 (90) ELT 241 (SC)

(e) Asst. Collec., Rajahmudry vs. Duncan Agro Ind. Ltd. – 2000 (120) ELT 280 (SC)

(f) Naresh J Sukhwani vs. U.O.I. – 1996 (83) ELT 258 (SC)

(g) Swati Menthol & Allied Chem Ltd vs. Jt. Dir., DRI – 2014 (304) ELT 21 (Guj.)

5. Heard both the sides and considered the submissions.

6. From the above arguments, the following issues arises:

(i) Whether the show cause notices issued on 07.10.2016 and adjudicated on 28.05.2019 shall stand vacated in terms of the explanation 4 to Section 28 of the Customs Act, 1962 or not?

(ii) Whether the show cause notice can be issued for recovery under Section 28 of the Customs Act, 1962 without challenging the assessment under Section 17 of the Customs Act 1962; and

(iii) Whether in the absence of following the procedure prescribed under Section 138C of the Customs Act, 1962, the documents relied by the adjudicating authority are admissible or not?

Issue (i) Whether the show cause notices issued on 07.10.2016 and adjudicated on 28.05.2019 shall stand vacated in terms of the explanation 4 to Section 28 of the Customs Act, 1962 or not?

7. To deal the issue, we have to see the provisions of Section 28 of the Customs Act, 1962 and explanation 4 w.e.f. 29.03.2018 which is as follows:

> ***"Un-amended Section 28 read as under:***
>
> ***SECTION 28. Recovery of duties not levied or not paid or short-levied or short-paid 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 shortlevied 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.*
>
> ***Provided** that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.*
>
> *(2) xxxxxxxx*
>
> *(3) xxxxxxxx*
>
> *(4) Where any duty has not been levied or has been shortlevied 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) xxxxx

(6) xxxxx

(7) xxxxx

(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, where it is possible to do so, in respect of cases falling under clause (a) of sub section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section(4).

(10) xxxxxxx

(11) xxxxxxx

Explanation 1. Xxxxxx

Explanation 2. xxxxxx

Explanation 3. xxxxxx

W.e.f. 29/03/2018, Sub-section (9) of Section 28 has been amended and a new Sub-section (9A) alongwith explanation 4 has been inserted.

Amended provisions are reproduced as under-

(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) <u>within one year from the date of notice, in respect of cases falling under sub-section (4).</u>

***Provided** that where the proper officer fails to so determine within the specified period, any officer senior in rank to the proper officer may, having*

regard to the circumstances under which the proper officer was prevented from determining the amount of duty or interest under sub-section (8), extend the period specified in clause (a) to a further period of six months and the period specified in clause (b) to a further period of one year:

***Provided** further that where the proper officer fails to determine within such extended period, such proceeding shall be deemed to have concluded as if no notice had been issued.*

(9A) Notwithstanding anything contained in sub-section (9), where the proper officer is unable to determined the amount of duty or interest under sub-section (8) for the reason that –

(a) an appeal in a similar matter of the same person or any other person is pending before the Appellate Tribunal or the High Court or the Supreme Court; or

(b) an interim order of stay has been issued by the Appellate Tribunal or the High Court or the Supreme Court; or

(c) the Board has, in a similar matter, issued specific direction or order to keep such matter pending; or

(d) the Settlement Commission has admitted an application made by the person concerned, the proper officer shall inform the person concerned the reason for non-determination of the amount of duty or interest under sub-section (8) and in such case, the time specified in sub-section (9) shall apply not from the date of notice, but from the date when such reason ceases to exist.

***Explanation 4 –** For the removal of doubts, it is hereby declared that in cases where notice has been issued for non-levy, not paid, short-levy or short paid or erroneous refund after the 14th day of May, 2015, but before the date on which the Finance Bill, 2018 receives the assent of the President, they shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which such assent is received."*

Further, the said explanation has been amended by the Finance Bill, 2020. The same is reproduced as under:

***"Explanation 4 –** For the removal of doubts, it is hereby declared that notwithstanding anything to the contrary contained in any judgment, decree or order of the Appellate Tribunal or any court or in any other provision of this Act or the rules or regulations made there-under, or in any other provision of this Act or the rules or regulations made there-under, or in any other law for the time being in force, in cases where notice has been issued for non-levy, short-levy, non-payment, short-payment or erroneous refund, prior to the 29th day of March, 2018, being the date of*

commencement of the Finance Act, 2018, such notice shall continue to be governed by the provisions of Section 28 as it stood immediately before such date."

As per the said provisions the contention of the Revenue is that for the show cause notice issued between the period from 14.05.2015 till 28.03.2018, the explanation dated 28.03.2018 is not applicable.

8. Admittedly, in this case the show cause notices have been issued on 07.10.2016; therefore, the said explanation is of no help for the appellants; but on this issue, the Hon'ble High Court of Punjab & Haryana, which is a jurisdictional high court, has dealt this issue in the case of *M/s Harkaran Dass Vedpal (supra)*, wherein the Hon'ble High Court has observed as under:

"14. *From the bare perusal of the afore-quoted amended Sub-section (9) and newly inserted (9A) of Section 28 w.e.f. 28.03.2018, it is evident that authorities are bound to pass order within one year from the date of Show Cause Notice in cases of Custom Duty not paid/short levied and said period may be extended for a further period of one year by any officer senior in rank to the proper officer having regard to the circumstances under which proper officer was prevented from passing an order before the expiry/lapse of the initial stipulated one year. Still further in case any circumstance as noticed in Sub-section (9A) exists, the extended period of one year provided in Sub Section 9 shall commence from the date when such reason ceases to exist provided the proper officer informs the person concerned of the reason for such non determination of amount of duty or interest under Sub Section 8. Thus the only outcome of non adjudication by the proper officer within one year without invoking of Sub-section (9A) or within the extended period of one year, if any, by a senior officer in terms of the first proviso to Sub Section (9) would be lapsing of notice, as provided in the*

second proviso to the Sub Section (9) of the amended Section 28 of the 1962 Act.

15. *The contention of the counsel for the respondents that amended Section 28 is not applicable in the case of Petitioners deserves to be rejected because amendment is not retrospective but it is certainly retroactive. Mandatory limitation would be applicable treating pending show cause notice as if issued on 29/03/2018. The Division Bench Judgment of this Court, cited by counsel for the petitioner, in Ballarpur's case, dealt with Section 11 of the Punjab General Sales Tax Act, 1948 (for short 'PGST Act'). Under Section 11 of PGST Act, 1948, prior to 03.03.1998 no limitation period for framing assessment was prescribed and assessments for the period prior to 1998 were pending. While dealing with question of application of said limitation period of 3 years to assessment years falling prior to 1997-98 in view of the amended provision providing a three year limitation, this Court in the case of Ballarpur Industries Ltd. Vs. State of Punjab (2010) 35 PHT 5 (P&H) decided in favour of the assessee and held that assessment of any year falling prior to 1997-98 shall be time barred if it is framed after the expiry of 3 years from 03.03.1998 i.e. date on which limitation period was prescribed. The ratio of the judgment in Ballarpur's case was followed by another Division Bench of this Court in State of Punjab Vs. Patiala Cooperative Sugar Mills Ltd. VATAP No. 110 of 2013 decided on 26.02.2014. The relevant portion of the judgment in Ballarpur's case, for ready reference, reads as under:-*

> *"There is no dispute that prior to the amendment of provisions of Section 11 of the PGST Act w.e.f. 03.03.1998 there was no limitation provided for the assessing authority under Sub Section (1) of Section 11 to assess the amount of tax due from the dealer on the basis of returns if he was satisfied with the returns furnished by the dealer. There was also no limitation provided for the assessing authority to assess the dealer under sub section (3) of Section 11 of the Act and consideration of evidence produced, if any. However, the position was materially altered w.e.f. 03.03.1998 which provided that the assessing authority was required to pass an order of assessment on the basis of returns within a period of three years from the last date prescribed for furnishing the last return in respect of such return for both assessment of tax due under Sub Section (1) as well as sub section (3) of Section 11 of the PGST Act.*

It is also not dispute that the notices in the form ST XIV for the assessment years 1995-96 and 1996-97 were issued on 26.04.2001 and 21.04.2001 respectively. The assessment orders under Section11(3) assessing demand of tax for a sum of Rs.18,18,318/- and Rs.10,51,851/- for the respective assessment years was passed on 27.07.2001. Therefore it is not disputed that even if the three years period of limitation was to be computed w.e.f. 03.03.1998, the assessment orders for both the assessment years were beyond the period of limitation as per the amended provisions of Section 11(3) of the Act. It is also not disputed that the learned Tribunal has on consideration of the provisions of PGST Act and ratio of judgments of cited case law has upheld the contention of the petitioner dealer that the amended period of limitation provided under Sub Section (3) being a piece of procedural law would be applicable to the pending cases like the present case. Learned Tribunal has also held that the assessments made by the assessing authority are not legally sustainable. It is also the admitted case of the Stat that the aforesaid findings of the Tribunal have not been challenged by the Sale Tax/Department/ Revenue. Thus, we do not consider it necessary to go into the question as to whether the amended provisions of sub section (1)(3) of Section 11 providing a period of limitation would apply to the pending assessments for the years prior to 03.03.1998 or not as even if the amended provisions are made applicable prospectively and limitation of three years is assumed to commence w.e.f. 03.03.1998, admittedly,the assessment orders dated 27.07.2001 are clearly beyond the period of limitation of three years and thus not sustainable in the eyes of law. Hence, there is no ascertainment/determination of the amount of tax due for the said two assessment years either by the assessee petitioner Company under Sub Section (4) of Section 10 or by the Assessing Authority under Section 11 of the PGST Act.

Therefore, in view of the above discussions, we are of the considered opinion that the findings recorded by learned Tribunal vide its impugned order (Annexure P-15) that there exists no justification for giving any relief to the petitioner company even after taking into account the limitation concept on the ground that the petitioner company cannot be absolved of their liability to pay purchase tax as per their returns by filing misleading statements, cannot be countenanced and thus are set aside. As a sequal thereto, the impugned order dated 30.01.2005 (Annexure P-15) qua the demand of tax for the assessment years 1995-96 and 1996-97 is set aside. ”

The afore-stated Amendment of Section 28 came into force w.e.f. 29.03.2018 and in the case of present Petitioners till date no order has been passed. Applying the principles of retroactive amendment, the Respondent was bound to pass order by 28.03.2019 which Respondent has failed. The Respondent has failed to pass order within one year from the date of Show Cause Notice, assuming the date to be 29.03.2018 on the principle of retroactive operation; still further there is nothing on record / to

a pointed query to even suggest that the said period was ever extended by one year by any senior officer in terms of the first proviso to Sub Section (9) of amended Section 28. No notice under Sub-section (9A) has been served upon Petitioners by the proper officer seeking the deferment of the commencement of the initial one year notice period for the reasons stated in sub-section (9A). By Amendment of 2018, the legislature has made it clear that no Show Cause Notice shall be kept pending beyond a period of 1 year by the proper officer unless and until requirement of Sub-section (9A) are complied with or beyond the extended period of another one year by an order passed by any officer senior in rank to the proper officer detailing the circumstances which prevented the proper officer from passing the order within the initial period of one year. In the present writ petitions, the Respondent-DRI issued Show Cause Notice on 20.02.2009 (P-6) & 19.03.2009 (P-9) for short levied custom duty and interest due to mis-declaration of description and value of goods relating to the two partnership firms/petitioners and at that point of time the proper officer was required to pass an order within one year i.e. By 2010 where it was possible to do so. However after the Amendment w.e.f. 29.03.2018, the Respondent was bound either to pass an order within one year i.e. by 28.03.2019 in terms of clause (b) of Sub Section (9) of amended Section 28 or within the extended time of one year in terms of first proviso, which is concededly not the case at hand or the extended period in terms of requirement of Sub Section (9A) which also is not the case at hand. Hence, the inevitable conclusion is that the show cause notices (P-6) and (P-9) in respective writ petitions will have to be accepted as lapsed

16. *In view of our above findings, we are of the considered opinion that present petitions deserve to be allowed on both counts namely (i) application of ratio laid down by this court in the case of GPI Textile (Supra) and (ii) retroactive application of the provisions of Section 28(9), (9A) as amended w.e.f. 28.03.2018 of the 1962 Act. Accordingly, both the Petitions are allowed and Show Cause Notices dated 19.03.2009 (CWP No.*

10889 of 2015) and Show Cause Notice dated 20.02.2009 (CWP No. 10537 of 2011) qua the petitioners-partnership firms are quashed."

The observation of the Hon'ble High Court is that the amendment made on 28.03.2018 is retroactive not retrospective, which means that the show cause notices issued prior to 29.03.2018, shall deemed have to be issued on 28.03.2018 and the same are to be adjudicated within one year except special circumstances where the extension of time for adjudication has been granted. The explanation dated 28.03.2018 has been further clarified in the Finance Bill 2020, which has been reproduced above.

9. After amendment to the explanation 4 to Section 28 of the Customs Act, the Revenue sought clarification from the Hon'ble High Court in the case of *M/s Prabhat Fertilizers & Chemical Works in CM-6352-CWP-2020 in CWP No. 23433 of 2019* and the Hon'ble High Court has clarified the same and observed as under:

"4. *The Applicant has filed present application on the ground that Section 28 has been amended by Finance Act, 2020 whereby Explanation 4 has been substituted and as per amended explanation all show cause notices issued prior to 29.03.2018 shall be governed by Section 28 as it stood prior to 29.03.2018. The show cause notice in the present case was issued on 22.06.2007 i.e. prior to 29.03.2018, thus it was governed by Section 28 of the Customs Act as it existed prior to 29.03.2018. Thus, the requirement of adjudication of show cause notice within one year, inserted w.e.f. 29.03.2018 is not applicable to present case and accordingly order dated 18.12.2019 deserves to be recalled and main petition deserves to be dismissed.*

5. *We have heard learned Counsel for the applicants/respondents Customs Department.*

6. *The main writ petition was disposed of in view of our judgment in the case of Harkaran Dass Vedpal (Supra). The Applicant has filed SLP before Hon'ble Supreme Court challenging order passed in the case of Harkaran Dass Vedpal (Supra). Recalling of our order dated 18.12.2019 in the present case would amount to recalling order passed in the case of Harkaran Dass Vedpal (Supra) which is already under challenge before Hon'ble Supreme Court. Thus, present application deserves to be dismissed on this ground.*

7*. The judgment in Harkaran Dass Vedpal (Supra) is based upon two grounds/issues and Applicant is disputing only one issue. If the contention of Applicant is accepted still our order dated 18.12.2019 cannot be recalled because Applicant is not disputing second issue i.e. non adjudication within reasonable period of limitation.*

We though not required, yet deem it appropriate to deal with argument raised by Applicant and clarify our findings qua retroactive amendment. Section 28(9) was amended w.e.f. 29.03.2018 and amended Section provides that if duty is not determined within one year from the date of notice, the proceeding shall be deemed to have concluded. We have held that amendment of Section 28(9) is retroactive in nature. If amendment is declared retrospective, all the notices issued prior to 29.03.2017 would have lapsed as soon as amended Section 28(9) came into force. We have not declared amendment as retrospective whereas we have applied principles of retroactive amendment. As per principle of retroactive amendment, all the show cause notices issued prior to 29.03.2018 are treated as if issued on 29.03.2018 and Authority was bound to determine duty liability within one year from 29.03.2018 unless time was extended in terms of the amended provision. The Explanation 4 amended by Finance Act, 2020 makes it clear that amendment of Section 28(9) is

not retrospective. The explanation provides that cases pending before 29.03.2018 would be adjudicated as per law existing prior to 29.03.2018. We have not declared amendment of Section 28(9) retrospective whereas we have applied principles of retroactive amendment. Applying the principles of retroactive amendment we have held that authority was bound to decide show cause notice within one year from 29.03.2018 (since time was not extended).

In view of above findings, we find that present application is devoid of merits and deserves to be dismissed and accordingly dismissed."

10. As per the amended explanation, the Revenue wants to save the show cause notices issued prior to 28.03.2018 to say that these show cause notices have no binding of explanation 4 to Section 28 of the Customs Act, 1962, but the Hon'ble High Court has explained that "we are not holding that the explanation 4 to Section 28 of the Act is not retrospective but same is retroactive" which means all the show cause notices issued prior to 28.03.2018, are to be adjudicated within one year from 28.03.2018.

11. Admittedly, in the case in hand, the show cause notices issued prior to 28.03.2018 and the same have not been adjudicated within one year and no time limit for adjudication has been extended. Therefore, in the light of the decision of the Hon'ble High Court in the case of *M/s Prabhat Fertilizers & Chemical Works (supra),* we hold that the impugned show cause notices stand vacated, therefore, the impugned order deserves to be set aside.

12. Accordingly, we set aside the impugned order and allow the appeals filed by the appellants with consequential relief (if any).

13. As we have allowed the appeals of the appellants on the above issue no.(i) itself, therefore, we are keeping open the remaining issues for future reference.

Ordered accordingly.

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Separate order by

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

RA_Saifi

PER: SANJIV SRIVASTAVA

I have gone through the order prepared by the learned Member (Judicial). However even after long deliberation I am unable to agree with the same. In para 6 of the order learned brother has framed following three issues for consideration,-

(i) Whether the show cause notices issued on 07.10.2016 and adjudicated on 28.05.2019 shall stand vacated in terms of the explanation 4 to Section 28 of the Customs Act, 1962 or not?

(ii) Whether the show cause notice can be issued for recovery under Section 28 of the Customs Act, 1962 without challenging the assessment under Section 17 of the Customs Act 1962; and

(iii) Whether in the absence of following the procedure prescribed under Section 138C of the Customs Act, 1962, the documents relied by the adjudicating authority are admissible or not?

After framing the three issues for consideration he has discussed the first issue only and has proposed to allow the appeal on the basis of determination made by him on the issue at (i), and has not rendered any findings on the other two issues. (refer para 13., of the order of learned brother.)

2.0 The entire determination has been made by the learned brother on the ground that the adjudicating authority has failed to strictly adhere to time limit prescribed as per the Sub Section (9) to the Section 28, and adjudicate the matter within one year from the date of enactment of the said provision, i.e. 28.03.2018. Before we go into the issue itself, it is necessary to give the timeline of the proceedings before the adjudicating authority. The timeline as submitted by the Authorized Representative, alongwith his submissions and during the course of argument is reproduced below:

07.10.2016	Show Cause Notice, answerable to multiple adjudicating authorities namely Commissioner Customs, Ludhiana and Additional/ Joint Commissioner Customs, Nhava Sheva issued. Since show cause notice was answerable

	to multiple adjudicating authorities, a common adjudicating authority was to be identified and notified by the Board (CBIC)
25.01.2017	Party informed that in addition to Rs 76,64,287/- deposited by them earlier, towards differential duty demanded, they have additionally deposited Rs 30,00,000/-, and will be depositing the remaining amount shortly. **No reply to the Show Cause Notice was filed.**
24.04.2017	They have additionally deposited Rs 32,00,000/- towards the demand of differential duty, and will be depositing the remaining amount shortly. **No reply to the Show Cause Notice was filed.**
27.07.2017	They have additionally deposited Rs 45,00,000/- towards the demand of differential duty, and will be depositing the remaining amount shortly. **No reply to the Show Cause Notice was filed.**
12.09.2017	They have additionally deposited Rs 20,00,000/- towards the demand of differential duty, and will be depositing the remaining amount shortly. **No reply to the Show Cause Notice was filed.**
20.11.2017	They have additionally deposited Rs 20,00,00/- towards the demand of differential duty, and will be depositing the remaining amount shortly. **No reply to the Show Cause Notice was filed.**
20.12.2017	They have additionally deposited Rs 17,66,116/- towards the demand of differential duty, and will be depositing the remaining amount shortly. **No reply to the Show Cause Notice was filed.**
21.12.2017	They have additionally deposited Rs 7,63,017/- towards the demand of differential duty, and will be depositing the remaining amount shortly. **No reply to the Show**

	Cause Notice was filed.
26.10.2018	Principal Commissioner/ Commissioner Customs Ludhiana, is appointed as common adjudicating authority in the matter vide Notification No 22/2018-Cus (NT/CAA/DRI)
04.12.2018	Personal Hearing was fixed on 08.01.2019
08.01.2019	Record of Personal Hearing is reproduced "***Sh. Ravinder Singh, Manager in case of M/s Gursam International, Ludhiana, appeared in person and submitted that some relied upon documents were not received from DRI Office, Ludhiana along with Show Cause Notice and submitted that they had requested DRI Office, Ludhiana to supply the documents at the earliest. He further requested to grant Personal Hearing after 1 months' time."***
08.01.2019	Personal Hearing was fixed on 30.01.2019
30.01.2019	Vide their letter dated 30.01.2019, appellant submitted that they have still not received some of the relied upon documents and are in touch with the DRI Office to get the same at earliest. Thus they requested time of another one month for filing the reply and for attending the personal hearing.
04.02.2019	Personal Hearing Fixed on 27.02.2019
27.02.2019	Record of Personal Hearing is reproduced, ***"Sh. Deepak Gupta, Advocate of the party appeared today on behalf of M/s Gursam International, New Shimlapuri, Ludhiana and re-iterated the submissions made in their interim written submissions dated 25.02.2019. He further sought time of two weeks to file final reply as he needs some instructions from the noticee."***

02.04.2019	Since the party did not filed the final reply in the matter, they were requested to file the final reply within two weeks. They were also informed that in case they do not file the final reply, adjudicating authority shall proceed on the basis available facts and records.
09.04.2019	**Party informed that their interim reply dated 25.02.2019 should be treated as final reply and case adjudicated without any further personal hearing in the matter.**
28.05.2019	Show Cause Notices are adjudicated.

3.0 From the timelines as narrated above that in the present case the appellant was issued the show cause notice on 07.10.2016, making the same answerable to multiple adjudicating authorities. Appellants while depositing the duty demanded from them in show cause notice from time to time never filed any reply to the Show Cause Notice. It was only on 25.02.2019, that they filed an interim reply to the show cause notice. In the case the common adjudicating authority, Principal Commissioner/ Commissioner Customs, Ludhiana was appointed on 26.10.2018 vide Notification No 22/2018-Cus (NT/CAA/DRI). Immediately on his appointment as common adjudicating authority in the matter, he took up the matter for adjudication and called the appellant for personal hearing on 08.01.2019, when appellants sought time to collect documents from the DRI office Ludhiana. In absence of any reply and submissions from the appellants in the matter, the adjudicating authority was compelled to again fix the matter for personal hearing on 30.01.2019. Appellants had themselves again sought adjournment and matter was again fixed for personal hearing on 27.02.2019. On 27.02.2019 also the appellant counsel while reiterating the submissions made in the interim reply filed on 25.02.2019, sought further time of two weeks for making the final submissions, which was never filed. Only when the adjudicating authority again reminded and called the appellant to make the final submissions in the matter vide his letter dated

02.04.2019, appellants replied vide their letter dated 09.04.2019, stating as follows:

*"**Sub: Request for adjudication.***

Ref: Show Cause Notice F No. DRI/LDZU/856/(ENQ-4)(INT-1) 2016/2458 dated 07.10.2016 issued to M/s Gursam International.

On, 27.02.2019, personal hearing in respect of above said show cause notice was attended by Shri Deepak Gupta, Advocate on the behalf of undersigned. During hearing the counsel submitted interim reply and sought time to file final reply. It is hereby submitted that undersigned do not wish to file any further reply and is requesting yourself to adjudicate the above said Show Cause Notice on the basis of reply submitted on 27.02.2019 by the counsel without any further personal hearing."

4.0 Counsel for the Appellant argued that as per the amended Section 28(9) and the new Sub-section (9A) inserted w.e.f. 29.03.2018 by Section 63 of Finance Act, 2018, the show cause notice should have been adjudicated within period of one year from the date of issue. He relied upon the decisions of Hon'ble Punjab and Haryana High Court in case of in case of M/s Harkaran Dass Vedpal [2019 (368) ELT 546 (P & H)] where Show Cause Notice dated 19.03.2009 and 20.02.2009 were quashed by following the ratio of GPI Textiles Limited [2018 (362) ELT 388 (P&H)] where-under the SCN was quashed as it was pending for more than 16 years old and the proceedings had not concluded within reasonable time. Since the adjudicating authority has failed to adjudicate the case within the period prescribed the adjudication order should fail on this account itself, because as these amendments have been held to be retroactive by the Hon'ble Punjab and Haryana High Court, all these Show cause Notices issued by on any date prior to 29.03.2018, shall be deemed to have been issued on 29.03.2018 sand should have been adjudicated by 29.03.2019.

5.0 The above argument which has been agreed to by the learned brother while deciding the issue in favour of the appellants though appears to be attractive is devoid of any merits.

5.1 Vide the Finance Act 2018, w.e.f. 29.03.2018, Section 28(9) has been amended and sub section 9A has been added thus making it mandatory for determining the duty and interest under sub-section (8) within 6 months from the date of notice in respect of cases falling under clause (a) of sub-section (1) and within one year from the date of notice in respect of cases falling under sub-section (4) and this period could be extended by the same period respectively in terms of the provision and the reasons stated therein by an officer senior to the one adjudicating the case. And if the proper officer fails to determine the duty and interest within such extended period such proceeding shall be deemed to have been concluded as if no notice had been issued. Explanation 4 was also inserted which is reproduced as under:-

"Explanation 4: For the removal of doubts it is hereby declared that in cases where the notice has been issued for no-levy, not paid, short-levy or short paid or erroneous refund after the 14th day of May, 2015 but before the date on which the Finance Bill, 2018 received the assent of the President, they Shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received."

5.2 The issue under consideration of the Hon'ble High Court in case of GPI Textiles was not in the respect of the amended provisions but was the case, wherein unamended provisions as they existed prior to the amendments made by the Finance Act, 2018 was under consideration. In that case there was delay of more than 16 years in the adjudication of the matter, and Hon'ble High Court decided the issue holding that when there is no express time limit provided for adjudication of the Show Cause Notice, the adjudication proceedings should have been concluded within a

reasonable period of time, and delay of 16 years in adjudication is not a reasonable period. For holding so they relied upon the decision of the Apex Court in the case of Bhatinda District Co-op. Milk P. Union Limited's [2007 (217) ELT 325 (SC)] wherein Hon'ble Apex Court has held

"**17. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors.**"

5.3 In the case of Harkaran Dass Vedpal [2019 (368) ELT 546 (P & H)], while following the ratio of GPI Textiles, that there has been unreasonable delay in the adjudication of the show cause notices, Hon'ble High Court has also taken the note of the amendments made by the Finance Act, 2018 and has observed as follows:

*"**13.** The judgment of GPI Textiles dealt with Section 11A of Central Excise Act, 1944 and present matters relate to Section 28 of Customs Act, 1962 which is para materia with Section 11A of Central Excise Act. In the present petitions, show cause notices were issued in 2009 and concededly are still pending adjudication in spite of no stay on continuing of proceedings/liberty granted to proceed with the adjudication of the show cause notices. As per judgment of GPI Textiles, show cause notice deserves to be quashed if it is pending adjudication beyond a reasonable period and in the present case, notice(s) are pending for more than 10 years which by no stretch of limitation can be held as reasonable period. In GPI Textiles this court noticed judgment of Hon'ble Supreme Court in the case of Bhatinda District Co-op. Milk P. Union Limited - 2007 (217) E.L.T. 325 (S.C.) where 5 years period has been considered as reasonable period for revision.*

Retroactive application of the amended provisions of Section 28 of the 1962 Act :

14. *From the bare perusal of the afore-quoted amended sub-section (9) and newly inserted [sub-section] (9A) of Section 28 w.e.f. 28-3-2018, it is evident that authorities are bound to pass order within one year from the date of show cause notice in cases of Customs Duty not paid/short-levied and said period may be extended for a further period of one year by any officer senior in rank to the proper officer having regard to the circumstances under which proper officer was prevented from passing an order before the expiry/lapse of the initial stipulated one year. Still further in case any circumstance as noticed in sub-section (9A) exists, the extended period of one year provided in sub-section (9) shall commence from the date when such reason ceases to exist provided the proper officer informs the person concerned of the reason for such non-determination of amount of duty or interest under sub-section 8. Thus the only outcome of non-adjudication by the proper officer within one year without invoking of sub-section (9A) or within the extended period of one year, if any, by a senior officer in terms of the first proviso to sub-section (9) would be lapsing of notice, as provided in the second proviso to the sub-section (9) of the amended Section 28 of the 1962 Act.*

15. *The contention of the Counsel for the respondents that amended Section 28 is not applicable in the case of petitioners deserves to be rejected because amendment is not retrospective but it is certainly retroactive. Mandatory limitation would be applicable treating pending show cause notice as if issued on 29-3-2018.*

The Division Bench judgment of this Court, cited by Counsel for the petitioner, in Ballarpur's case, dealt with Section 11 of the Punjab General Sales Tax Act, 1948 (for short 'PGST Act'). Under Section 11 of PGST Act, 1948, prior to 3-3-1998 no limitation period for framing assessment was prescribed and assessments for the period prior to 1998 were pending. While dealing with question of application of said limitation period of 3 years to assessment years falling prior to 1997-98 in view of the amended

provision providing a three year limitation, this Court in the case of Ballarpur Industries Ltd. v. State of Punjab, (2010) 35 PHT 5 (P&H) decided in favour of the assessee and held that assessment of any year falling prior to 1997-98 shall be time-barred if it is framed after the expiry of 3 years from 3-3-1998 i.e. date on which limitation period was prescribed. The ratio of the judgment in Ballarpur's case was followed by another Division Bench of this Court in State of Punjab v. Patiala Cooperative Sugar Mills Ltd., VATAP No. 110 of 2013 decided on 26-2-2014. The relevant portion of the judgment in Ballarpur's case, for ready reference, reads as under :-

"There is no dispute that prior to the amendment of provisions of Section 11 of the PGST Act w.e.f. 3-3-1998 there was no limitation provided for the assessing authority under sub-section (1) of Section 11 to assess the amount of tax due from the dealer on the basis of returns if he was satisfied with the returns furnished by the dealer. There was also no limitation provided for the assessing authority to assess the dealer under sub-section (3) of Section 11 of the Act and consideration of evidence produced, if any. However, the position was materially altered w.e.f. 3-3-1998 which provided that the assessing authority was required to pass an order of assessment on the basis of returns within a period of three years from the last date prescribed for furnishing the last return in respect of such return for both assessment of tax due under sub-section (1) as well as sub-section (3) of Section 11 of the PGST Act.

It is also not in dispute that the notices in the form ST XIV for the assessment years 1995-96 and 1996-97 were issued on 26-4-2001 and 21-4-2001 respectively. The assessment orders under Section 11(3) assessing demand of tax for a sum of Rs. 18,18,318/- and Rs. 10,51,851/- for the respective assessment years was passed on 27-7-2001. Therefore it is not disputed that even if the three years period of limitation was to be computed w.e.f. 3-3-1998, the assessment orders for both the assessment years were beyond the period of limitation as per the amended provisions

of Section 11(3) of the Act. It is also not disputed that the Learned Tribunal has on consideration of the provisions of PGST Act and ratio of judgments of cited case law has upheld the contention of the petitioner dealer that the amended period of limitation provided under sub-section (3) being a piece of procedural law would be applicable to the pending cases like the present case. Learned Tribunal has also held that the assessments made by the assessing authority are not legally sustainable. It is also the admitted case of the State that the aforesaid findings of the Tribunal have not been challenged by the Sale Tax/Department/Revenue. Thus, we do not consider it necessary to go into the question as to whether the amended provisions of sub-section (1) and (3) of Section 11 providing a period of limitation would apply to the pending assessments for the years prior to 3-3-1998 or not as even if the amended provisions are made applicable prospectively and limitation of three years is assumed to commence w.e.f. 3-3-1998, admittedly, the assessment orders dated 27-7-2001 are clearly beyond the period of limitation of three years and thus not sustainable in the eyes of law. Hence, there is no ascertainment/determination of the amount of tax due for the said two assessment years either by the assessee petitioner company under sub-section (4) of Section 10 or by the Assessing Authority under Section 11 of the PGST Act.

Therefore, in view of the above discussions, we are of the considered opinion that the findings recorded by Learned Tribunal vide its impugned order (Annexure P-15) that there exists no justification for giving any relief to the petitioner company even after taking into account the limitation concept on the ground that the petitioner company cannot be absolved of their liability to pay purchase tax as per their returns by filing misleading statements, cannot be countenanced and thus are set aside. As a sequal thereto, the impugned order dated 30-1-2005 (Annexure P-15) qua the demand of tax for the assessment years 1995-96 and 1996-97 is set aside."

Emphasis supplied

The afore-stated amendment of Section 28 came into force w.e.f. 29-3-2018 and in the case of present petitioners till date no order has been passed. Applying the principles of retroactive amendment, the respondent was bound to pass order by 28-3-2019 which respondent has failed. The respondent has failed to pass order within one year from the date of show cause notice, assuming the date to be 29-3-2018 on the principle of retroactive operation; still further there is nothing on record/to a pointed query to even suggest that the said period was ever extended by one year by any senior officer in terms of the first proviso to sub-section (9) of amended Section 28. No notice under sub-section (9A) has been served upon petitioners by the proper officer seeking the deferment of the commencement of the initial one year notice period for the reasons stated in sub-section (9A). By Amendment of 2018, the Legislature has made it clear that no show cause notice shall be kept pending beyond a period of 1 year by the proper officer unless and until requirement of sub-section (9A) are complied with or beyond the extended period of another one year by an order passed by any officer senior in rank to the proper officer detailing the circumstances which prevented the proper officer from passing the order within the initial period of one year.

In the present writ petitions, the respondent-DRI issued show cause notices on 20-2-2009 (P-6) & 19-3-2009 (P-9) for short-levied customs duty and interest due to misdeclaration of description and value of goods relating to the two partnership firms/petitioners and at that point of time the proper officer was required to pass an order within one year i.e. by 2010 where it was possible to do so. However after the Amendment w.e.f. 29-3-2018, the respondent was bound either to pass an order within one year i.e. by 28-3-2019 in terms of clause (b) of sub-section (9) of amended Section 28 or within the extended time of one year in terms of first proviso, which is concededly not the case at hand or the extended period in terms of requirement of sub-section (9A) which also is not the case at hand. Hence,

the inevitable conclusion is that the show cause notices (P-6) and (P-9) in respective writ petitions will have to be accepted as lapsed."

5.4 Admittedly in the case of appellants the Show Cause Notice has been issued on 07.10.2016, and adjudicated on 28.05.2019 pursuant to appointment of Principal Commissioner/ Commissioner Customs Ludhiana as common adjudicating authority on 26.10.2018 and filing of final reply by the appellant on 09.04.2019. The present case cannot be said to be the case on unreasonable delay as the matter was taken up for adjudication by the common adjudicating authority as soon as he was appointed. Further it is also observed that the appellants had deliberately delayed the adjudication process, by not filing the reply to show cause notice within time. It is not even the case of the appellant that they have done what was expected of them for the early disposal of the show cause notice issued to them. Reasonable time for exercise of the power vested in authority, etc are concepts which flow from the principles of equity and good conscience and cannot be the defence in the case where the person claiming such equity has deliberately delayed the proceedings. Can a person charged with fraud and who deliberately avoids the proceedings claim equity and rule of good conscience. As far as it is understood, first and foremost principle of equity as propounded lays down that, those who claim equity should come out with clean hands. Thus in my view the decision of the Hon'ble High Court in case of GPI Textiles, do not support the case of the appellant for the reasons that there has been no inordinate delay in completion of the adjudication proceedings and in case if any delay is there it is for the reason of non submission of the reply by the appellants in time to the show cause notice, making it impossible for the adjudicating authority to complete the adjudication proceedings. In Broom's Legal Maxims on (P-162), Maxim states, "LEX NON COGIT AD lMPOSSIBILIA", the law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must

yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases.

5.5 In case of Harkaran Dass Vedpal, Hon'ble High Court has decided the issue on two counts stating in first part that in that case there has been undue delay in completion of the adjudication proceedings, so as per their decision in the case of the GPI Textiles, the relief as prayed for by the petitioners is admissible to them. They also referred to the amendments made to Section 28, as per Finance Act, 2018, and have by applying the principle of retroactivity, said that amended provision shall be applicable in that case and the show cause should have been adjudicated within one year of the enactment of the Finance Act, 2018. However as stated earlier the two show cause notices under consideration of the Hon'ble High Court in that case were dated 19.03.2009 and 20.02.2009, and were not covered by the expressed provisions of Explanation 4, referred above. This explanation has created a separate class of Show Cause Notices issued between 14.05.2015 to 29.03.2018 which would be governed by earlier provision of Section 28(9) before being amended. Hon'ble High court has not decided any issue where show cause notices was falling within this class as per Explanation 4, as introduced w.e.f. 29.03.2018, have been considered. Since the issue of the show cause notice issued during the period 14.05.2015 to 29.03.2018, was not even considered by the Hon'ble High Court this decision to is distinguishable. When the matter was argued before us on 26.02.2020, a specific query was made by the bench to the counsel with regards to the applicability of the said decisions to the facts of the present case, and in reply learned counsel, had agreed that these decisions do not decide the issue for the class of show notices issued between 14.05.2015 to 29.03.2018, which are

covered by the explanation 4. The order sheet for the hearing on 26.02.2020 is reproduced below:

"Specific query was put to the Ld. advocate as to whether in the cases decided by the High Court and referred by him during the course of arguments whether any show cause notice pertain to the period covered by explanation 4 to Section 28 of the Customs Act, 1962. Ld. Counsel admitted and categorically replied that none of the show cause notices under consideration in the decisions referred by him during the course of argument was for the period covered by explanation 4 to Section 28 that is after enactment of Finance Act, 2015. The said submission of Counsel is noted and taken on record."

Thus in our view this decision of the Hon'ble Punjab and Haryana High Court and the decisions in case of M/s Shri Ram Agro Chemicals (P) Ltd [CWP No. 9863 of 2017, SCN dated 17.05.2007], M/s Anil. K. Soni [CWP No. 6862 of 2017, SCN dated 02.04.2009], M/s Prabhat Fertilizers & Chemical Works [CWP No. 23433 of 2019, SCN dated 26.02.2009] and [CWP No. 34817 of 2019, SCN dated 15.01.2010] quashing the Show Cause Notices by following the ratio of M/s Harkaran Dass Vedpal's case (supra) and GPI Textiles., which have relied upon this case for the show cause notices issued during the period not covered by the explanation 4, are not applicable to the present case.

5.6 During the course of arguments on 27.11.2020, learned counsel had relied upon the decision of the Hon'ble Punjab and Haryana High Court in M/s Prabhat Fertilizers & Chemical Works in CM-6352-CWP-2020 in CWP No. 23433 of 2019 (extensively quoted by learned brother in para 9 of his order) dated 27.July 2020, and has argued stating-

"That Section 28 has been amended w.e.f. 29.3.2018 and as per amended Sub-section (9) read with (9A), the adjudicating authority unless period extended is bound to pass order within one year from the date of show cause notice. Explanation 4 annexed to Section 28 has been amended by

Finance Act, 2020 and as per amended Explanation 4, show cause notice issued prior to 29.3.2018 would be adjudicated as per law applicable prior to 29.3.2018. Hon'ble Punjab and Haryana High Court in Prabhat Fertilizer CWP No. 23433 of 2019 quashed show cause notice on the ground of non-adjudication within one year from 29.3.2018. The department filed CM No. 6352 of 2020 seeking recalling of order dated 18.12.2019 on the ground of amended explanation 4 of Section 28 of the Act. The Hon'ble High Court while dismissing review application vide order dated 27.7.2020 has clarified that amendment of Section 28(9) is not retrospective but retroactive and as per principles of retroactive, show cause notice issued prior to 29.3.2018 shall be deemed to be issued on 29.3.2018 and authority would be bound to adjudicate within one year from 29.3.2018. In the present case, show cause notice was issued on 7.10.2016 and was bound to be adjudicated by 29.3.2019 whereas impugned order was passed on 28.5.2019. The show cause notice dated 7.10.2016 stands vacated on 29.3.2019, thus impugned order is liable to be quashed on this sole ground."

This order of Hon'ble High Court is in an application moved by the department for the recall of the order earlier passed by the High Court, following the Harkaran Dass Vedpal's decision. In this order high court has only explained their earlier decision and expressed their inability to recall their earlier order in view of the subsequent amendments made in 2020. Hon'ble High Court has held that the first ground on which the order was based is for the reason of unreasonable delay in undertaking the adjudication proceedings, in respect of the show cause notice dated 22.06.2007, and that ground holds good. Hon'ble High Court thus records-

"*The judgment in Harkaran Dass Vedpal (Supra) is based upon two grounds/issues and Applicant is disputing only one issue. If the contention of Applicant is accepted still our order dated 18.12.2019 cannot be recalled*

because Applicant is not disputing second issue i.e. non adjudication within reasonable period of limitation."

Hon'ble High Court then explain the principle of retroactive amendment, applied by them for holding that the show cause notice should have been adjudicated within one year from the date of enactment. Thus observation cannot be said to the pronouncement of the Hon'ble High Court on the *"Explanation 4"* as it was introduced by the Finance Act, 2018. Explanation 4, was not the issue before the Hon'ble High Court, in the case of Harkaran Dass Vedpal or in the case of Prabhat Fertilizers & Chemical Works, neither the same was considered by the Hon'ble High Court in this Miscellaneous Petition seeking the recall of the earlier order in case of Prabhat Fertilizers & Chemical Works. Thus in my view this order dated 27th July 2020 of the Hon'ble High Court also do not alter the situation.

5.7 From the reading of *"Explanation 4",* as introduced by the Finance Act, 2018, it is evident that while making the amendments in section 28, legislature has consciously carved out an exception and created a class of show cause notices, that were issued during the period 14.05.2015 to 29.03.2018, and has stated that these show cause notices continue to be governed by the provisions of Section 28 as they stood prior to the amendments made in that section by the Finance Act, 2018. In view of the said conscious declaration of law by the legislature, no court would take a contrary view to the expressed intention of the legislature. In case of Sulochana Amma vs Narayanan Nair [1995 (77) ELT 785 (SC)], Hon'ble Supreme Court has categorically laid down stating as follows:-

"8.*It is settled law that explanation to a section is not a substantive provision by itself. It is entitled to explain the meaning of the words contained in the section or clarify certain ambiguities or clear them up. It becomes a part and parcel of the enactment. Its meaning must depend upon its terms. Sometime it would be added to include something within it or to exclude from the ambit of the main provision or condition or some*

words occurring in it. Therefore, the explanation normally should be so read as to harmonise with and to clear up any ambiguity in the same section."

Hon'ble Supreme Court has in case of Kay Pan Fragrances Pvt Ltd [2019 (31) GSTL 385 (SC)], laid down the law stating as follows:

"11.There is no reason why any other indulgence need be shown to the assessees, who happen to be the owners of the seized goods. They must take recourse to the mechanism already provided for in the Act and the Rules for release, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum (even upto the total value of goods involved), respectively, as may be prescribed or on payment of applicable taxes, interest and penalty payable, as the case may be, as predicated in Section 67(6) of the Act. In the interim orders passed by the High Court which are subject-matter of assail before this Court, the High Court has erroneously extricated the assessees concerned from paying the applicable tax amount in cash, which is contrary to the said provision.

12. In our opinion, therefore, the orders passed by the High Court which are contrary to the stated provisions shall not be given effect to by the authorities. Instead, the authorities shall process the claims of the concerned assessee afresh as per the express stipulations in Section 67 of the Act read with the relevant rules in that regard. In terms of this order, the competent authority shall call upon every assessee to complete the formality strictly as per the requirements of the stated provisions disregarding the order passed by the High Court in his case, if the same deviates from the statutory compliances. That be done within four weeks without any exception.

13.We reiterate that any order passed by the High Court which is contrary to the stated provisions need not be given effect to in respect of all the

cases referred in the affidavit by the State Government before this Court and fresh cases which may have been filed or likely to be filed before the High Court in connection with the subject matter of these appeals, by all concerned and are deemed to have been set aside/modified in terms of this order."

5.8 Subsequently by the Finance Act, 2020, the scope of ***"Explanation 4"*** , has been extended to cover all the show cause notices issued prior to the enactment of Finance Act, 2018, and it has been declared that all such show cause notices shall be governed by the provisions of Section 28 as they existed prior to the amendments made by the Finance Act, 2020. The amended ***Explanation 4***, now substituted with effect from 29th March 2018 (date of enactment of Finance Act, 2018) reads as follows:

"Explanation 4- For the removal of doubts, it is hereby declared that notwithstanding anything to the contrary contained in any judgment, decree or order of the Appellate Tribunal or any Court or in any other provision of this Act or the rules or regulations made there-under, or in any other provision of this Act or the rules or regulations made there under, or in any other law for the time being in force, in cases where notice has been issued for non-levy, short:-levy, non-payment, short payment or erroneous refund, prior to the 29th day of March, 2018, being the date of commencement of the Finance Act, 2018, such notice shall continue to be governed by the provisions of section 28 as it stood immediately before such date"

The above referred explanation 4 substituted by the Finance Act, 2020, with effect from 29th March, 2018, is declaratory in nature and also starts with a ***"non obstante clause".*** Since the amended explanation is declaratory it is retrospective in operation. Further for the reason of use of non obstante clause the said declaration of law by the legislature will prevail ***over anything contrary contained in any judgement, decree or the Appellate Tribunal or any Court***. Thus any declaration of the law by any court contrary to what has

been stated by the legislature cannot be a valid declaration to the extent of declaration made by the legislature.

5.9 Hon'ble Supreme Court has in the case of Raghuvar India Ltd [2000 (118) ELT 311 (SC)] held as follows:

"13. Any law or stipulation prescribing a period of limitation to do or not to do a thing after the expiry of period so stipulated has the consequence of creation and destruction of rights and, therefore, must be specifically enacted and prescribed therefor. ***It is not for the Courts to import any specific period of limitation by implication, where there is really none****, though Courts may always hold when any such exercise of power had the effect of disturbing rights of a citizen that it should be exercised within a reasonable period."*

5.10 Thus in my view there is no merit in the submission made by the counsel to the effect that the Show Cause Notice dated 7.10.2016 should have been adjudicated by 29.03.2019, in view of the decisions of Hon'ble High Court in case of Harkaran Dass Vedpal. I also find that in the present case the Appellant, himself has vide his letter dated 09.04.2019, closed the arguments in the matter, and have requested the adjudicating authority to adjudicate the matter. Even at the time when this correspondence was made by the appellant, the date was much beyond the 29.03.2018. In case the adjudicating authority would have proceeded without taking closure of submissions which were being made by the appellant, the order would have been considered as bad in law for the violation of the principle of natural justice. In my view any interpretation of statue which makes it a dead letter in law, and allow the parties to take benefit of their own misdoing and delays, cannot be a fair interpretation of law. The law and statue is organic and should be interpreted lively so as ensure fair play of justice to the contending interests.

5.11 Amendments were made to by insertion of sub-section (2A) to the Section 2A with effect from 11.05.2002 by the Finance Act, 2002. The sub-section (2A) as inserted read as follows:

"(2A) The Appellate Tribunal shall where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed :

Provided that where an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of Section 35B the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eight days from the date of such order :

Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order, shall on the expiry of that period stand vacated."

On the plain reading of the sub-section (2A), it is evident that in any case where tribunal has stayed the recovery of the duty, penalty etc., either partially or fully as per the Section 35F of the Central Excise Act, 1944 as it existed then, the appeal should be decided by the tribunal within a period of 180 days from the date of such an order granting the stay. In case the tribunal is not able to dispose of the appeal within period of 180 days the stay order shall stand vacated. The impact of the amendment was far reaching and would have serious impact on the functioning and the powers of tribunal to grant stay under section 35F. Some of the benches in the tribunal interpreted the amendment literally and strictly and others would interpret the same in a purposive manner. The matter was referred to larger bench in the case of IPCL [2004 (169) E.L.T. 267 (Tri. - LB)], and larger bench decided the matter holding as follows:

"6.The observation of the Bench that if the Tribunal grants further extension of stay beyond the period of 180 days the amendment would become redundant is also not justified. A similar contention raised in

regard to sub-section (2A) of Section 254 of the Income Tax Act was not accepted by the Income Tax Appellate Tribunal in Centre for Women's Development Studies. The inherent jurisdiction of the Tribunal to grant interim relief so as to make the ultimate relief effective cannot be curtailed indirectly by sub-section (2A). At the end of the period of 180 days when the appellant makes an application for extension of the stay the Tribunal can always consider whether there is any change in the circumstances which would justify extension or modification of the stay. The Revenue gets an opportunity to bring to the notice of the Tribunal such changed circumstances e.g. a binding decision on the issue in its favour.

7.One of the decisions relied on in Kumar Cotton Mills is the decision of Delhi High Court in ITC v. UOI. In this case the issue of jurisdiction of this Tribunal to grant an order of stay was specifically considered. The High Court took the view that apart from the proviso to Section 35F as an appellate authority the Tribunal has inherent power to grant relief in exercise of its appellate jurisdiction. Relevant portion of the judgment is quoted below :-

"Apart from the proviso to Section 35F, the appellate authority has inherent power of granting interim relief in the exercise of its appellate jurisdiction. This has been so recognized explained by the Supreme Court in the case of Income Tax Officer v. Mohd. Kunhi, 92 ITR 341. We must make it clear that it does not mean that in every case where appeal is filed the Collector (Appeals) or the Tribunal must, as a matter of course, grant interim relief. The guidelines for the grant of interim relief are contained in the proviso to Section 35F, namely, relief will be granted only if there would be undue hardship to the person if he is asked to pay excise duty or penalty. Unless, therefore, it can be shown by the appellant that undue hardship would be caused if he is required to pay the duty or penalty the appellate authorities would be entitled to refrain from granting any

interim relief. What is undue hardship would depend upon the facts of each case."

In ITO v. M.K. Mohammed Kunhi the Hon'ble Supreme Court observed as follows :-

"The argument advanced on behalf of the appellant before us that, in the absence of any express provisions in Sections 254 and 255 of the Act relating to stay of recovery during the pendency of an appeal, it must be held that no such power can be exercised by the Tribunal, suffers from a fundamental infirmity inasmuch as it assumes and proceeds on the premise that the statute confers such a power on the Income-tax Officer who can give the necessary relief to an assessee. The right of appeal is a substantive right and the questions of fact and law are at large and are open to review by the Appellate Tribunal. Indeed, the Tribunal has been given very wide powers under Section 254(1), for it may pass such orders as it thinks fit after giving full hearing to both the parties to the appeal. If the Income-tax Officer and the Appellate Assistant Commissioner have made assessments or imposed penalties raising very large demands and if the Appellate Tribunal is entirely helpless in the matter of stay of recovery, the entire purpose of the appeal can be defeated if ultimately orders of the departmental authorities are set aside..... It is a firmly established rule that an express grant of statutory power carries with it by necessary implications the authority to use all reasonable means to make such grant effective (Suthernland's Statutory Construction, third edition, Articles 5402 and 5402). The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective."

8. In Themis Pharmaceuticals the Bench took the view that the ratio of the decision in ITO v. M.K. Mohammed Kunhi will not be applicable while

considering the issue of jurisdiction of this Tribunal in granting stay. In coming to the above conclusion reliance was placed on a decision of the Orissa High Court in CCE & C v. Golden Hind Shipping (India) Pvt. Ltd., 1993 (68) E.L.T. 739 (Ori.). We will now examine the decision of the Orissa High Court. In the above case the issue that came up for consideration was whether CEGAT had the power to direct the petitioner to pay a sum of Rs. 5 lakhs as compensation to the Opposite party No. 1 in exercise of its powers under Section 129B(1) of the Customs Act, 1962 and pass another order enhancing the compensation to Rs. 20 lakhs through amendment of the said order in exercise of its power under Section 129B(2) of the Customs Act. It is in this context the Hon'ble High Court compared the powers of CEGAT under Section 129B of the Customs Act and powers of ITAT under Section 254(1) of the Income Tax Act. Their Lordship were not considering the power of the Appellate Tribunal to grant stay as an inherent power of an appellate authority when there is no statutory provision for granting stav. It is to be noted that this specific issue was considered by the Delhi High Court in ITC Ltd. v. UOI and the Hon'ble High Court placed reliance on ITO v. M.K. Mohammed Kunhi. We are, therefore of the view that Kumar Cotton Mills was correct in following the decision of Delhi High Court.

9.A Bench of Madras High Court had also occasion to consider the jurisdiction of this Tribunal to grant interim relief in CC v. Madras Electro Castings P. Ltd., 1994 (71) E.L.T. 646. The Court took the view that the Tribunal has jurisdiction to pass such interim order as are necessary in order to aid the main relief sought for in the appeal. Relevant portion of the judgment is quoted below :-

In addition to this, it may also be as to whether the "8. Customs, Excise and Gold (Control) Appellate Tribunal has jurisdiction to issue interim orders. It may be pointed out here that Section 129B of the Act empowers the Customs, Excise and Gold (Control) Appellate Tribunal to confirm,

modify or annul the decision or order appealed against. It is also open to it to remit the matter back for fresh adjudication. In addition to this, Rule 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 specifically provides that the Tribunal may take such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice. The words 'secure the ends of justice' are wide enough to clothe the Tribunal with powers to pass such interim orders, as it may deem fit in the facts and circumstances of the case. In addition to this, the power of Appellate Tribunal to confirm, modify or annul the decision or order appealed against also takes in its fold to pass such interim orders as are necessary in order to aid the main relief sought for in the appeal. To put it in other words, the interim relief is granted to preserve in status quo the rights of the parties (See Kihoto Hollohan). In Madan Gopal's case, it has been pointed out that the interim orders are passed in aid of the main relief. Therefore, it is quite inherent in the Appellate power and more so in the case of the CEGAT to pass such interim orders as are necessary for the purpose of ensuring that the main relief sought in the appeal is available to the party at the end of the proceeding. The fact that Section 129E only provides for relieving the appellant from the undue hardship that would be caused to him in depositing the duty and interest as demanded or penalty as levied, does not in any way take away the inherent power of the Appellate Tribunal to pass such interim orders as are necessary. This is only re-stated in Rule 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982."

10.Income Tax Appellate Tribunal had occasion to consider an identical issue relating to the power of the Tribunal to grant further stay after the expiry of six months since passing the first order of stay, in Centre for Women's Development Studies v. Deputy Director of Income Tax. The relevant portion from the above order reads as follows :-

"On a careful perusal of the relevant new provisions in the law and aforesaid judicial pronouncements, we are of the considered opinion that sub-section (2A) was inserted in Section 254 to curtail the delays and ensure the disposal of the pending appeals within a reasonable time frame. There is no intention of the Legislature to curtain or withdraw the powers of the Tribunal for granting a stay exceeding a period of six months. Had it been the intention of the Legislature, there would be a specific amendment in the Act to this effect because if the powers of the Tribunal for granting the stay exceeding a period of six months are withdrawn by this amendment, the object of imparting justice by the Tribunal cannot be achieved even in those cases where the assessee has co-operated with the Tribunal to its full extent and the hearing is in progress. We, therefore, are of the considered view that the Tribunal has power to grant a further stay on the expiry of six months of earlier stay if the facts and circumstances so demand."

While coming to the above conclusion the Tribunal had taken note of the Explanatory Notes on Clauses of the Finance Bill introducing the amendment."

The issues which came up as a consequence of the insertion of sub-section (2A) to Section 35C were also raised before the Hon'ble Supreme Court and adjudicated by them in case of Kumar Cotton [2005 (180) E.L.T. 434 (S.C.)]. While adjudicating the issues the Hon'ble Apex Court held as follows:

"3.The provision has clearly been made for the purpose of curbing the dilatory tactics of those assessees who, having got an interim order in their favour, seek to continue the interim order by delaying the disposal of the proceedings. Thus, depriving the revenue not only of the benefit of the assessed value but also a decision on points which may have impact on other pending matters.

4.The Tribunal which was then known as Customs, Excise Gold (Control) Appellate Tribunal (CEGAT) came to the conclusion that the amendment did not affect stay orders which were passed prior to the date of coming into force of the amendment and also held that the amendment did not in any way curtail the powers of the Tribunal to grant stay exceeding six months.

5.During the pendency of the appeal before this Court, the matter was referred to a Larger Bench of the Tribunal. The Larger Bench has by its decision reported in 2004 (169) E.L.T. 267 upheld the view impugned in this case. The decision of the Larger Bench has not been challenged by the Department being of the view that repeated special leave petition raising the same issue was unnecessary.

6.The sub-section which was introduced in terrorem cannot be construed as punishing the assessees for matters which may be completely beyond their control. For example, many of the Tribunals are not constituted and it is not possible for such Tribunals to dispose of matters. Occasionally by reason of other administrative exigencies for which the assessee cannot be held liable, the stay applications are not disposed within the time specified. The reasoning of the Tribunal expressed in the impugned order and as expressed in the Larger Bench matter, namely, IPCL v. Commissioner of Central Excise, Vadodara (supra) cannot be faulted. ***However we should not be understood as holding that any latitude is given to the Tribunal to extend the period of stay except on good cause and only if the Tribunal is satisfied that the matter could not be heard and disposed of by reason of the fault of the Tribunal for reasons not attributable to the assessee.****"*

By referring to this amendment, and the interpretations put it to by the larger bench of tribunal and Hon'ble Apex Court, I would like to point out that both these judicial authorities had followed the principles of purposive interpretation rather than the literal interpretation, while

interpreting similar provisions. The sub-section (8) to the section 28, provides for a strict directive to the adjudicating authorities to complete the adjudication proceedings in the time bound manner. However, the said section cannot be interpreted to mean that adjudicating authority is in race against the time and the noticee can by operation of the provisions of this sub-section, cannot get the proceedings concluded in his favour by adopting the dilatory tactics. I have earlier pointed in para 2, that appellants herein had themselves taken nearly two and half years to file the reply to the show cause notice, even after constant persuasion. When the reply to show cause notice itself is filed much beyond the period prescribed for the adjudication, then how can the adjudication proceedings be completed within the prescribed period of adjudication as per sub-section (8) to Section 28. Even if it is assumed that the adjudication proceedings were to be completed within one year from the date of amendment i.e. 28.03.2018, as have been held by the Hon'ble Punjab and Haryana High Court in case of Harkaran Das Vedpal, then also appellant needs to show that he has acted with clean intent of getting the matter adjudicated within one year from that date, by filing the reply within one month from that date. In my view no court or tribunal will be justified in directing the adjudicating authority to proceed in such a manner ignoring the principles of natural justice. In the present case adjudicating authority has in less than two months of the completion of the submissions and receiving the final reply from the noticee (appellant) adjudicated the matter.

5.12 Hon'ble Punjab and Haryana High Court has decided the case of Harkaran Das Vedpal, following their own decision in the case of GPI Textiles. Both in the case of GPI Textiles and Harkaran Das Vedpal, there was unreasonable and unexplained delay of more than fifteen years in undertaking the adjudication proceedings. Finding this delay of more than fifteen years in completing the adjudication proceedings as unreasonable, Hon'ble High Court has quashed the show cause notice itself. The issue of

“reasonable time” in institution of proceedings or their conclusion has been subject matter of many decisions of the Hon’ble Supreme Court. In the case of Joseph Severance And Ors vs Benny Mathew And Ors [(2005(7) SCC 667)], has referred to various earlier decisions and observed as follows:

“The basic issue is whether the suit was filed within a "reasonable time".

As observed in Veerayee Ammal v. Seeni Ammal, [2002] 1 SCC 134, it is "looking at all the circumstances of the case; a "reasonable time" under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than `directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea".

According to Advanced law Lexicon by P. Ramanatha Aiyar 3rd Edition, 2005 reasonable time means as follows:

"That is a reasonable time that preserves to each party the rights and advantages he possesses and protects each party from losses that he ought not to suffer.

"Reasonable Time" is defined to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case.

If it is proper to attempt any definition of the words "reasonable time", as applied to completion of a contract, the distinction given by Chief Baron Pollock may be suggested, namely, that a "reasonable time" means as soon as circumstances will permit.

In determining what is a reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage or trade or business, if any, with respect to such instrument, and the fact of the particular case.

The reasonable time which a passenger is entitled to alighting from a train is such time as is usually required by passengers in getting off and on the train in safety at the particular station in question.

A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than "directly" such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.

Reasonable time always depends on the circumstances of the case. (Kinney) It is unreasonable for a person who has borrowed ornaments for use in a ceremony to detain them after the ceremony has been completed and the owner has demanded their return. (AIR 1930 Oudh 395).

The expression "reasonable time" means so much time as is necessary under the circumstances to do conveniently what the contract or duty requires should be done in a particular case".

At this juncture, it would be appropriate to take note of the view expressed by this Court in several cases.

In Firm Sriniwas Ram Kumar v. Mahabir Prasad and Ors., AIR (1951) SC 177 it was noted as follows :

"As regards the other point, however, we are of the opinion that the decision of the trial court was right and that the High Court took an undoubtedly rigid and technical view in reversing this part of the decree of the subordinate judge. It is true that it was no part of the plaintiff's case as made in the plaint that the sum of Rs. 80,000 was advanced by way of loan to the defendant's second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Court to give him relief on that basis. The rule undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant it may not be proper to drive the plaintiff, to a separate suit. As an illustration of this principle, reference may be made to the pronouncement of judicial committee in Mohan Manucha v. Manzoor Ahmad, 70 IA 1AIR

30 (1943) PC 29. This appeal arose out of a suit commenced by the plaintiff- appellant to enforce a mortgage security. The plea of the defendant was that the mortgage was void. This plea was given effect by both the lower courts as well as by the Privy council. But the Privy Council held that it was open in such circumstances to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under Section 65 of the Contract Act. Although no such alternative claim was made in the plaint, the Privy Council allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the appellants even though the appeal was heard ex party in the absence of the respondent."

In Sant Lal Jain v. Avtar Singh, [1985] 2 SCC 332 in paragraph 7 & 8 of the judgment it was observed as follows:

"7. In the present case it has not been shown to us that the appellant had come to the court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds in possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction.

8. The respondent was a licensee, and he must be deemed to be always a licensee. It is not open to him, during the subsistence of the licence or in

the suit for recovery of possession of the property instituted after the revocation of the licence to set up title to the property in himself or anyone else. It is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to the property subsequently though some other person. He need not do so if he has acquired title to the property from the licensor or from someone else lawfully claiming under him, in which case there would be clear merger. The respondent has not surrendered possession of the property to the appellant even after the termination of the licence and a institution of the suit. The appellant is, therefore, entitled to recover possession of the property. We accordingly allow the appeal with costs throughout and direct the respondent to deliver possession of the property to the appellant forthwith failing which it will be open to the appellant to execute the decree and obtain possession."

The explanation offered by the plaintiffs is plausible. The defendants did not specifically raise any plea that the time taken was unreasonable. No evidence was led. No specific plea was raised before the trial Court and first appellate Court. The question of reasonable time was to be factually adjudicated. For the first time in the Second Appeal the dispute essentially founded on factual foundation could not have been raised."

This decision has been followed by the Hon'ble Supreme Court in the case of E.S.I.C vs C.C. Santhakumar [(2007)1 SCC 584]. Thus the issue of the "reasonable time" needs to be considered from the facts of each and every case. In the present case when the present adjudicating authority was appointed as common adjudicating authority only on 26.10.2018 and he has completed the adjudication proceedings on 28.05.2019, he cannot be said to have not completed the proceedings within reasonable time. In fact there taking the period of one year from the date of appointment of the present adjudicating authority as common adjudicating authority to adjudicate the show cause notices issued answerable to multiple

authorities, the show cause notice has been adjudicated within one year as mandated by sub-section (8) to Section 28 as amended. Hence on both the counts of reasonable time, and also on the basis of the time prescribed as per sub-section (8) I do not find any merits in the submissions made by the counsel. In my view in facts and circumstances of this case the law as laid down by the Hon'ble Punjab and Haryana High Court in case of Harkaran Das Vedpal etc will not be applicable.

6.1 Since I am not in agreement with the learned brother for the dismissal of appeal on this first ground, I proceed to consider the other two questions of laws framed by the learned brother as referred above.

6.2 The next question which needs to be addressed is ***"Whether the show cause notice can be issued for recovery under Section 28 of the Customs Act, 1962 without challenging the assessment under Section 17 of the Customs Act 1962".***

6.3 On this issue learned counsel for the appellant has submitted stating as follows:

"That Section 28 deals with demand of duty not levied or short levied or not paid or short paid. It is a case of entitlement of exemption notification which can be denied only after re assessment of bill of entry. Section 28 does not deal with determination of entitlement of exemption. In civil law it may be called as execution of decree and it is well known fact that execution is meaningless without decree. There is no Section or Rule under Customs Act which prescribes mode, manner or method of re-determination of exemption notification. In the absence of power prescribed under the Rule or Act itself, the department has no authority to issue Show Cause Notice under Section 28 to re determine or hold any claim of exemption as duty not levied or short levied, not paid or short paid. It is settled law that no demand can be made in the absence of power/ mechanism prescribed under the Act or Rules made thereunder. Contention is supported with latest judgment of Hon'ble Supreme Court in

the case of CCE Vs Larsen & Toubro 2015 (39) STR 913 wherein Hon'ble Supreme Court has set aside demand of Service Tax on works contract executed prior to 01.07.2007, on the ground that there is no mechanism to determine value of service component. Similar view has been expressed by Hon'ble Punjab and Haryana High Court in the case of Lakshya Media Pvt. Ltd. versus State of Punjab 2016 (4) PLR 455 while dealing with question of recovery of non-payment of tax on advertisement.

That the Respondent at the time of clearance of imported goods examined declared value, duty and claim of exemption under Notification No. 46/2011-CUS dated 01.06.2011. From the conspectus of examination order of each and every bill of entry, it would be gleaned that claim of exemption notification was duly examined prior to clearance of goods. In other words, there was application of mind at the end of Proper Officer. The Proper Officer examined self assessment but did not frame reassessment contrary to self assessment even though he was competent to frame reassessment regarding valuation of goods, classification, exemption or concession of duty availed consequent to any notification. The department cannot claim alibi. Now the question arises that whether Respondent at this stage can reassess exemption claim when goods are no more imported goods. There is no provision permitting re-assessment of claim of exemption and there is only remedy of appeal with both the parties. The Assessing authority cannot reassess claim of exemption and in case of any grievance, he has right to file appeal which Respondents failed in the present case."

6.4 In contra learned authorized representative submitted stating as follow:

"A. The appellant has adopted the ground that demand cannot be raised without re-assessment and that there is no machinery of re-assessment which is fallacious, erroneous and against the settled law. The importer fled Bills of Entry in contravention of Section 46(4) of Customs Act, 1962 read-with Section 17 and fraudulently obtained clearance under Section

47 ibid. It is pertinent to mention that the invoices were willfully created and used for self-assessment showing the bicycle parts to be of Malaysian origin so as to avail the benefit of the exemption notification issued under the Preferential Trade Agreement whereas they were of Chinese origiv, which willfully resulted in short payment of Customs duty for which the Revenue has raised a demand under Section 28(4) ibid. The Appellants committed a fraud to avoid payment of appropriate customs duties which has been clearly established and they cannot try to hide behind any web of technicalities. The Supreme Court in case of Commissioner of Mumbai v. Virgo Steels -2002 (141) ELT 598 (S.C.) held that the power to recovery duty which has escaped collection is a concomitant power arising out of levy of customs duty under section 12 of the Act and the Same does not emanate from section 28 of the Act and that section 28 only provides for the procedural aspect for recovery of duty.

B. The appellant in this ground of appeal is harping that the assessment has attained finality and has to be reviewed by way of filing appeal against the same before issuance of SCN for recovery of duty, which is against the well settled law. It is well settled law that SCN for recovery of Customs duty leviable but not paid can be issued under section 28 ibid subsequent to clearance under section 47 as held by the Honble Supreme Court in case of Union of India Vs Jain Shudh Vanaspati Ltd 1996(86) ELT 460 (S.C.), [para 5 and 6] and Hon'ble Madras High Court in case of Venus Enterprises Vs Commissioner of Customs Chennai. [2006 (199) ELT 405 (Mad)] [para 6]. The observations of the Madras High Court have been approved by the Hon'ble Supreme Court at [2007(209) ELF A61(SC)] The well settled legal position that demand of duty can be made under Section 28 without reviewing the assessment under Section 129D has also been reiterated by the Hon'ble Tribunal in case of Mahindra & Mahindra Vs Commissioner of Customs (Import), Mumbai [2014 (312) ELT (Tri.-Mumbai|."

6.5 Before we proceed to examine this aspect, it is necessary to reproduce the relevant provisions of the Custom Act, 1962 as they existed at the time when the show cause notice was issued

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 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 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 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, any 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 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.

17 (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.

Section 28 Recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded. –

(1) Where any duty has not been levied or not paid or short-levied or short-paid 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 two years from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid 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.

Provided that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.

(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 where notice under clause (a) of sub-section (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be

levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of sub-section (1) shall be deemed to be concluded.

(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 69[two years] shall be computed from the date of receipt of information under sub-section (2).

(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.

(5) to (7) …….

(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), (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.

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

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

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

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

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

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.]

Explanation 3. – For the removal of doubts, it is hereby declared that the proceedings in respect of any case of non-levy, short-levy, non-payment, short-payment or erroneous refund where show cause notice has been issued under sub-section (1) or sub-section (4), as the case may be, but an order determining duty under sub-section (8) has not been passed before the date on which the Finance Bill, 2015 receives the assent of the President, shall, without prejudice to the provisions of sections 135, 135A and 140, as may be applicable, be deemed to be concluded, if the payment of duty, interest and penalty under the proviso to sub-section (2) or under sub-section (5), as the case may be, is made in full within thirty days from the date on which such assent is received.

Explanation 4.— ……

Section 46 Entry of goods on importation. –

(1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting electronically to the proper officer a bill of entry for home consumption or warehousing in the prescribed form:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner:

Provided further that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) A bill of entry under sub-section (1) may be presented at any time after the delivery of the import manifest or import report, as the case may be:

Provided that a bill of entry may be presented even before the delivery of such manifest or report, if the vessel or the aircraft or the vehicle by which the goods have been shipped for importation into India is expected to arrive within thirty days from the date of such presentation

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.

Section 47. Clearance of goods for home consumption. –

(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

Provided that such order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:

(2) Where the importer fails to pay the ;import duty, either in full or in part, within two days (excluding holidays) –

(a) from the date on which the bill of entry is returned to him for payment of duty; or

(b) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not below ten per cent and not exceeding thirty-six per cent per annum, as maybe fixed by the Central Government, by notification in the Official Gazette.

Provided that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:

Provided further that where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section:

Provided also that] if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section.

6.6 Discussing the relationship and interplay between these provisions Hon'ble Supreme Court has in the case of Virgo Steel [2002 (141) ELT 598 (SC)] has held as follows:

"8. We will next consider the requirement of Section 28 of the Act and the applicability of the principle of waiver to the said requirement of that Section. While so doing, it is to be noted that our discussion of Section 28

of the Act is with reference to the Section as it stood at the relevant time and not with reference to the existing Section 28 of the Act. The Tribunal by the impugned order has held that in the absence of a notice under Section 28 of the Act, the recovery of duty which has escaped collection, is impermissible in law. While accepting this argument, the Tribunal has placed reliance on a judgment of this Court in Collector of Customs, Calcutta v. Tin Plate Co. of India Ltd. [1996 (87) E.L.T. 589]. It is true that in the course of the above-cited judgment, this Court had held that a notice under Section 28 is a condition precedent, but having perused the said judgment carefully, we are of the opinion that this Court used the expression "condition precedent" with reference to issuance of notice under Section 28 and not with reference to the jurisdiction of the proper Officer under that Section. While the absence of notice may invalidate the procedure adopted by the proper Officer under the Act, it will not take away the jurisdiction of the Officer to initiate action for the purpose of recovery of duty escaped. This is because of the fact that the proper Officer does not derive his power to initiate proceedings for recovery of escaped duty from Section 28 of the Act. Such power is conferred on him by other provisions of the Act which mandate the proper Officer to collect the duty leviable. By a perusal of Chapter V of the Act in which Section 28 is found, it is seen that the charging Section which authorises the levy of customs duty is found in Section 12 of the Act. Section 17 contemplates the procedure for making an assessment in regard to duty payable while sub-section (4) of Section 17 makes a provision to empower the proper Officer to reassess the imported goods for duty if it is found that the assessment made at the time of importation was based on incorrect or false information. Section 142 of the Act found in Chapter XVIII provides for actual recovery of sums due to the Government. A cumulative reading of these provisions found in the Act clearly shows that the jurisdiction of a proper Officer to initiate proceedings for recovery of duty which has escaped collection, is not traceable to Section 28. The power to recover

duty which has escaped collection is a concomitant power arising out of the levy of customs duty under Section 12 of the Act, and the same does not emanate from Section 28 of the Act. In our opinion, Section 28 only provides for the procedural aspect for recovery of duty, hence, any irregularity committed by a proper Officer in following the procedure laid down in Section 28 would not denude that Officer of his jurisdiction to initiate action for recovery of escaped duty but it may make such proceedings initiated by that Officer voidable. In that view of the matter, in our opinion, the term "condition precedent" used in the case of Tin Plate Co. (supra) is referable to the procedural requirement of Section 28 and not to the jurisdictional aspect of the proper Officer to recover the escaped duty. In the said view of the matter, we are of the opinion that the law laid down by this Court in Tin Plate Co.'s case (supra) is that issuance of a notice under Section 28 is a mandatory requirement of that Section, with which we are in agreement. We also notice the very important fact that in that case the question of waiver did not arise and what was considered by this Court was the contention of the Revenue that a subsequent letter written by the Revenue after the expiry of the period of limitation would cure the defect of non-issuance of a notice."

6.7 Similarly in case of Jain Shudh Vanaspati relied upon by the learned Authorized Representative, Hon'ble Apex Court has clearly laid down that the notice under Section 28 could have been issued only subsequent to the clearances of the goods.

6.8 Plain reading of the provisions also suggest the same. Custom duty is levied as per the provisions of the section 12 of the Act. The manner of entry of goods on importation and clearance of goods for home consumption has been provided by the section 46 and 47. Section 17 of the Custom Act provide for manner of assessment of goods. Word assessment has been defined by the Section 2 (2) as follows:

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

From the provision of Section 17 it is quite evident that the person who is seeking to clear the goods for home consumption upon the entry of goods for importation is required to file the Bill of Entry in the prescribed form manner self assessing the duty due on these goods. On payment of the duty as assessed and after satisfying the proper officer that the duty as assessed has been paid along with the other charges due, the person seeking clearance of goods can clear the goods for home consumption consequent to the order of clearance of the goods made under Section 47 by the proper officer. Section 17 provides for the reassessment of duty as self assessed by the person filing the Bill of Entry. It do not provide that such self assessment needs to be done prior to the clearance of goods. Sub-section (3) provides that proper officer shall for causing the verification of the self assessment made by the importer, call for any information, as provided by that section in relation to the goods imported. Sub-section (4) empowers the proper officer to reassess the goods and the duty due on these goods. Subsection (5) provides that in case the goods are re-assessed contrary to the self assessment made by the importer, the proper officer can modify the assessment and in case the importer demands shall issue an speaking order specifying the reasons/ grounds for making such reassessment. There is no time limit prescribed by the Section 17 of the Customs Act, 1962 for making the order of re-assessment. Further section 47 of the Act, also do not mandate that clearance of the goods will be only consequent upon the re-assessment of duty. Thus the order clearance of the goods under Section 47, will not automatically result in the conclusions of the proceedings of assessment as the definition of assessment as per Section 2(2) includes re-assessment. Section 17, as it existed then provides for the manner of assessment and verification of the goods which have been entered for importation, however section do not in any way lays down any time limit or limitation,

in respect of the completion of assessment proceedings. Further neither Section 17 nor Section 47, makes it necessary that assessment proceedings should have been completed and finalized before the order of clearance of the goods is made under Section 47. The limitation in respect of initiation of the proceedings for completion of assessment is provided by the section 28 of the Act. Section 28 (1) and Section 28 (4) provide that in case where the Custom authorities are of the opinion that any duty and interest has been not levied or not paid or short levied or short paid, they will initiate the proceedings for determination of the quantum of non levied/ nonpayment or short levy/ short payment by issuance of the notice under this section within the period of limitation as prescribed by this section. From the plain reading of Section 28, it is quite evident that the period of limitation has to be computed from the relevant date as defined by Explanation 1 to that section. This explanation defines the relevant date qua the-

- The date of the order of clearance of goods made by the proper officer;
- In case of provisional assessment the date of final adjustment of duty consequent upon finalization of the assessment or re-assessment thereof;
- In case of erroneous refund, the date of refund;
- In all other cases the date of payment of duty, interest etc.

The definition of relevant date does not make any reference to any assessment order under Section 17. The view that section 28, provides for the machinery provision to complete the assessment, is strengthened by the sub-section (11) to the Section 28, This sub-section specifically clothes all the persons appointed as officer of Customs, with the power of assessment under Section 17, for purpose of initiation of proceedings under this section. Learned counsel for appellant had during course of

arguments relied upon the decision of Hon'ble Supreme Court in case of ITC Ltd [2019 (368) ELT 216 (SC)] to argue that once the goods have been cleared upon assessment made under section 17, then department should have filed an appeal before the concerned appellate authority, and should have got the assessment order set aside or modified before issuing the notice under Section 28. He also relied upon the decision of Hon'ble Punjab and Haryana High Court in the case of Jairath International 2019 (370) ELT 116 (P & H)] and submitted that once having permitted the clearance of the goods on the basis of self assessment made by the appellants department do not have power to reassess the goods subsequent to the order of clearance made under Section 47, and the only remedy available with the department was to challenge the order of self assessment before the appropriate appellate authority. We find none of the case support the submissions made by the learned counsel. None of the case is in respect of the demand notice issued under section 28. The case of ITC is qua the refund proceeding under section 27 of the Customs Act, 1962 and that of Jairath is in respect of Rule 16 of the Drawback Rules. Further in the case of ITC, Hon'ble Supreme Court has very clearly stated as follows:

"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).*

44. The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. ***The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all.*** *Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra)."*

When Hon'ble Apex Court itself observes that the proceedings of claim of refund under Section 27, are distinct from the assessment and reassessment proceedings, how is it possible to apply the ratio of the said decision to the case of re-assessment, for which a notice has been issued in terms of Section 28. It is also not the case that no machinery provision has been provided in law for making reassessment subsequent to the clearance of the goods. Section 28 is the machinery provision to frame such reassessment in case of any non levy/ nonpayment or short levy/ short payment of duty. In such a case where machinery provision has been specifically provided the decision of the Hon'ble Apex Court in case of Larsen & Toubro 2015 (39) STR 913 and of Hon'ble Punjab & Haryana High Court in case of Lakshya Media Pvt. Ltd. [2016 (4) PLR 455] do not advance the case of the appellants. Hon'ble Apex Court in case of Sayed Ali [], wherein Hon'ble Apex Court has clearly stated that the proceedings under Section 28 are re-assessment proceedings.

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****. ….."*

6.9 Rejecting the similar contentions as raised by the learned counsel for the appellant before us, Bombay bench of tribunal held as follows:

7. Regarding the contention of the appellant that the demand of duty under Section 28 of the Customs Act, 1962 is not sustainable because the department did not review the assessments made in the bills of entry at the time of importation under Section 129D does not have any legal basis. The same issue came up before the Hon'ble Apex Court in the case of UOI

v. Jain Shudh Vanaspati Ltd. case cited supra and the Hon'ble Apex Court observed as follows :

"It is patent that a show cause notice under the provisions of Section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under Section 47 of the concerned goods. Further, Section 28 provides time limits for the issuance of the show cause notice thereunder commencing from the "relevant date"; "relevant date" is defined by sub-section (3) of Section 28 for the purpose of Section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under Section 47. The High Court was, therefore, in error in coming to the conclusion that no show cause notice under Section 28 could have been issued until and unless the order under Section 47 had been first revised under Section 130."

7.1 From the above decision of the Supreme Court it is clear that when there is a short levy or non-levy or short payment or non-payment or erroneous refund, show cause notice under Section 28 for recovery of duty can be issued and the proceedings are sustainable. A similar view was taken by this Tribunal in the case of Venus Enterprises cited supra wherein this Tribunal observed as follows :

"We have gone through the records of the case carefully and heard both sides. The appellants imported certain items by filing 11 Bills of Entry. After assessment and clearance, certain investigations were conducted which revealed undervaluation of the goods. We are of the view that the issue of show cause notice under Section 28 of the Customs Act is quite legal to demand short levy in the light of the investigations conducted subsequent to the clearance. If the contention of the appellants that no demand notice can be issued without reviewing the order of assessment, then Section 28

would become redundant. Hence we do not accept the ld. Counsel's contention that no show cause notice under Section 28 can be invoked after clearance of the goods by enhancing the declared value."

7.2 The said decision of the Tribunal was challenged before the Hon'ble High Court of Madras and the Hon'ble High Court of Madras upheld the decision of the Tribunal and observed as follows :

"With regard to question No. 1, the law is well settled that a show cause notice under the provisions of Section 28 of the Act for payment of customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance of the goods under Section 47 of the Act vide Union of India v. Jain Shudh Vanaspati Ltd. [1996 (86) E.L.T. 460 (S.C.)]. Therefore, as rightly held by the Tribunal, if the contention of the appellant's counsel that when the goods were already cleared, no demand notice can be issued under Section 28 of the Act is accepted, we will be rendering the words "where any duty has been short-levied" as found in Section 28(1) of the Act as unworkable and redundant, inasmuch as the jurisdiction of the authorities to issue notice under Section 28 of the Act with respect to the duty, which has been short-levied, would arise only in the case where the goods were already cleared. In view of the clear finding with regard to the misdeclaration and suppression of value, which led to the undervaluation and proposed short-levy of duty, we do not see any lack of jurisdiction on the part of the adjudicating authority to issue notice under Section 28(1) of the Act."

7.3 The SLP filed against the order of the Madras High Court was also dismissed by the Hon'ble Apex Court reported in 2007 (209) E.L.T. A61 (S.C.). The reliance placed by the appellant on the Cotspun case and Mahindra and Mahindra case cited supra does not help their cause because these decisions pertains to interpretation of Section 11A of the Central Excise Act. When there are decisions by the Hon'ble Apex Court,

the Hon'ble High Court of Madras and this Tribunal directly on the scope of Section 28 of the Customs Act itself, there is no need to refer to any decisions pertaining to Central Excise Act at all. Therefore, we reject the contention of the appellant that the show cause notices issued demanding duty short levied under Section 28 of the Customs Act, after assessment of the bills of entry is not valid in law. In other words, we uphold the right of the revenue to demand duty short levied or paid or not levied or paid or erroneously refunded under Section 28 of the Customs Act, 1962. Thus there is no infirmity or illegality in the instant case as far as demand of duty made under Section 28 ibid is concerned."

6.10 In view of the discussions as above we are not in agreement with the submissions made by the learned counsel for appellant and hold that the revenue had complete jurisdiction to proceed against the appellant in case of any non levy/ nonpayment or short levy/ short payment under section 28 of the Customs Act, 1962. Thus this question framed by the learned brother also is decided in favour of the revenue and against the appellants.

7.1 The last question which has been framed by the learned brother states as follows:

"Whether in the absence of following the procedure prescribed under Section 138C of the Customs Act, 1962, the documents relied by the adjudicating authority are admissible or not."

7.2 Learned Counsel for appellant has on this issue in his submissions stated as follows:

"That whole case is based upon documents/conversation recovered from the emails which were taken without complying with provisions of Section 138C of the Act. Print out as document is admissible only if accompanied by certificate in terms of Section 138C of the Act obtained at time of taking printouts. Any documentary evidence by way of electronic record under the Act can be proved only in accordance with procedure prescribed under

Section 138C of the Act which postulates admissibility of electronic record. The purpose of Section 138C of the Act is to sanctify evidence in electronic form, generated by a computer. The very admissibility of documents i.e. micro films, facsimile copies of documents and computer print outs as documents and as evidence depends on the satisfaction of four conditions prescribed under Section 138C (2) of the Act. There is nothing in the whole impugned order that DRI complied with Section 138C of the Act while placing reliance upon documents/ conversation printed out from the computer or hard disks resumed during investigation. In the absence of compliance of Section 138C of the Act documents/conversation printed out from computers are not admissible as evidence against the Appellant and any proceedings on the basis of inadmissible documents/conversation as evidence is not sustainable in the eye of law. Contention is countenanced with case of Anvar P. V versus P.K. Basheer and others, Civil Appeal No. 4226 of 2012 (SC) & Final Order No. A/63225-63234/2018 titled as Commissioner of Central Excise versus Vishal Gupta, (Tri-Chd). It is apt to mention that Section 138C of the Customs Act, 1962 is pari materia with Section 65B of the Evidence Act, 1872 & Section 36B of the Central Excise Act, 1944."

7.3 Countering the said arguments of the learned counsel, authorized representative stated-

"In this ground of appeal the appellant is trying to take benefit of Section 138C of the Customs Act, 1962 which is fallacious. The relied upon documents. E-mails have been retrieved from web-based e-mail accounts i.e. gmail.com stored on servers maintained by Google and not from e-mails stored in computers installed in the factory/ office premises of the appellant. The documents have been printed on different dates from two e-mall accounts namely rajvinbath@,gmail.com owned and operated by Sh. Rajwinder Singh Batth , Manager(Import / Export) of the appellant and rsaminternational@gmail.com owned and operated by Sh. Samarjeet

Singh, proprietor of the appellant and any document printed from these e-mail addresses are in fact documents produced by them or has been seized from their custody and as such are covered under Section 139 ibid and it leaves no doubt that, unless the contrary is proved that the signature and other part of the documents are genuine. Moreover all the printouts taken from e-mall accounts were duly signed by respective owners of the said e-mail accounts in token of it's correctness. The Appellants had certified each and every message culled from the e-mail accounts and never disputed the authenticity of the same. Rather this fact facts has been admitted in their statements recorded under Section 108 ibid. Therefore the evidence as relied upon in this case is proper and complies with the applicable provisions of law. Further, this is not stand alone evidence, there is corroborative evidence bringing out one to one co-relation of the well organized fraud which also stands admitted in their statements recorded under Section 108 ibid which have not even been retracted. Reliance is also placed upon the following case laws to buttress the Revenue's position: -

- *Copier Force India Ltd. [2008 (231) ELT 224 (Tri . –Chennai)]*
- *Shri Ulacanavari Ammali Steels [2008 (231) ELT 434 (Tri.-Chennai].*
- *Sri Ulaganayagi Amman Steels [2009 (241) ELT 537 (Tri.-Chennai].”*

7.4 For the ease o f reference Section 138 C and 139 of the Customs Act, 1962 and Section 65 B of the Indian Evidence Act are reproduced below:

Section 65 B of Indian Evidence Act,-

65B. Admissibility of electronic records:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in

relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: - (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether –

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation: For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

Customs Act, 1962

SECTION 138C. Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. –

(1) Notwithstanding anything contained in any other law for the time being in force, -

(a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or

(b) a facsimile copy of a document; or

(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer

printout"), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question,

shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer printout shall be the following, namely :-

(a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether -

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. - For the purposes of this section, -

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived there from by calculation, comparison or any other process.]

SECTION 139. Presumption as to documents in certain cases. *- Where any document -*

(i) is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India in the course of investigation of any offence alleged to have been committed by any person under this Act, and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the court shall -

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document.]

Explanation. - For the purposes of this section, "document" includes inventories, photographs and lists certified by a Magistrate under sub-section (1C) of section 110.

7.5 From the perusal of the provisions of Indian Evidence Act and Customs Act, 1962 as referred to above it is quite evident that when the electronic record/ document that is produced is produced as a secondary evidence the same needs to be accompanied by the certificate as prescribed by Section 65B (4) of Evidence Act, 1962 or Section 138C (4) of the Customs Act, 1962 from the authority who is in control of the said electronic record. In case the electronic record/ document was produced as primary evidence, then there is no requirement to produce such certificate, as the section 65B(2) of the Evidence Act and 138C(2) of the Customs Act, 1962 are in respect of secondary evidence and not when such electronic record/ document is produced as primary evidence. Undisputedly the electronic records/ documents produced in this case are not mere printouts seized recovered from the appellant. These electronic record/ document are in nature of the email stored on the web servers of gmail.com, in the e-mail accounts in the name of ***Sh. Rajwinder Singh Batth , Manager(Import / Export)*** **[*rajvinbath@,gmail.com] and Sh. Samarjeet Singh, proprietor of the appellant [rsaminternational@ gmail.com].*** Both the accounts are password protected as per the privacy policy of Google, and are operated by the respective owners. During the course of investigation both these persons have themselves operated the e-mail accounts and tendered these documents from their e-mail accounts to the investigating authority. It is not the case that these electronic records/ documents were recovered from any third person, and produced as evidence in the matter. The electronic records/ documents produced in this case being the primary evidence, and having been tendered by the appellants themselves during the course of investigation are the in nature of primary evidence and do not require to be proved by the production of certificate as prescribed by Section 138 C (4). Appellants have themselves tendered these electronic record/ documents after verifying and attesting them under their signature. Further they do not dispute their authencity

and also have admitted them in their statements recorded under Section 108 of the Customs Act, 1962.

7.6 The decision of the Hon'ble Supreme Court in case of Anvar, referred to by the learned counsel, was subsequently considered and explained by the Hon'ble Supreme Court in case of Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal [2020 SCCOnLine SC 571]

26. Sections 65-A and 65-B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V., this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65-A and 65-B of the Evidence Act. Primary evidence is the document produced before the Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

27. The term "electronic record" is defined in Section 2(1)

(t) of the Information Technology Act, 2000 as follows:

"2.(1)(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;"

28. The expression "data" is defined in Section 2(1)(o) of the Information Technology Act as follows:

"2.(1)(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being

processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;"

29. The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65- B(4) is not always mandatory.

30. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies."

7.7 The case of Vishal Gupta, referred to by the learned Counsel too is distinguishable on facts. In that the case the evidence was in form of the pen-drive recovered from one "Priyanka jain". The facts of the case as recorded in the order are reproduced below:

"2. The facts of the case are that the appellant/M/s P.S. is engaged in the manufacture of Stainless Steel Pipes & Tubes who is registered with the central excise department having their head office at Hisar and also having their trading office at Motia Khan, Delhi. M/s P.S is also having their sister unit namely M/s Sheela Stainless Pvt. Ltd (in short M/s SSPL) having their office at Hisar and engaged in their trading of Iron & Steel Products and also having central excise registration as registered dealer. They are also having their sales office located at Motia Khan, Nabi Karim, New Delhi. The offices of the M/s P.S and M/s SSPL located in Delhi were not registered with the central excise department. The head office of M/s P.S and M/s SSPL is located in Hisar and the records of the both were maintained M/s P.S's office at Hisar. On 11.04.2013, a search was conducted at the premises to the M/s P.S and M/s SSPL. The factory of M/s P.S was found working. No variation in stock of inputs as well as finished goods were found in records of the stock maintained in the statutory records and no incriminating documents were recovered during the search of the factory premises of the appellant. ***Shri Deepak Gupta, Director of M/s SSPL was present in the office and two pen drives were recovered from possession of one Ms. Priyanka Jain, Office Executive. On the basis of two pen drives recovered from the possession of Ms. Jain, the print outs were taken and it was summarized that M/s P.S is engaged in clandestine removal of goods from their head office at Hisar as well as at their office at New Delhi.*** *It was also alleged that the appellants were also engaged in issuing goodless invoices enabling to avail in admissible cenvat credit and it was also alleged that M/s P.S had undervalued their goods. On the basis of the chart, it was found that the quantity of 426.2365 MT was cleared by the M/s P.S as per invoice and the appellant has issued invoice as the quantity of 2181 MT only facilitate to avail inadmissible cenvat credit and it was also considered in the show cause notice that the appellants have received cash in their daily account as per the pen drive, therefore, the cash received has been taken as the receipt of the goods*

cleared clandestinely by the appellants and consequently the duty was demanded. ***In the pen drives recovered from M/s Priyanka Jain, the data allegedly found as under****:- ….."*

"8. On careful consideration of submissions of both sides, we find that in this case during the course of investigation neither stock variations were found and nor any incriminating documents were recovered during the search of factory premises of appellants. Only two pen drives were recovered from the possession of Ms. Priyanka Jain in the joint office of the appellant and data has been retrieved and on that basis, the case has been made out against the appellant. Section 36B of the Central Excise Act, 1944 deals with the situation of admissibility of documents and computer print outs as evidence. The Section 36B of CEA, 1944 is extracted herein below:-

…..

We find that the procedure has been prescribed under Section 36B of the Act. In this case, the procedure laid down under Sub-sections 2, 3 & 4 of section 36B, has not been followed, in that circumstances, the data gathered from pen drives relied in toto and some of the invoices, are not admissible evidence. Therefore, on this sole ground, the show cause notice is not sustainable."

Since neither the pen drives were recovered from the possession of the appellant (in that case) nor were tendered by them during the course of investigation or thereafter, the tribunal has found them to be inadmissible in evidence in those proceedings for not having followed the procedure as prescribed by Section 36B of the Central Excise Act, 1944. The facts are clearly distinguishable and the said decision cannot apply to the facts in the present case.

7.8 In the case of Copier Force India Ltd [2008 (231) ELT 224 (T-Chennai), following has been held:-

"9.1 As regards the certificate to be given in terms of Sub-section 2(d) of Sec. 36B, it is admitted that Shri Krishnakumar, Manager (Accounts) CFI and his Assistants Ms. Radha, and Ms. Rathi entered the data on a daily basis. This has been admitted by Shri S. Krishnakumar, in his statement dated 29-1-03. This will meet the requirement of certification in terms of Sub-section 2(d) Section 36B of the Act. They cannot later say that no enquiry was made with the person stipulated u/s 36B(2)(d). Revenue has argued that once the printout is taken in presence of responsible persons who dealt with the data entry in the CPU and retrieval, printouts of such data do not need to comply with the safeguards enlisted u/s 36B(2) of the Act. While this is a reasonable stand, we find that the data retrieved are proved by the bank statements and oral evidence of employees of CFI. Thus the computer printouts are not solely relied on as evidence and the non-fulfilment of conditions under 36B(2) alleged does not affect the printouts being used in proceedings. Relevant extracts of Section 36B are reproduced below :

SECTION 36D. Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. —

……

The Computer printouts are amply corroborated by the bank statements. Therefore the provisions of Section 36B cannot be invoked to make its application in the proceedings impermissible. The printout is not a standalone evidence; they become evidence only when juxtaposed alongside the bank statements. Section 36B does not bar such use of a printout in proceedings which does not satisfy the requirements of its Sub-section 2(d)."

7.9 Similarly in case of Shri Ulacanavari Ammali Steels [2008 (231) ELT 434 9T-Chennai)], following has been held,-

*"**16.** We find that the printouts relied upon are not from the CPU belonging to the assessee. The precautions sought to be ensured through Section 36B(2) of the Act would appear to apply to printouts of data taken from a CPU. It cannot apply to a printout of a file in the presence of the person who had maintained the same and with the key (password) supplied by him. Such data is beyond suspicion of having been tampered by the investigating agency. These printouts are also corroborated by other evidence. In the consolidated submissions of SASAI dated 3-1-08, SASAI submitted that in the instant case the provisions of Section 36B would come into operation only when the computer printouts were sought to be relied upon without any corroborative evidence. We find that the printouts from floppies are admissible evidence and do not require corroboration. However the Commissioner found reliable evidence outside the printouts to find evasion. Since the authenticity of the seizure of the floppies has come under cloud, only such files opened after seizure for the first time in the presence of Shri S.P.M. Anandan with the password he gave are reliable. The files, from floppies seized from Ms. Ponnalagu's residence which on opening in her presence showed the last they were modified to be prior to 24-6-04, i.e., the date of seizure, are also reliable."*

7.10 In the present case when the print out of the e-mails were taken from the e-mail server by the person owning and operating the e-mail accounts which are password protected and have been verified and signed by the said person requirement of certificate as per the section 138 C (4) of the Customs Act, 1962 is substantially complied with. In case of D Bhurmal, [1983 (13) ELT 1546 (SC)], Hon'ble Supreme Court has clearly laid down that the cases of fiscal fraud need not be subject to the rigors of strict evidence as per the Evidence Act, but can be said to be established if they are established within the pre-ponderence of probability of their

being true. The observations of the Hon'ble Apex Court are reproduced below:

"43. *If we may so with great respect, it is proper to read into the above observations more than what the context and the peculiar facts of that case demanded. While it is true that in criminal trials to which the Evidence Act, in terms, applies, this section is not intended to relieve the prosecution of the initial burden which lies on it to prove the positive facts of its own case, it can be said by way of generalisation that the effect of the material facts being exclusively or especially within the knowledge of the accused, is that it may, proportionately with the gravity or the relative triviality of the issues at stake, in some special type of case, lighten the burden of proof resting on the prosecution. For instance, once it is shown that the accused was travelling without a ticket; a prima facie case against him is proved. If he once had such a ticket and lost it, it will be for him to prove this fact within his special knowledge. Similarly, if a person is proved to be in recent possession of stolen goods, the prosecution will be deemed to have established the charge that he was either the thief or had received those stolen goods knowing them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then it will be for him to explain or establish those facts within his peculiar knowledge, failing which the prosecution will be entitled to take advantage of the presumption of fact arising against him, in discharging its burden of proof.*

44. *These fundamental principles, shorn of technicalities, as we have discussed earlier, apply only in a broad and pragmatic way to proceedings under Section 167(8) of the Act. The broad effect of the application of the basic principle underlying Section 106,. Evidence Act to cases under Section 167(8) of the Act, is that the Department would be deemed to have discharged its burden if it adduces only so much evidence, circumstantial or direct, as is sufficient, to raise a presumption in its favour with regard to the existence of the fact sought to be proved. Amba Lal's case, (1961) 1*

SCR 933 = 1983 E.L.T. 1321, was a case of no evidence. The only circumstantial evidence viz. the conduct of Amba Lal in making conflicting statements, could not be taken into account because he was never given an opportunity to explain the alleged discrepancies. The status of Amba Lal viz. that he was an immigrant from Pakistan and had come to India in 1947-before the customs barrier was raised-bringing along with him the goods in question, had greatly strengthened the initial presumption of innocence in his favour. Amba Lal's case thus stands on its own facts."

While in the case of Anvar,supra, Hon'ble Supreme Court has clearly held that the case of corrupt practice is akin to criminal charge and need to be proved with precision. The court observed:

39. It is now the settled law that a charge of corrupt practice is substantially akin to a criminal charge. A two-judge Bench of this Court while dealing with the said issue in Razik Ram v. Jaswant Singh Chouhan and Others - (1975) 4 SCC 769, held as follows :

"15. ... The same evidence which may be sufficient to regard a fact as proved in a civil suit, may be considered insufficient for a conviction in a criminal action. While in the former, a mere preponderance of probability may constitute an adequate basis of decision, in the latter a far higher degree of assurance and judicial certitude is requisite for a conviction. The same is largely true about proof of a charge of corrupt practice, which cannot be established by mere balance of probabilities, and, if, after giving due consideration and effect to the totality of the evidence and circumstances of the case, the mind of the Court is left rocking with reasonable doubt - not being the doubt of a timid, fickle or vacillating mind - as to the veracity of the charge, it must hold the same as not proved."

The same view was followed by this Court P.C. Thomas v. P.M. Ismail and Others - (2009) 10 SCC 239, wherein it was held as follows :

"42. As regards the decision of this Court in Razik Ram and other decisions on the issue, relied upon on behalf of the appellant, there is no quarrel with the legal position that the charge of corrupt practice is to be equated with criminal charge and the proof required in support thereof would be as in a criminal charge and not preponderance of probabilities, as in a civil action but proof "beyond reasonable doubt". It is well settled that if after balancing the evidence adduced there still remains little doubt in proving the charge, its benefit must go to the returned candidate. However, it is equally well settled that while insisting upon the standard of proof beyond a reasonable doubt, the courts are not required to extend or stretch the doctrine to such an extreme extent as to make it well-nigh impossible to prove any allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process. (please see S. Harcharan Singh v. S. Sajjan Singh)"

In view of the clear distinction made by the Hon'ble Apex Court between the criminal proceedings and the civil proceedings under the Customs Act, 1962 we would hold that the condition of production of electronic record/ documents as evidence in the present case have been substantially complied, and these electronic records/ documents can be relied upon as evidence in the matter. Even if there is any procedural lapse the same needs to be condone as has been held by the Hon'ble Apex Court in the case of Arjun Panditrao Khotkar, referred in para 7.6 supra.

7.11 On the basis of the discussion as above and the case laws referred above we do not find any merits in the submissions made by the appellant counsel in this respect.

8.1 Certain other grounds have been taken by the appellant in their appeal which were not pressed by the learned counsel during the course of argument. However for the sake of completion I would reject those ground for the reason as stated below:

8.2 Appellants have questioned the reliance placed in the matter on the statements as evidence. These statements have been tendered by the appellant under Section 108 of Customs Act, 1962, voluntarily, revealing the modus operandi of routing the goods through Malaysia to avail the benefit of the exemption notification under Preferential Trade Agreement. These statements have not even been retracted. Statements recorded under Section log of Customs Act have evidentiary value. The Apex Court in K.I.Pavunny [1997 (90)ELT 241 (SC)] has held

"26. *In Naresh J. Sukhawani v. Union of India - 1996 (83) E.L.T. 258 (S.C.) = 1995 Supp. 4 SCC 663 a two-Judge Bench [to which one of us, K. Ramaswamy, J., was a member] had held in para 4 that the statement recorded under Section 108 of the Act forms a substantive evidence inculpating the petitioner therein with the contravention of the provisions of the Customs Act as he had attempted to export foreign exchange out of India. The statement made by another person inculpating the petitioner therein could be used against him as substantive evidence. Of course, the proceedings therein were for confiscation of the contraband. In Surjeet Singh Chhabra v. Union of India - 1997 (89) E.L.T. 646, decided by a two-Judge Bench to which one of us, K. Ramaswamy, J., was a member the petitioner made a confession under Section 108. The proceedings on the basis thereof were taken for confiscation of the goods. He filed a writ petition to summon the panch (mediater) witnesses for cross-examination contending that reliance on the statements of those witnesses without opportunity to cross-examine them, was violative of the principle of natural justice. The High Court had dismissed the writ petition. In that context, it was held that his retracted confession within six days from the date of the confession was not before a Police Officer. The Custom Officers are not police officers. Therefore, it was held that "the confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the*

petitioner". As noted, the object of the Act is to prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc., separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act consists in the statement given or recorded under Section 108, the recovery panchnama (mediator's report) and the oral evidence of the witnesses in proof of recovery and in connection therewith. This Court, therefore, in evaluating the evidence for proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve."

These Statements recorded under Section 108 admitting the modus operandi which have also been corroborated by the e-mails retrieved from the custody and certified by Samarjeet Singh and Rajwinder Singh Batth establishing the fraud committed to evade Customs duty. It is settled law that what is admitted need not be proved as held by the Hon'ble Supreme Court in case of Systems & Components Pvt. Ltd. [2004 (165) ELT 136 (SC)] stating as follows:

*"**5.**The Appeal filed by the Department has been disposed of by the Tribunal by holding that the Department has not proved that these parts*

*were specifically designed for manufacture of Water Chilling Plant in question. The Tribunal has noted the Technical details supplied by the Respondents and the letter of the Respondents dated 30th November, 1993 giving details of how these parts are used in the Chilling Plant. The Tribunal has still strangely held that this by itself is not sufficient to show that they are specifically designed for the purpose of assembling the Chilling Plant. We are unable to understand this reasoning. Once it is an admitted position by the party itself, that these are parts of a Chilling Plant and the concerned party does not even dispute that they have no independent use there is no need for the Department to prove the same**. It is a basic and settled law that what is admitted need not be proved."***

8.3 The appellants have committed a fraud by routing the goods of Chinese origin through the port of Malaysia and obtaining a Country of Origin Certificate to claim the benefit of exemption notification issued under Preferential Trade Agreement. The evidences to establish the fraud to claim the inadmissible exemption are in form of-

- invoices culled from the e-mail accounts of the Proprietor of the Appellant and Manger (Import/Export), both of whom have certified it and never doubted it's authenticity which has also been supported by Statements recorded under Section 108 of Customs Act, 1962 which has evidentiary value.
- Annexure I to the SCN bringing out the details of parallel invoices recovered,
- Annexure II the details of TRS sent by M/s Gursam International to Multiway Manufacturing for onward transfer to different suppliers in China,
- Annexure III is the list of TTs sent by M/s Multiway Manufacturing to different suppliers in China and
- Annexure IV is the list of e-mails having reference of TRS sent to different suppliers based in China and TTs sent by M/s Multiway

Manufacturing, Malaysia to different Chinese suppliers in excel sheet.

8.4 Appellants have in their appeal assailed the impugned order as the request of cross examination of co-accused was denied. However in case of Surjeet Singh Chabbra [1997 (89) E.L.T. 646 (S.C.)], following has been held,-

"3. *It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a Kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the petitioner."*

8.5 The power to issue show cause notice under Section 28 of the Custom Act, 1962 has been extended to all the officers of customs notified under the said act. Hence the ground questioning the jurisdiction of DRI

officers to issue this show cause notice cannot be sustained in view of the decision of the Hon'ble Gujarat High Court in case of Swati Menthol and Allied Chemicals Ltd. [2014 (304) E.L.T. 21 (Guj.)] holding as follows;

*"**32.**In that view of the matter by the settled position, we cannot hold that respondent No. 1 lacked the jurisdiction to issue a show cause notice. Had this notification not been issued, the question perhaps would be whether under sub-section (17) of Section 28 despite the decision of the Supreme Court in the case of Sayed Ali (supra), the respondent No. 1 could be considered as a proper officer for the purpose of Section 28. However, it is not necessary for us to examine such question since in our opinion notification dated 6-7-2011 is specific and assigns functions under Sections 17 and 28 to such officer. He is, therefore, the proper officer in terms of Section 2(34) of the Act. Subsequent notification dated 2-5-2012 would not change this position. This is only a further notification assigning further functions to various officers including those under the Directorate of Revenue Intelligence, functions specified in column No. 3 thereof. This notification is not in supersession of the earlier Notification dated 6-7-2011. Both notifications, therefore, co-exist. In other words notification dated 2-5-2012 has not rescinded the earlier notification. Assignment of the functions, under both notifications, therefore, must operate simultaneously. When we hold that under notification dated 6-7-2011 respondent No. 1 was assigned the functions under Sections 17 and 28 of the Act, his action of issuing show cause notice after the said date in particular cannot be seen as one without jurisdiction. We have noticed that in the clarification issued by C.B.E. & C. on 23-9-2011 it is specified that these officers "DRI and Preventive Wing" would continue the practice of not adjudicating the show cause notice issued under Section 28 of the Act. It was perhaps because of this that having issued show cause notice, the said authority placed the adjudication proceedings before the competent Customs officer at Mumbai for adjudication."*

8.5 Since undoubtedly appellants have committed the fraud to avail the inadmissible benefit under Notification No 46/2011-Cus dt. 01.06.2011 issued under Preferential Trade Agreement between the Governments of Member States of the ASEAN and the Republic of India by way of mis-declaring the country of origin, the penalties imposed on the appellants are justified. Adjudicating Authority has in impugned order clearly brought out the role of the both the appellant in commission of fraud. Hence the penalties imposed on the appellant cannot be disputed. In case of Apco Infratech Pvi. Ltd. [2019 (368) ELT 157 (Tri.-Mumbai)] penalty on the employee who has committed fraud has been upheld stating as follows:

*"**7.** Heard both the sides and perused the records of the case. We find that the appellant M/s. Apco had imported the "Hot mix plant" under Notification No. 21/2002-Cus. Sr. No. 230. It is apparent from the facts of the case that the plant was never utilized as provided under the conditions of the notification. The contention of the appellant that they were eligible for multiple road construction contract issued by Govt. of U.P. for different road construction sites does not mean that the condition of the notification has been followed. In fact the plant was never used for such contracts as canvassed by the appellant during the importation of goods and claiming exemption. The appellant has not adduced single evidence that they have followed the conditions of the notification. They declared that they had contracts awarded by the State of U.P. wherein the imported plant would be used. However they never used the said imported equipments in State of U.P. for construction of road. Instead they used the plant as a sub-contractor in State of Rajasthan and Tamil Nadu, but even in these cases also they were not named as sub-contractor in the contract awarded for construction of road. As per the conditions of the exemption notification, an importer can claim the benefit of exemption provided they are named as sub-contractor for construction of road. Even this condition was not satisfied. It clearly shows that the appellant never complied with the*

conditions of the exemption notification and has knowingly violated the conditions. We also find that since the conditions of the notification were not complied with and from the facts of the case it is very clear that the same were never intended to be complied with, we hold that the impugned order confirming demand, penalties and confiscation of goods has been rightly passed. We also find that the officers had handed over the plant for safe custody after seizure and the same could not have been used without permission from the department. Having violated the conditions of Section 110 safe keeping by using the plant even after seizure makes the appellant liable for penalty under Section 117 of C.A. 1962. Further we find that Shri Anil Singh, Managing Director was fully aware about the benefits likely to accrue by availing ineligible notification and use of machine and therefore in such case his complicity in deliberate violation of the condition of notification is apparent. However in case of Shri V.S. Rao, Chief Manager (F & A), we find that he was only concerned with the taxation matter to the extent of availing benefit of exemption notification and was not concerned/connected with the decision to use machine and his role in violation of condition is also not visible. We are therefore of the view that he cannot be burdened with penalty. Resultantly, in view of our above findings, we uphold the impugned order inasmuch as it has confirmed demand, confiscation of goods and penalties against M/s. Apco and Shri Anil Singh. However the penalty imposed upon Shri V.S. Rao is set aside. The impugned order is modified to the above extent. The appeals filed by M/s. Apco Infratech and Shri Anil Kumar Singh is rejected and the appeal filed by Shri S.V. Rao is allowed."

9.1 In view of the discussions as above I do not find any merits in the appeals and dismiss the same.

Sd/-

(SANJIV SRIVASTAVA)

MEMBER (TECHNICAL)

Points of Difference

In view of the difference in opinion expressed by the Members hearing these appeals, the following question is referred to Hon'ble President for referring the same to third member for his consideration-

"Whether in the facts and circumstances of this case,-

these appeals should be allowed following the decision of Hon'ble Punjab & Haryana High Court in case of *M/s Prabhat Fertilizers & Chemical Works in CM-6352-CWP-2020 in CWP No. 23433 of 2019* as held by Hon'ble Member (Judicial);

Or

these appeals should be dismissed as the decision of Hon'ble Punjab & Haryana High Court in case of *M/s Prabhat Fertilizers & Chemical Works in CM-6352-CWP-2020 in CWP No. 23433 of 2019* is not applicable as has been held by Hon'ble Member (Technical).

(Interim Order pronounced on 03.02.2021)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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THIRD MEMBER: Hon'ble Mr. S. S. Garg, Member (Judicial)

DATE OF HEARING: 09.09.2025

APPEARANCE:

Mr. Naveen Bindal, Advocate for the Appellants

Mr. Anurag Kumar, Authorized Representative for the Respondent

PER: S. S. GARG

The difference on the following issue, recorded in terms of an Interim Order dated 03.02.2021 having two separate orders passed by two learned Members of the original Division Bench, has been placed before me to give my opinion as a Third Member:

> "Whether in the facts and circumstances of this case,
>
> these appeals should be allowed following the decision of Hon'ble Punjab & Haryana High Court in case of *M/s Prabhat Fertilizers & Chemical Works in CM-6352-CWP-2020 in CWP No. 23433 of 2019* as held by Hon'ble Member (Judicial);
>
> Or
>
> these appeals should be dismissed as the decision of Hon'ble Punjab & Haryana High Court in case of *M/s Prabhat Fertilizers & Chemical Works in CM-6352-CWP-2020 in CWP No. 23433 of 2019* is not applicable as has been held by Hon'ble Member (Technical)."

2. Though the facts of the case have already been recorded by the Members of the original bench, therefore, I will not repeat the facts of the case.

3. The learned Counsel for the Appellants as well as the learned Authorized Representative for the Respondent have filed the written submissions, which have been taken on record. Heard both the

parties and perused the material on records and also gone through the respective opinions recorded by both the learned Members.

4. The learned Counsel for the Appellants submits that the issue in this case, on which there is a difference of opinions between the Members of the original Division Bench, is whether the present case is covered by the decision of Hon'ble Punjab & Haryana High Court in the case of *M/s Prabhat Fertilizers & Chemical Works in CM-6352-CWP-2020 in CWP No. 23433 of 2019* or not?

4.1 He further submits that in present appeals, the Appellants have assailed the order dated 28.05.2019 passed by the Commissioner of Customs, Ludhiana, whereby the learned Commissioner has confirmed the duty apart from imposing penalty upon both the Appellants.

4.2 He further submits that Section 28 of the Customs Act, 1962, which provides for recovery of customs duty not levied or short levied or not paid or short paid or erroneously refunded; the said Section has been amended w.e.f. 29.03.2018 and as per amended sub-section (9) read with (9A), the Adjudicating Authority, unless period extended, is bound to pass an order within one year from the date of show cause notice; Explanation 4 annexed to Section 28 has been amended by Finance Act, 2018 and has been further clarified by Finance Act, 2020 and as per amended Explanation 4, show cause notice issued prior to 29.03.2018 would be adjudicated as per law applicable prior to 29.03.2018. He further submits that Hon'ble Punjab & Haryana High Court in the case of *M/s Prabhat Fertilizers & Chemical Works* in *CWP No. 23433 of 2019* quashed the show cause

notice on the ground of non-adjudication within one year from 29.03.2018; the Department filed *CM No. 6352 of 2020* seeking recalling of order dated 18.12.2019 on the ground of amended Explanation 4 of Section 28 of the Act; the Hon'ble High Court dismissed the review application vide its order dated 27.07.2020 and clarified that amendment of Section 28(9) is not retrospective but retroactive and as per principles of retroactive, show cause notice issued prior to 29.03.2018 shall be deemed to be issued on 29.03.2018 and the Adjudicating Authority would be bound to adjudicate the show cause notice within one year from 29.03.2018.

4.3 He further submits that in the present case, show cause notice was issued on 07.10.2016 and the same was bound to be adjudicated by 29.03.2019, whereas the Adjudicating Authority adjudicated the show cause notice dated 07.10.2016 vide the impugned order dated 28.05.2019; the show cause notice dated 07.10.2016 stands vacated on 29.03.2019 and therefore, the impugned order is liable to be quashed on this sole ground.

4.4 He further submits that the Member (Technical) has failed to consider the order of Hon'ble High Court passed in review application in the case of *M/s Prabhat Fertilizers & Chemical Works* subsequent to amendment of Explanation 4. He also submits that the Member (Technical) has failed to consider the difference between retrospective amendment and retroactive amendment. He also submits that Hon'ble High Court has interpreted the very same provision i.e. Section 28(9) of the Act and has duly explained the difference between retrospective and retroactive amendment. He

further submits that as per retrospective amendment, the show cause notice issued prior to amendment like in the present case, would have been lapsed on the date of amendment itself i.e. 29.03.2018, but retroactive amendment gives a level playing field to all previous show cause notices and in terms of principles of retroactive amendment, the old show cause notice would be treated to have been issued on the date of amendment itself. He further submits that Hon'ble High Court has clearly held that amendment is not retrospective but is retroactive in nature.

4.5 He further submits that the Respondent-Revenue itself had admitted the amendment applicable to old show cause notices in the case of *M/s Shri Ram Agro Chemicals* and had requested for extension of time in terms of Section 28(9A) of the Act, despite the fact that show cause notice had been issued much prior to 2018 amendment.

4.6 The learned Counsel further submits that now the issue is no more *res integra* as the concerned Section as well as the amendment, have been interpreted by the jurisdiction High Court and judicial discipline demands that this interpretation be followed by the Tribunal. In this regard, he places reliance on the following cases:

a) Ambica Industries vs. CCE [(2007) 6 SCC 769]

b) Vodafone India Ltd vs. CCE [2015 (9) TMI 583 Bom. H.C.]

4.7 The learned Counsel further submits that the other issues dealt by the Member (Technical), including adjudication in reasonable

period, have not decided by the Member (Judicial) and therefore, have not been referred to the third Member.

5. On the other hand, the learned Authorized Representative for the Revenue submits that the view taken by the Member (Technical) is correct in law. He further submits that the Member (Technical) has distinguished the present case on both law and fact. He further submits that in the present case, for delaying in adjudication, the Appellants are responsible for the delay in adjudication because the Appellants never filed the reply to the show cause notice until February 2019 despite multiple opportunities and also they sought adjournments citing non-receipt of documents. He also submits that the Appellants themselves admitted their liability by making substantial duty payments in instalments between January and December 2017. He further submits that the delay in adjudication was a direct consequence of their non-cooperation. He further submits that in the present case, the show cause notice was issued on 07.10.2016 and the adjudication order was passed on 28.05.2019 which is less than three years and it is a reasonable period for deciding the show cause notice. He further submits that as per the Member (Technical), Explanation 4 creates a specific legal exception for show cause notices issued between 14.05.2015 and 29.03.2018; these show cause notices are explicitly governed by the old law, not the new one. He also submits that even if the retroactive principles were applied, the Appellants themselves caused the delay making the defense of "lapsed notice" inequitable.

6. I have considered the submissions made by both the parties and perused the written submissions filed by both the parties. I find that as per the difference of opinions, the only question referred for my opinion, is whether the present case is covered by the decision of Hon'ble Punjab & Haryana High Court in the case of *M/s Prabhat Fertilizers & Chemical Works* in *CM-6352-CWP-2020 in CWP No. 23433 of 2019* or not?

7. Further, I find that the Member (Judicial) has relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of *M/s Prabhat Fertilizers & Chemical Works* (supra) whereby the Hon'ble High Court quashed the show cause notice on the ground of non-adjudication within one year from 29.03.2018. Not satisfying with the decision of the Hon'ble High Court, the Department filed review petition CM No. 6352 of 2020 seeking recalling of the order dated 18.12.2019 on the ground of amended Explanation 4 of Section 28 of the Act. It is to be noted that the Hon'ble High Court, vide its order dated 27.07.2020, dismissed the review petition filed by the Department and clarified that amendment of Section 28(9) of the Act is not retrospective but retroactive and as per principles of retroactive, show cause notice issued prior to 29.03.2018 shall be deemed to be issued on 29.03.2018 and the Adjudicating Authority is bound to adjudicate the show cause notice within one year from 29.03.2018.

8. Further, I also find that in the present case, show cause notice was issued on 07.10.2016 and as per the law laid down by the Hon'ble High Court in *M/s Prabhat Fertilizers & Chemical Works*

(supra)'s case, the said show cause notice should have been adjudicated by 29.03.2019, whereas the Adjudicating Authority adjudicated the said show cause notice on 28.05.2019, which is beyond the time as prescribed by the Hon'ble High Court.

9. Further, I also find that the Member (Technical) has not considered the order dated 27.07.2020 of Hon'ble High Court passed in review petition in the case of *M/s Prabhat Fertilizers & Chemical Works* (supra) subsequent to amendment of Explanation 4.

10. I also find that the Department challenged both the orders of the Hon'ble High Court, i.e. order dated 18.12.2019 passed in CWP No. 23433 of 2019 and order dated 27.07.2020 passed in CM No. 6352 of 2020, before the Hon'ble Supreme Court and the Hon'ble Supreme Court vide its order dated 04.02.2025 has dismissed the SLP of the Department.

11. Since, the decisions of the jurisdictional High Court passed in CWP as well as in review petition, have been upheld by the Hon'ble Supreme Court vide its order dated 04.02.2025, therefore, in view of the law laid down by the Hon'ble Supreme Court, I am of the considered opinion that the present case is squarely covered by the decision of Hon'ble Punjab & Haryana High Court in the case of *M/s Prabhat Fertilizers & Chemical Works* in *CM-6352-CWP-2020 in CWP No. 23433 of 2019*; accordingly, by following the ratio of the above said decision, I have no hesitation but to hold that the view taken by the Member (Judicial) on the basis of the decision of Hon'ble Punjab & Haryana High Court in the case of *M/s Prabhat Fertilizers & Chemical Works* (supra) is justified in law, therefore, I affirm the

same view. The view taken by the Member (Technical) is not in accordance with law as discussed above.

12. Now, let the matter be placed before the original Division Bench for drawing the majority view.

(Third Member's Order pronounced on 07.01.2026)

Sd/-

(S. S. GARG)
MEMBER (JUDICIAL)

RA_Saifi

MAJORITY ORDER

In view of the Majority Decision, the appeals stand allowed.

(Final Order pronounced on 20.01.2026)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)